THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1874:

COMPRISING

REPORTS OF CASES

In the House of Lords, In the Privy Council, and in the Exchequer Chamber;

IN THE

Courts of Chancery and Bankruptcy;

IN THE COURTS OF

Queen's Bench and the Bail Court, Common Pleas, and Exchequer;

IN THE COURT FOR

Crown Cases Reserved;

In The High Court of Admiralty, The Court of Probate, The Court for Divorce and Matrimonial Causes, and The Ecclesiastical Courts;

MICHAELMAS TERM, 1873, TO MICHAELMAS TERM, 1874.

The House of Lords Cases are in the Chancery and Common Law Volumes respectively; the Decisions in the Exchequer Chamber will be found with the Reports of Cases in the respective Courts from which the Errors and Appeals come; the Appeals from Revising Barristers are in the Common Pleas; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

THESE CASES (EQUITY AND COMMON LAW) FORM TWO DISTINCT VOLUMES OF REPORTS.

THE CASES RELATING TO THE POOR LAWS, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS.

THE PRIVY COUNCIL CASES, THE PROBATE CASES AND DIVORCE AND MATRIMONIAL CASES, THE ECCLESIASTICAL CASES, AND THE ADMIRALTY CASES, ARE SEPARATELY ARRANGED, AND FORM DISTINCT VOLUMES OF REPORTS.

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CASES

ARGUED AND DETERMINED

IN THE

Court of Queen's Bench,

AND IN THE

Exchequer Chamber

ON ERROR AND ON APPEAL FROM THE QUEEN'S BENCH,

REPORTED BY

ROBERT SAWYER, Esq., AND ARTHUR PAUL STONE, Esq.,

BARRISTERS-AT-LAW;

AND ON APPEAL FROM THE EXCHEQUER CHAMBER TO

The House of Lords,

REPORTED BY

EDMUND STORY MASKELYNE, Esq., Barrister-at-Law.

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37 & 38 Victoriæ.

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 37 VICTORIÆ.

1873. Nov. 11. } RICHARDSON *v.* SYLVESTER.

False Representation—Deceit—Action—Nonsuit.

The defendant caused to be inserted in a public newspaper an advertisement for the letting by tender with immediate possession "all that farm," &c. (describing it). The plaintiff, believing in the bona fides of such advertisement, and desiring to become tenant of a place of the description advertised, was induced to take and did take trouble and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of his becoming tenant thereof. The defendant knew at the time he caused the advertisement to be published that he had not power to let the said farm, and in fact the said farm was not to be let, and the defendant caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. Upon the above facts, disclosed by the particulars in a plaint in a County Court, the Judge directed a nonsuit, holding that no cause of action was disclosed:—Held, *upon appeal, that the Judge was wrong, and that he ought to have heard the evidence.*

CASE stated upon appeal from a County Court.

This is an action of tort brought in the County Court of Montgomeryshire.

The particulars of the plaintiff's claim in the said action were and are in the words following (that is to say)—

The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances: For that the defendant in or about March, 1872, caused to be inserted in a public newspaper called the *Cambrian News* an advertisement for the letting by tender with immediate possession of all that farm, mansion house and mill called Dolangwyn, situate in the parish of Towyn, in the county of Merioneth, containing 400 acres (more or less), together with an extensive sheep-walk or mountain pasture carrying 1,000 sheep. And the plaintiff, believing in the *bona fides* of such advertisement, and desiring to become tenant of a place of the description advertised, was induced to take and did take considerable trouble and pains, and incurred considerable costs and expenses in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view to his becoming tenant thereof; whereas it afterwards appeared that the defendant had no power to let the property as advertised and caused the advertisement to be issued to serve some purpose of his

own other than that appearing by the advertisement.

The action came on for trial on the 27th day of February, 1873, before me, the Judge of the County Court aforesaid. Neither party demanded a jury.

The plaintiff's advocate applied to have the particulars amended by inserting the words, "The defendant knew at the time he caused such advertisement to be published that he had not power to let the same farm, and the said farm was not to be let."

I was of opinion that the particulars filed did not disclose, and if amended in the manner required by the plaintiff's advocate, would not disclose a good cause of action, and directed that the plaintiff should be nonsuited.

The question for the opinion of the Court of Queen's Bench is, whether the particulars filed disclose, or whether if amended in the manner required by the plaintiff, they would disclose a good cause of action?

Lopes, for the appellant (the plaintiff). —The learned Judge was wrong in declining to hear the case, as the plaintiff might have proved that he had a good cause of action against the defendant. The allegations in the particulars, especially with the proposed amendment, were sufficient to shew that there had been a fraudulent misrepresentation by the defendant. The Judge has precluded the plaintiff from proving his case by evidence.

[QUAIN, J.—It was a question of fact to be tried, whether or not the plaintiff had relied upon the allegations in the advertisement.]

Yes; and it is alleged in the plaint that he did believe in the *bona fides* of the advertisement. In *Gerhard* v. *Bates* (1) Lord Campbell, C.J., in delivering the judgment of the Court, said, "We consider it clear law, that if A fraudulently makes a representation which is false, and which he knows to be false, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers a damage, B may maintain an action upon the case against A for the deceit; there being here the conjunction of wrong and loss entitling the injured and suffering party to a compensation in damages." An advertisement in a public newspaper imports an intention that the public should read it, and in this case that they might go to see the farm. The plaintiff could be called as a witness, and would sustain the allegation that he did rely upon the advertisement. [He also referred to *Harris* v. *Nickerson* (2).]

T. S. Pritchard, for the respondent.—The case must be treated as upon a demurrer to the particulars as amended. The form of this advertisement is so general and vague that it shews the defendant did not mean that it should be acted upon. No time is fixed within which the sale is to take place. No address is given with respect to any application for a view or for particulars. It is only in the nature of a preliminary advertisement. It was not a natural consequence that a person should employ surveyors to inspect and view and take journeys without communicating with the defendant. If the defendant is to be held liable it would be depriving him of the liberty of withdrawing from the sale except upon payment of all the expenses incurred, it may be, by a large number of persons. In *Harris* v. *Nickerson* (2) it was held that there was no implied contract on the part of the vendor to indemnify a person who attended a sale, which had been advertised, to buy certain articles inserted in the catalogues of sale, but which articles were withdrawn from the sale, against the expense and inconvenience which he had incurred, and Quain, J., in delivering his judgment says, "To uphold the decision of the Judge in the Court below, it would be necessary to go to this extent, that whenever a person advertises goods for sale, he must be held to be not at liberty to withdraw them from the sale or be liable to an action, even though the person bringing it may have gone generally to the sale, and bought other goods there. I think to introduce such a principle without strong authority would be very mischievous."

(1) 2 E. & B. 476; s. c. 22 Law J. Rep. (N.S.) Q.B. 364.

(2) 42 Law J. Rep. (N.S.) Q.B. 171; s. c. Law Rep. 6 Q.B. 286.

And Archibald, J., says, "I can quite understand that if a false and fraudulent representation were to be made that a sale had been fixed for *a certain day*, and persons thereby induced to go to the *place appointed*, so as to lose their time, that they might be entitled to bring an action against the person making the representation." But here there was no such definite invitation to view and employ others to view. In *Gerhard* v. *Bates* (1) there was an express allegation in the second count that the defendant intended to induce the public to become purchasers, and their becoming so was the direct and natural consequence of the false prospectus issued by him.

Lopes was not called on to reply.

BLACKBURN, J.—I think that the Judge was wrong in directing a nonsuit. The question is not whether or not the plaintiff has a cause of action against the defendant, but whether, upon the opening statement of the case, the allegations on behalf of the plaintiff, and the particulars of claim, there appeared to be a cause of action, taking the allegations to be true—whether upon the allegations of the plaintiff there was a cause of action which he sought to prove. I do not say that if it is clear upon the opening statement and the particulars that there cannot be a cause of action, the Judge is not entitled to direct a nonsuit, but in a case where a cause of action may be shewn, the Judge should hear the case before he directs a nonsuit. In the case before us it would seem, taking the particulars to have been amended as proposed, that it is alleged on behalf of the plaintiff that the defendant had inserted the advertisement in a public newspaper, and, as the plaintiff alleges, from some indirect motive, there being no farm which could be let as advertised. If that was done for the purpose of the advertisement being read by persons who might be looking out for a farm, and might enquire about it, and come to look at the farm so advertised we must take it that there was a representation which may be treated as having been made to the plaintiff. The rule is laid down in *Swift* v. *Winterbotham* (3), where it is said, "It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby." We think that the law on this subject is correctly stated by Pollock, C.B., in *Bedford* v. *Bagshawe* (4): "Generally a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or, at all events, to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statement and the fraudulent conduct, had in his contemplation the individual making the complaint, or, at all events, that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing."

I was not a party to the decision of that case, but I agree with the law as so laid down in the considered judgment of the Court. Even if I did not, of course I should be bound by it. We must, therefore, take the statement in these particulars to have been made by the defendant to the plaintiff. *Barley* v. *Walford* (5), while it recognises the doctrine laid down in *Collins* v. *Evans* (6), reversing the judgment of this Court, pointedly saves the case of a falsehood uttered by a person with a view to his own lucre. I think that the Judge was premature in directing a nonsuit.

QUAIN, J.—I am of the same opinion. I think that the case must go back in order that it may be heard upon the merits. I do not say that a Judge may not direct

(3) 42 Law J. Rep. (N.S.) Q.B. 111.

(4) 4 Hurl. & N. 533; s. c. 29 Law J. Rep. (N.S.) Exch. 65.

(5) 9 Q.B. Rep. 197; s. c. 15 Law J. Rep. (N.S.) Q.B. 369.

(6) 5 Q.B. Rep. 820; s. c. 13 Law J. Rep. (N.S.) Q.B. 180.

a nonsuit upon the opening of the case, but where, as in the County Courts, there are no written pleadings, such a course should not be adopted, unless it appears in the plainest way that there is not any cause of action. *Prima facie*, these particulars with the proposed amendment do, I think, disclose a cause of action. The plaintiff, knowing that he had no power to let the farm, falsely represented that he could let it with immediate possession. He publishes to the world that all persons who were interested in the matter, or who might wish to take the farm, might go and look at it. The plaintiff acts upon the representation and has sustained loss thereby. Taking the facts as originally stated in the particulars, together with the amendment, it cannot be said that there could not be proof of a good cause of action.

ARCHIBALD, J.—I am of the same opinion.

Judgment for the appellant.

Attorneys—Jones, Blaxland & Son, agents for Atwood, Aberystwith, for the appellant; J. Needham, agent for C. G. Brown, Bilston, for the respondent.

1873. Nov. 18. } BOARD *v.* BOARD.

Estoppel—Will by Tenant by the Curtesy—Tenant for Life—Remainderman—Heir-at-Law barred by Statute of Limitations.

R. A., tenant by the curtesy of an estate of freehold of inheritance, died in 1820, *after making a will by which he devised the freehold to trustees in trust for his daughter Rebecca, for life, and after her decease to his grandson, W. B. Certain annuities were payable under the will, and were paid by Rebecca. The testator died in the year* 1855, *and at and after his death Rebecca remained in possession. In* 1849 *the plaintiff bought of W. B., the remainderman, all his interest in the freehold. In* 1863 *Rebecca sold the freehold to the defendant, and in* 1872 *she died, whereupon the plaintiff demanded possession and brought an action of ejectment against the defendant to recover possession:*—Held, *that Rebecca having taken under the will, and having acted under it, would have been estopped from asserting that it was invalid and that by reason of her possession for twenty years she was entitled to the fee; that the defendant, who claimed through her, was estopped in like manner, and that consequently the plaintiff who had purchased from W. B., the remainderman, was entitled to recover from the defendant.*

This was an action of ejectment, brought to recover possession of a certain dwelling-house and premises, situate in the parish of Burham, in the county of Somerset, more particularly described in the writ.

The case came on to be tried before Grove, J., at the Spring Assizes, 1873, held at Taunton, when a verdict was found by consent for the plaintiff, subject to the opinion of the Court of Queen's Bench upon the following case, the Court to be at liberty to draw from the facts stated therein all the inferences which a jury might have drawn.

CASE.

1. In the year 1820, one Robert Amesbury was seised and possessed as tenant by the curtesy of England of (*inter alia*) the premises mentioned in the writ of ejectment hereinafter called the "disputed premises."

2. Robert Amesbury was twice married. By his first wife, Hannah, who died intestate about the year 1812, and who was seised and possessed of an estate of freehold of inheritance in the disputed premises, he had issue four daughters, first, Rebecca; second, Fanny; third, Lydia; and fourth, Maria; and one son, Joseph. His second wife, Mary Locke, was a sister of his first wife.

3. On the 15th of April, 1800, the said Fanny Amesbury married one William Board, and by him had issue three sons, first, William; second, Robert (the plaintiff); and third, Joseph. The said Fanny Amesbury, afterwards Fanny Board, died a few years afterwards; and William Board, about the year 1818, married her sister, the said Rebecca. The defendant, Thomas Board, is the son of William Board and the said Rebecca.

4. Robert Amesbury died in the year 1820, having previously duly made and executed his will (whereof the said Joseph Amesbury was sole executor), dated the 24th day of May, 1819, and a codicil to the said will, dated the 23rd day of August, 1820. By his will, the said Robert Amesbury (hereinafter called the testator), devised (amongst other things) to William Adams and John Buncombe, as trustees, the disputed premises "in trust for his said daughter, Rebecca, for her life, and the life of the said William Board, to live in, provided they or one of them should pay unto the testator's three grandsons, the said William, Robert (the plaintiff), and Joseph, the annual sum of 3*l.* each, and after the decease of the said Rebecca, the said testator devised (*inter alia*) the said disputed premises to his grandson, William, charged with two annuities of 7*l.* each, payable to the said Robert Board, the plaintiff, and Joseph Board for their lives." The three annuities of 3*l.* each were duly paid until 1826, to the said William, Robert and Joseph Board respectively by the said Rebecca Board, and after the year 1826, to the said Joseph Amesbury and Robert Board respectively under the circumstances hereinafter appearing.

5. The said testator also devised to his only son, Joseph, certain other premises, situate in the parish of Huntspill, charged with an annuity of 10*l.* payable to the testator's second wife for her life, and after her decease, to her children (excepting one Ann Board) for their lives as joint tenants.

6. By the said codicil the said testator charged the premises situate at Huntspill aforesaid, with a further sum of 5*l.* per annum to be paid during her natural life to the said Rebecca, the second wife of the said William Board, and proceeded to direct and will as follows—

"And my will is, and I do hereby further declare, that if my said son, Joseph Amesbury, or his heirs, executors, administrators or assigns, shall call into question or dispute the validity of the marriage of me with Mary Locke, or the marriage of William Board with my daughter, Rebecca, then and in such case I declare the devises and bequests by me before given to my said son, Joseph Amesbury, to be revoked, null and void, and I do hereby give and devise the same with their and every of their appurtenances unto either of them whose marriage may be called into question, their heirs and assigns for ever."

7. The said will and codicil were proved on the 4th of November, 1820, by the said Joseph Amesbury. The said Joseph Amesbury accepted the benefit of the devises to him contained in the said will, and never disputed or called into question, nor have his heirs, executors or administrators ever since his death, which took place about the year 1855, disputed or called into question the validity of the said marriages or either of them.

8. At the death of the testator, the said Rebecca and William Board were residing with him upon the disputed premises, and, upon the death of the testator, the said Rebecca and William Board contined to remain in the actual enjoyment and occupation of the same.

9. In the year 1826, the plaintiff purchased of his brother, Joseph Board, Joseph Board's annuity of 3*l.*, and from the date of the death of the testator down to the year 1834, the plaintiff received the sum of the two annuities from the said Rebecca Board. In or about the same year 1826, William Board, brother of the plaintiff, sold his annuity of 3*l.* to the said Joseph Amesbury, who was in the habit of regularly each year deducting the amount thereof from the annuity payable by him to the said Rebecca Board under the provisions of the said will and codicil.

10. In the year 1837, William Board, the reputed husband of Rebecca Board, died, leaving the said Rebecca in occupation of the said disputed premises.

11. In the year 1842, the said annuities payable to the plaintiff and his brother William, were in arrear. The plaintiff pressed for payment of the arrears; and eventually an agreement was entered into on the 3rd of November, 1842, between Rebecca Board and the plaintiff in order to stop proceedings by the plaintiff for the recovery of arrears of the annuities payable by Rebecca, by which it was agreed that Rebecca should give up possession to Robert Board of certain pieces of land,

and that he should acquit her of all the annuities which might become due out of the estate during her life.

12. The plaintiff in pursuance of this agreement took possession of the said two pieces of land in satisfaction of the said annuities, and still remains in possession of the same.

13. In 1849, the plaintiff bought of his brother, William Board, all William's remainder in the said two pieces of land last mentioned, and in the disputed premises.

14. In April, 1863, the said Rebecca Board sold the said disputed premises by auction to her son, Thomas Board, the defendant. The plaintiff, with his legal adviser, attended the sale, and the latter publicly stated on behalf of the plaintiff that the said Rebecca Board had no right to sell the said disputed premises, but the defendant nevertheless persisted in purchasing the said premises, and the same in pursuance of the said sale were duly conveyed by Rebecca Board to the defendant.

15. For many years prior to the said sale, and down to May, 1872, the said Rebecca Board and her son, the defendant, resided together on the disputed premises, the land being farmed and managed by the said defendant.

16. In May, 1872, the said Rebecca Board died, and the defendant continued in possession of the disputed premises. On the 13th of June, 1872, the plaintiff, as and being the assignee of the interest and remainder of his brother, William Board, demanded possession. Possession was refused, and this action was thereupon commenced.

The question for the opinion of the Court is whether the plaintiff is entitled to the said disputed premises, or to any and what part of them. If the Court should be of opinion that the plaintiff is entitled to the whole or any part of the said disputed premises, judgment is to be entered for the plaintiff accordingly, with costs of suit. Otherwise judgment is to be entered for defendant, with costs of suit.

Charles, for the plaintiff.—Rebecca, the daughter of the testator, took under the will, and evinces by her acts that she was not a trespasser. She takes the advantage of the will and submits to the burthen imposed by it, and would be estopped from saying that she was a trespasser and did not take under the will. She could not be allowed to say that her possession for twenty years conferred the estate upon her. That being so, all who claim under her, including the defendant, are equally estopped. The action is therefore maintainable by the plaintiff, who has purchased of William Board, the remainderman, under the will. Joseph, the son of Robert Amesbury, was the heir-at-law, but his right was barred by the Statute of Limitations, and the legal estate would be in the trustees of Rebecca under the will. *Asher* v. *Whitlock* (1) is a case very like the present. There the heir-at-law of the daughter took under the will as the remainderman in this case does, and the Court held that he was entitled to recover. See *Hawkesley* v. *Hawkesley* (2). In *Anstee* v. *Nelmes* (3), a testator left by his will all his lands in the parish of Doynton to his daughter, Mary. After his death in 1804, she entered and occupied land of the testator till her death in 1843. Some of the land upon which she entered turned out to be not in the parish of Doynton, but in another parish. Nevertheless, as it was reputed to be in the parish of Doynton, it was held that the testator must have intended her to have it, that she held under the will, and that the remainderman under the will was entitled to the land as against the devise of Mary. Martin, B., said, in the course of his judgment, "My impression is (if it were necessary to decide the point) that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such a possession was unlawful, so as to give to his heir a right against the remainderman. I think that no Court would so construe it." And in the course of the argument the learned Baron said, "If a person takes under a will, and is

(1) 35 Law J. Rep. (N.S.) Q.B. 17; s.c. Law Rep. 1 Q.B. 1.
(2) 11 Hare, 230.
(3) 1 Hurl. & N. 225; s.c. 26 Law J. Rep. (N.S.) Exch. 5.

allowed to hold, and continues to hold in that character, I think that he would be estopped from saying that he did not so take the property."

T. W. Saunders, for the defendant.—The plaintiff has no cause of action. Robert Amesbury, being tenant by the curtesy simply, had no power to devise the land by will. He did, however, devise it, and all the parties interested recognised the will, until at last it was thought that the plaintiff might lay claim to the land. The cases which have been cited are distinguishable, because there was in those cases a devisable interest. But such is not the case here; Robert Amesbury had no estate which he could devise. The remainderman, William, cannot take any estate under such a will, which must be treated as a nullity. His vendee cannot recover against the defendant, who is in possession.

Charles replied.

BLACKBURN, J.—In this case I think the plaintiff is entitled to our judgment. Robert Amesbury was tenant by the curtesy, and consequently, as soon as he died, his estate was determined. Joseph Amesbury was the person who, then being heir-at-law, would be entitled to turn everyone out of possession, but Robert Amesbury made a will leaving the property to his daughter, Rebecca, for life, with remainder to William in fee. Rebecca was permitted to come in and enjoy and hold under that will; she pays the legacies, and acts under the will. It is clear that she was allowed to continue in possession because she was a devisee under the will. She, after the lapse of twenty years (whether the twenty years or not had elapsed is not material in the view I take), or after a lapse of time, sets up that she has the estate in fee. She lets in the defendant who claimed under her, and being privy in estate to her, is subject to all the estoppels that would have taken effect upon her. Then comes the question—Rebecca having taken under the will that gave her an estate for life, is she not estopped from saying, as against William or the person who claims from him, that "the will under which I come in as tenant for life, and under which William was entitled as remainderman, is altogether void, for, although I was let in and enjoyed under it, nevertheless I will say it was altogether void, and the third person, Joseph, is entitled to the land; the twenty years have elapsed, he therefore cannot meddle with it, and I say I will prevent you, William, taking possession under the will, because Joseph in the interim has lost his right." I am of opinion that she cannot do that. It seems to me that she claimed under the will, and retained possession under the will; and as against everybody else interested in the will, is estopped from denying its validity. It is the same as a tenant coming in under a landlord, who is estopped from denying that the landlord is entitled. As to the point Mr. Saunders argued that there is a distinction between such a case and the present, because Robert being only tenant by the curtesy had nothing to devise, I think that in the greater part of the decisions upon this point the landlord had only an equitable interest; and where consequently the tenant obtained possession from a man who had nothing, yet he was estopped, as against him, until evicted by some one of a superior title. The consequences of holding otherwise would be very disastrous, for how greatly unjust it would be that the person who was let in under the will, or otherwise, as being tenant for life, and continued in possession until twenty years had elapsed, was then to step forward and say, "I will shew there was a latent defect in the title of those who were before me, and the estate really belonged to A B, and I say that I who come in as tenant for life now set up that I am tenant in fee," that would be very unjust and wrong. We have an authority in what my brother Martin said in *Anstee* v. *Nelmes* (3), where he speaks of the tenant for life who comes in under a will, that she cannot set up that the property which she holds under the will had become hers in fee, because it was taken under the will. That seems directly in point; it seems good sense and good law. And I think that all we have to decide here is that Rebecca having come in under the will, William, the remainderman under that will, has a right to say

that she is estopped from denying that the will was valid; and that the property passed to the remainderman.

MELLOR, J.—I am of the same opinion. The only person who could have disputed the possession of Rebecca under the will was the heir-at-law. He never disputed the possession, and by the operation of the Statute of Limitations he became barred. Whatever his motive was, whether he received advantages under the will or not, or whether he chose to abstain from making any claim or not, is wholly immaterial because the effect of the statute is absolutely to bar him at the end of the twenty years. That being so, Rebecca being in possession all the time under the will, supposed, or alleged at all events, as far as she was concerned, to be a valid will, takes a life estate under it. Then the will giving the remainder to another person, she, during the period of her life estate, effects a sale, adversely to the interests of the remainderman under the will, of an estate to the defendant. This she could not do. She accepted, and was seised under the will; she acted under it, and did everything in point of fact which she would have done if it had been a perfectly valid will. She does all that, and then she says, or acts as if she said, "I will nevertheless say I have a right to dispose adversely to the remainderman who takes under the will under which I have always acted, under which I have received the property." I am of opinion that cannot be done. It would be contrary to the wholesome doctrine of estoppel applied to these cases, and very dangerous, if she could convert a life estate into an estate in fee simple, and she could accept the benefits under the will to a certain estate, and then say the will is valid so far, but invalid as regards the rest of it. That cannot be done, and therefore I agree in this case, the question really arising between two persons—one claiming under the will, and the other under the remainderman—that the title of the remainderman must prevail, and therefore that the plaintiff is entitled to our judgment.

QUAIN, J.—I am of the same opinion. I decide this case on the simple point that a person who assumes to take under a will and acts on such will in paying legacies, cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who took under the same will. It seems to me that Rebecca having gone in with that title, is estopped, as against all those who take a remainder under the will, from saying in fact that her father, Robert Amesbury, had not the right to make the will. The only difficulty I had about it was to see where the legal estate was. As soon as the title of Joseph Amesbury, the heir-at-law, was barred at the end of the twenty years, where was the legal estate? It would have gone, under ordinary circumstances, to those who were in actual possession of the property during those twenty years. Rebecca was in actual possession of it during those twenty years, and then the estoppel would apply as between her and the other parties under the will. Therefore the effect between them is precisely the same as if Robert Amesbury himself took the property under the devise. For these reasons I agree with my learned brothers.

Judgment for the plaintiff.

Attorneys—Reed & Lovell, agents for Reed & Cook, Bridgwater, for plaintiff; T. K. Edwards, agent for Lovibond, Bridgwater, for defendant.

1873. Nov. 11. { LEWIS AND WIFE *v.* THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY.

Carriers by Railway—Passenger—Negligence—Evidence—Over-shooting Platform—Backing of Train—Invitation to alight.

The mere stopping of a train, and calling out the name of a station, is no evidence of an invitation to alight.

The plaintiff was a passenger by the defendants' railway to Bromley station. As the train arrived at Bromley she heard "Bromley, Bromley," called out several times. The train was brought to a

standstill, but not before it had partly overshot the platform. The engine was then on the other side of a bridge adjoining the platform. As the plaintiff was in the act of getting out, and when her foot was on the step of the carriage, the train was put back with a jerk, and she fell on the platform. The period occupied by the stoppage was little more than momentary, and the plaintiff knew the station well:—Held, *that there was no evidence of negligence on the part of the defendants to go to the jury.*

Appeal against the ruling of the Judge of the Westminster County Court upon the facts stated in the following

CASE.

1. This was an action of tort commenced in Her Majesty's Court of Queen's Bench, and remitted to the Westminster County Court under 30 & 31 Vict. c. 142. s. 10.

2. The plaintiff lodged with the registrar of the county court a statement of his cause of action, and of the particulars thereof, which was as follows—

"The above-named sue the London, Chatham and Dover Railway Company for that the defendants were carriers of passengers upon a railway from St. Mary Cray to Bromley, in the county of Kent, for reward to the defendants, and the plaintiff, Mary Ann Lewis, became and was received by the defendants as a passenger to be by them safely and securely carried upon the said railway on a journey from St. Mary Cray to Bromley aforesaid for reward to the defendants, yet the defendants did not safely and securely carry the plaintiff, Mary Ann Lewis, upon the said railway on the said journey, and so negligently and unskilfully conducted themselves in that behalf, and in managing the said railway and the carriage and train in which the said Mary Ann Lewis was a passenger upon the said railway on the said journey as aforesaid, that the said Mary Ann Lewis was thereby wounded and injured, and has sustained and will sustain serious bodily injury, and was for a long time prevented from earning divers wages which she would otherwise have obtained as a washerwoman and otherwise."

And the plaintiff, George Lewis, also sues the defendants for that the defendants committed the grievances in the first count mentioned, as therein alleged; whereby the said George Lewis lost the comfort and services of the said Mary Ann Lewis for a long time, and incurred expense in nursing her, and in medical attendance, and has been deprived of the wages which she would otherwise have earned as a washerwoman and otherwise, and the plaintiffs claim under the first count 30*l.*, and the plaintiff, George Lewis, claims under the second count 15*l.*

3. The cause was tried on the 21st February, 1872, before the Judge of the County Court and a jury, when the jury found a verdict for the plaintiff with damages 20*l.* This verdict was, on the application of the defendants, set aside by the Judge, and a new trial was ordered.

4. On the 21st of June, 1872, the cause was again tried before the Judge of the said court and a jury.

5. The evidence given on behalf of the plaintiffs was, so far as is material, as follows—

The plaintiff, Mary Ann Lewis, on her examination in chief said: On the 7th October, 1871, at a few minutes past seven in the evening, I started from St. Mary Cray for Bromley, in a third class carriage of defendants. I paid 4*d.* for my ticket. The train was late at St. Mary Cray. When it arrived at Bromley station I heard "Bromley, Bromley," called out several times. I know the station well. After I heard "Bromley, Bromley," called out the train stood still.

I was in the act of getting out, and an old gentleman in the same compartment with me opened the door. I had a basket and a large parcel. When the old gentleman opened the door I wanted to get my basket. He wished me to get out first, and said he would hand me out my goods.

I put my hand on the door and my foot on the step, and a sudden jerk of the train threw me off the step on to the end of the platform.

When I got up and was getting out of the carriage the train was quite still, the sudden jerk threw me down.

I fell at the edge of the platform, just clear of the bridge, where the platform joins the bridge. I fell just off the platform. The jerk of the train threw me from the edge of the door on to the platform. I should have fallen on to the platform provided there had been sufficient ground to hold me. I just went off the platform.

Some wires were outside; but for those wires I should have been under the railway carriage. They protected me from the wheels of the railway carriage.

The carriage I was in went close to the edge of the platform, as near it as it could be.

If the train had been a little further back I should have fallen or been upon the platform. After the jerk the train shunted back some distance.

My knee was very much hurt. I was taken to a cab. Before that the guard asked me if I heard him call out "Bromley." I said I did not. He said he called out, "Keep your seats." I did not hear any one call out, "Keep your seats." I told the guard that.

On cross-examination she said—

I know the Bromley station very well. I had observed it many times before the occasion. I know the platform goes quite up to the brickwork of the bridge. The brickwork of the bridge in fact joins the end of the station. When I fell I did not come upon the ground. I was thrown suddenly from the step of the carriage. One foot was on the step, and my hand was on the carriage door. I was suddenly thrown from the carriage door to the edge of the platform. I came on to the wires. The wires adjoin the platform; they come quite up to it; they are lower than the platform. I found myself at the edge of the platform, upon the ground.

Q.—And as the platform comes up close to the end of the bridge, you were under the bridge?

A.—I could not be under the bridge.

Q.—If the platform came absolutely up to the bridge, and you were under the bridge, you could not have fallen on the platform?

A.—It was not far under the bridge.

Q.—Could you have been anywhere else than under the bridge?

A.—I could not be under the bridge.

Q.—What was near you?

A.—The brick wall of the platform. The brick wall was above me.

There were other persons in the carriage. After the train stopped I prepared to get out. The old gentleman said I was to get out and he would hand me out my basket and parcels. I was in the act of stooping down to lift them up myself. He opened the door.

He did not caution me not to get out because it was dangerous to do so.

I could not exactly say whether he opened the door or any one else. I know I did not. I do not know whether any other passenger opened the door. I could not say whether any one from the outside opened it. There was nobody close by. I did not open the door.

Previous to leaving the train I did not hear any one call out, "Keep your seats," I heard only "Bromley, Bromley." I travel on the line sometimes once or twice a week, and I know it is the practice to call out the name of the station as the train comes up to it.

On re-examination the witness said—

The train was perfectly still when I endeavoured to get out. I was in the front part of the train—not in the back part of the carriages.

In answer to the Judge she said—

There is an archway at the further end of the platform coming from St. Mary Cray, and the railway goes under it. The platform goes up to the bridge and adjoins it.

Part of the train was standing under the bridge when I got out, and the engine was on the other side. My carriage was just at the end of the platform. If my carriage had been a little further back I should have fallen on the platform.

I do not know that I fell against an iron bar. I could not tell. There is an iron bar close adjoining the platform, that is the bar the wire is on.

Richard Elliott examined said—

I am a basket-maker, and live at Bromley. On the 7th of October I came in the train from Sevenoaks Junction to Bromley. The train was due at Bromley at 7.29 P.M. It was late.

When the train came up to Bromley Station several officials called out, "Bromley," "Bromley."

I was in the hind part of the train, and had put my basket in the back part of the train in the luggage break. After "Bromley, Bromley," was called out the train stopped. I got out and went to the back part of the train. I walked seven or eight yards, and then the train shunted back about three or four yards. I did not hear any guard or anyone call out, "Keep your seats."

Thomas Strong being examined said—I am a plumber and glazier, and reside at Bromley. I was a passenger in this train from St. Mary Cray. I was in the fore part of the train. I had my basket and my frame of glass on my back.

When we got to Bromley Station I heard "Bromley" called three times. The train came to a stand; my basket was on the seat of the carriage. I took my basket in my hand when the train stopped. The frame was strapped on my back. I stood upright and bent over to take hold of the handle of the door. All at once the train shunted back and threw me back, and my glass went against the back of the carriage, and two large sheets of my glass were broken—snapped across. I was not injured. I did not attempt to get out when the train gave me that jerk. I stopped till it came to a stand again. I heard no one call out, "Keep your seats."

On cross-examination he said—

They may have called out, "Keep your seats," but I did not hear them.

I was in the fore part of the train, at the upper end, near the engine, with my back to the engine, up at the fore end of the train—underneath the bridge. I was in the fore part of the train as it run up through Bromley. I put my arm over towards the door, and then the train shunted back and gave me a jerk, and then I stayed till the train went back and came to a stand. I am almost certain I was within three or four carriages of the engine.

I cannot say how much I was under the bridge.

I should not call the fore part that part which was going to London. I should call it the back of the train.

In answer to the Judge, the witness said—

I knew some portion of the train was a long way beyond the station where it used to stay. I was thrown back. I was encumbered with the glass at my back, and then after the jerk the train put back.

In answer to a juror the witness said—I cannot exactly say whether the carriage I was in when I first attempted to get out was under the bridge.

6. At the conclusion of the plaintiffs' case, the Judge stated that in his opinion there was no evidence of negligence on the part of the defendants to go to the jury, and that it was his duty to direct a nonsuit, but the plaintiffs refused to be nonsuited, and the Judge thereupon directed the verdict to be entered for the defendants.

The question for the opinion of the Court is, whether the verdict entered for the defendants ought to be set aside, and a new trial ordered.

B. T. Williams, for the appellants.—The case for the plaintiffs was, that the train had stopped, and that the female plaintiff had an invitation to alight in the calling out of "Bromley, Bromley." The train had stopped several minutes.

[BLACKBURN, J.—Say rather several seconds. She must have known that the train had overshot the platform. We must have evidence of a negligent invitation to alight, given after the stopping. When a train overshoots the platform it must of necessity stop some little time before it can back.]

Cockle v. *The South Eastern Railway Company* (1) is an authority for the plaintiffs; see especially the judgments of Cockburn, C.J., and Lush, J.

[BLACKBURN, J.—This case is quite distinguishable from *Cockle's Case* (1). As for the calling out the name of the station, that was but telling the plaintiff what she knew.]

He also cited *Bridges* v. *The North London Railway Company* (2).

(1) 41 Law J. Rep. (N.S.) C.P. 140.
(2) 40 Law J. Rep. (N.S.) Q.B. 188. It is believed that in this case an appeal is pending to the House of Lords.

W. G. Harrison, for the respondents, was not called upon to argue.

BLACKBURN, J.—In this case the question is whether there was evidence on which a jury could reasonably find that the defendants were guilty of negligence, and I am of opinion that there was no such evidence. It is abundantly clear from the plaintiff's own evidence that "Bromley, Bromley," was shouted out by the porters, but this was done to convey information to the passengers that the station had been reached, and of itself meant nothing more. On reaching the station, the train overshot the platform, a thing which may happen from all kinds of reasons, and does often happen. Thereupon the train began to back, and just before the backing, the plaintiff got out, and received the injury. Now was there any negligence in the defendants causing her to get out? Mr. Williams says that if she supposed she was intended to get out, that would be enough. But even if it were, she could not have supposed it, for she knew the place well. I see nothing on the part of the company to induce her to get out, when from the circumstances stated she had every reason to believe that she was not to get out unless she should be expressly requested to do so. I do not at all agree that "Bromley, Bromley," meant "jump out." The calling out of the name of the station is generally done just as the train is drawing up and before it has quite stopped, and this is a matter of common knowledge. It is, in fact, done by way of preparing passengers to get out. As for the case of *Cockle* v. *The South Eastern Railway Company* (1), that is as distinguishable from the present as it could possibly be.

QUAIN, J.—I am entirely of the same opinion. The plaintiff in this case had no ground for believing that the train had come to a stand-still, for she knew the station well, she was in the front part of the train, and the carriage in front of hers had gone quite beyond the platform. Her own carriage was close to the end of the platform; and she, knowing the station as she did, must have known that all was not right, and that the train would be backed. This being so, there was no opening of the door by a porter, or other invitation for her to alight. She did of her own motion that which the company had done no act whatever to induce her to do.

ARCHIBALD, J.—I am also of opinion that there was no evidence to go to the jury. There may indeed be conduct on the part of a company's servants, without the opening of a door, or requesting to alight, which amounts to an invitation to alight. For instance, if a train should stop a considerable time, that might be an invitation. But here the train had gone considerably beyond the platform, and the plaintiff must have been aware of the danger of getting out, knowing the station as she did. The time of the stoppage is shewn to have been very short, for there is the evidence of one of the passengers, an active man, that he had got himself in readiness to get out, but the train was shunted back before he could do so. It must be that the plaintiff got out very indiscreetly and hurriedly, and at a time when she had no intimation or invitation to get out.

Judgment for the defendants.

Attorneys—Martin, Gregory & Bowerman, for appellants; W. Cleather, for respondents.

1873. Nov. 17. } THE QUEEN *v.* ROBERTS.

Costs of Prosecution—Order under 33 *&* 34 *Vict. c.* 23. *s.* 3—*Bankruptcy Act*, 1869 (32 *&* 33 *Vict.*), *c.* 71. *s.* 17—*Order for Payment out of Money taken from Person convicted at the Time of his Apprehension —Bankruptcy of Convict between Apprehension and Sentence.*

By 33 *&* 34 *Vict. c.* 23. *s.* 3, *power is given to any Court, by which judgment is pronounced, upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses of the prosecution; and the payment of such costs and expenses, or any part thereof, may be ordered by the Court to be made out of any moneys taken from such*

person on his apprehension. By the Bankruptcy Act, 1869, 32 & 33 *Vict. c.* 71. *s.* 17, "*until a trustee is appointed, the registrar shall be the trustee for the purposes of this Act; and, immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar.*"

R. was convicted of felony at a May Sessions of the Central Criminal Court; and the Court, after passing sentence, made an order, under 33 & 34 *Vict. c.* 23. *s.* 3, *for the payment of the costs of the prosecution out of money taken from him at the time of his apprehension. He had been arrested on the 5th of April, and on the 24th of April he was adjudged bankrupt:*—Held, *without deciding what would have been the case if the money in question, though in the possession of had not really belonged to the bankrupt, or if the act of bankruptcy had been previous to his arrest, that the order was valid, as the subsequent bankruptcy could not affect the right of the Criminal Court which had vested at the time of the arrest.*

[For the report of the above case see 41 Law J. Rep. (N.S.) M.C. 17.]

1873. Nov. 10. } *Ex parte* H. W. MOSES.

*Attorney—Service under Articles—Absence from Ill-health—*6 & 7 *Vict. c.* 73. *ss.* 12, 14.

An articled clerk who had served under his articles for three of the term of five years, was then absent from illness for eleven months, but on his return served to the end of the term of his articles and passed his final examination:—Held, *that an application for his admission as though he had served the full term of five years could not be granted, but that he might be allowed to complete his term by serving for a further period of eleven months.*

H. W. Moses was on the 2nd of July, 1868, articled to a solicitor for the term of five years. He served under these articles till July, 1871, when he became unwell, and under medical advice and with the consent of his master went to Australia, not returning till June, 1872.

In Trinity Term last he passed his final examination (1).

W. Wright now moved that Mr. Moses might be admitted as an attorney of this Court. The cases of *Ex parte Mathews* (2), where the applicant was admitted though he had been prevented by illness from attending to business during great part of the term of his articles, on the ground that he had done all in his power to qualify himself, *Ex parte Hodge* (3), where the application was granted though the absence through illness had been for a year, and *Ex parte Brutten* (4), where Coleridge, J., observes that occasional absences do not prevent the clerk from making an affidavit that he has served five years, are authorities in favour of this application.

BLACKBURN, J.—I do not think that we ought to grant this application. The object of the Act in fixing the term of service under articles was to secure not merely sufficient information, but the practical experience to be obtained in the actual service. If the applicant can serve for a further period of eleven months, which he may possibly do by arrangement with his former master, I think we may allow him to be admitted as if he had duly served the whole term under his articles. It may well be that an absence for a month or two with the consent of the principal would not be a break in the service, but

(1) By 6 & 7 Vict. c. 73. s. 12, the clerk "shall during the whole time of service to be specified in such contract, continue and be actually employed by such attorney and solicitor in the proper business, practice and employment of an attorney and solicitor, save only and except in the case hereinbefore mentioned."

By s. 14, "Every person who shall have been or shall be bound as a clerk as aforesaid shall, before he be admitted an attorney or solicitor according to this Act, prove that he has actually and really served and been employed by such practising attorney, &c., during the whole time and in the manner required by the provisions of this Act."

(2) 1 B. & Ad. 160.

(3) 2 Jur. 989.

(4) 23 Law J. Rep. (N.S.) Q.B. 290.

the present is a very different case. Here the applicant during the space of eleven months and while he was at the Antipodes, was practically out of the control of his master and cannot be said to have been in his service. The question in every case is one of more or less, and here I think that the absence was too long.

QUAIN, J., and ARCHIBALD, J., concurred.

Application refused.

Attorney—T. Norton, for applicant.

1873. Nov. 15. } THE QUEEN *v.* THE GUARDIANS OF ST. OLAVE'S UNION.

Poor Law — Removal — Unemancipated Child—Irremovablity—9 & 10 Vict. c. 66. s. 1—11 & 12 Vict. c. 111. s. 1.

H. H., a spinster of the age of nineteen, had resided as a domestic servant for two years in the respondent union previously to becoming chargeable through illness. Her mother was settled in the appellant union, and an inmate of a workhouse therein. H. H. never gained a settlement in her own right, and has no other settlement than that of her mother:—Held, *that H. H. was removable to the appellant union.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 15.]

1873. Nov. 24. } HODSOLL *v.* TAYLOR.

Interrogatories—Action for Seduction—Means and Position of Defendant.

In an action for seduction it is not allowable to interrogate the defendant as to his present means or what property he is possessed of. But it is allowable to interrogate him with a view of obtaining admissions from him as to his having had sexual intercourse with the plaintiff's daughter.

This was an action brought against the defendant for the seduction of the plaintiff's daughter.

The plaintiff proposed to interrogate the defendant as follows—

1. What was your age on your last birthday, and when was such last birthday?

2. Are you in the employment of Messrs. Waite & Saul, and at what salary? If not in their employ, state in whose employ you are, and at what salary?

3. What was your father's name, and where did he reside when he died?

4. Did he leave any will? if so, in what registry of the Court of Probate was it proved? when and by whom?

5. Were you entitled under your father's will to any real or personal estate, or any and what interest therein respectively? Specify what property you acquired under such will, and whether any and what part of such property has been paid or transferred to you and when?

6. Did you, during the year 1872, and up to August, 1873, reside at Farningham, Kent, in the house of Mr. Winder, and if not, where did you reside? and is not Mrs. Winder his wife and your mother?

7. Do you know Matilda Amelia Hodsoll, the daughter of the plaintiff, and when did you first make her acquaintance?

8. Did you not during the years 1872 and 1873, and during what parts thereof respectively, frequently visit at the house of the plaintiff at Farningham aforesaid, and did not the said Matilda Amelia Hodsoll during the same period reside at the house of the plaintiff, and did she not during the same period visit at the house of the said Mr. Winder?

9. Did you not very frequently from November, 1872, and until August, 1873, have sexual intercourse with the said Matilda Amelia Hodsoll, the daughter of the plaintiff, at the house of the plaintiff, and while she so resided with the plaintiff, or at what other place or places, time or times?

10. Were you not informed by the said Matilda Amelia Hodsoll many times previously to the month of September, 1873, that she was pregnant by you, and did you not advise her to leave her father's house and go and reside in apartments, and did you not at the same time tell her that you would find her such apartments, and did you not in fact neglect to do so?

11. Do you not know that the said Matilda Amelia Hodsoll was delivered of a

child on or about the 22nd of September, 1873, and are you not the father of it?

12. Did you not on the 24th of September, 1873, receive a visit from Mr. George William Churchley at the counting-house or office of the said Messrs. Waite & Saul, and did you not on that occasion state to the said George William Churchley, in the presence of other persons, that you had no reason whatever to believe that the said Matilda Amelia Hodsoll had been sexually intimate with any other man than yourself, and did you not then and there state to the said George William Churchley, that you would willingly keep and maintain the said child of the said Matilda Amelia Hodsoll and request him to apply to the said Mr. Winder, your step-father, on the subject of compensation to the plaintiff?

13. Do you not know that Mr. Gibson, the plaintiff's attorney, accordingly on the 27th of September, 1873, applied to the said Mr. Winder on the subject referred to in the last paragraph, and have you not in fact seen the letter of that date?

14. Did you not, on or about the 4th of October, 1873, receive from the said Mr. Gibson a letter requesting you to make arrangements for the maintenance of the said child, and for compensating the plaintiff for the seduction of his daughter?

15. Have you in fact made or proposed, or offered to make any arrangements whatsoever with the plaintiff or any person on his behalf for the maintenance of such child, or for the support of the said Matilda Amelia Hodsoll?

An order had been made by Martin, B., at chambers, disallowing the said interrogatories, but the learned Judge had made an order that the answers of the defendant should have respect to the means of the defendant and what property he was possessed of, and he framed the question in these terms—"What are the present means of the defendant, and what property is he possessed of?"

A rule had been obtained calling upon the plaintiff to shew cause why the said order should not be rescinded.

A cross rule had also been obtained by the plaintiff calling upon the defendant to shew cause why the above-mentioned order should not be amended or varied, and why the interrogatories or some of them disallowed should not be allowed.

Glynn shewed cause against the rule to rescind the order of Martin, B., and supported the rule obtained by the plaintiff.—This question might be put in an action for breach of promise of marriage, and the same rule ought to prevail in an action for seduction.

[BLACKBURN, J.—I question whether that is so; the means and position of the defendant are relevant in an action for breach of promise, but not so in an action for seduction. The interrogatory which you seek to support could not properly be put as a question at the trial of the cause. How can the means of the defendant be a proper ingredient in such an action?]

In *Andrews* v. *Askey* (1), Tindal, C.J., told the jury that they might take into consideration the situation in life of the parties, and say what they thought, under all the circumstances of the case, was a reasonable compensation to be given to the mother. See also the cases cited in the note to that case. Next, some of the interrogatories have been improperly disallowed. It is no objection to an interrogatory that the answer might criminate the person making it—*Osborne* v. *The London Dock Company* (2). It is admitted that the 13th and 14th interrogatories cannot be supported, but the rest should be allowed—*Whateley* v. *Crawford* (3).

James Mellor supported the defendant's rule, and shewed cause against the plaintiff's rule.—The 2nd, 3rd, 4th and 5th interrogatories are framed for the purpose of obtaining indirectly the information which is sought to be obtained directly by the question which was framed by the learned Judge. None of them are allowable, on the ground that such matters are irrelevant in an action for seduction. Further, the interrogatories numbered 6, 7, 8, 9, 10, 11 and 12 have been properly disallowed. The object of the plaintiff in putting those questions is to obtain admissions from the defendant which will

(1) 8 Car. & P. 7.
(2) 10 Exch. Rep. 698; s. c. 24 Law J. Rep. (N.S.) Exch. 140.
(3) 5 E. & B. 709; s. c. 25 Law J. Rep. (N.S.) Q.B. 163.

establish the case for the plaintiff without putting the plaintiff's daughter in the witness box. Such a course would be most injurious to the defendant. The tendency of such questions is to lead the defendant into stating what is false.

[QUAIN, J.—The plaintiff has a right to prove his whole case if he can out of the mouth of the defendant. BLACKBURN, J.—The plaintiff wishes to find out whether or not the defendant will admit that he has had sexual intercourse with his daughter.]

The Court ought not to assist the plaintiff by allowing such a question as No. 9 to be put to the defendant. Again, the 12th is manifestly put for the purpose of preventing the daughter's character being attacked.

[*Glynn* gave up the first five interrogatories.]

BLACKBURN, J.—The first question is whether the interrogatory which was framed by my brother Martin, in substitution for Nos. 2, 3, 4 and 5, ought to be allowed. He has framed it in this way, "What are the present means of the defendant, and what property is he possessed of?" Can it be said that such a question is one which properly aids and assists the case which the plaintiff has to make out? Very likely the jury would give higher damages if the means and property of the defendant were stated to be considerable, but we cannot help recognising that that is not a ground for giving damages to the plaintiff in an action for seduction. I think, therefore, that such an interrogatory ought not to be allowed, nor ought those to be allowed which indirectly raise the same question. Mr. Glynn agrees that he cannot support the 13th and 14th interrogatories. It seems to me that the remaining interrogatories go to the very gist of the case which the plaintiff would seek to establish. They are distinctly relevant to the plaintiff's case. It has been contended that the tendency of such questions is to make the defendant tell a lie, but that is not a legal ground for disallowing them. It is said also that the plaintiff is seeking to prove his case by interrogating the defendant, and so to obviate the necessity of putting his daughter in the witness-box and depriving the defendant of the opportunity of cross-examining her. But the fact of putting these questions affords no ground for saying that the plaintiff does not intend to call his daughter as a witness. If he should not call her at the trial, the defendant's counsel will no doubt observe upon her absence.

QUAIN, J.—I am of the same opinion. The very object of putting interrogatories to the defendant is to get admissions from him in order to prove the case of the plaintiff. The questions which we allow are relevant to the issue, and I see nothing to shew that the plaintiff intends to abuse the process of the Court. They go to prove the case for the plaintiff.

Rules absolute.

Attorneys—Makinson & Carpenter, agents for Gibson & Co., Dartford, for plaintiff; Hughes & Sons, agents for Walker, Sons & Rainey, Spilsby, for defendant.

1873. Nov. 19. THE PIMLICO, PECKHAM AND GREENWICH STREET TRAMWAYS COMPANY (*appellants*) *v.* THE ASSESSMENT COMMITTEE OF THE GREENWICH UNION (*respondents*).

Poor-rate—Valuation List—Tramways—Rateability.

By the Tramways Act, 1870, 33 & 34 *Vict. c.* 78, *tramway companies shall have the exclusive use of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail. By section* 57, *notwithstanding anything in the Act, the promoters of any tramway shall not acquire any right other than that of user of any road along or across which they lay any tramway. By section* 62, *nothing in the Act is to abridge the right of the public to pass along or across any road upon which a tramway is laid:*—Held, *that a tramway company were rateable and liable to be inserted in a valuation list in respect of the occupation of their tramways, as they had an occupation of the soil of the road, like the occupation of gas and water companies.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 29.]

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

1873. Nov. 27. } RAMSDEN *v.* LUPTON.

*Bill of Sale—Successive Bills of which last alone Registered—*17 & 18 *Vict. c.* 36.

E. and W. were engaged in a speculation and E. had agreed that the plaintiff should receive a share of the profit which should accrue to him. E. advanced a sum of money, and as W. was unable to repay it when it became due, it was agreed between E., W. and the plaintiff, that a bill of sale should be given to the plaintiff of certain furniture in a house occupied by W. It was at the same time agreed between the three parties that the bill of sale was to be kept renewed for twelve months, and that neither it nor the renewals were to be registered during that period unless W. should get into difficulties in the meantime. In pursuance of such agreement a bill of sale, dated the 8th of March, 1872, *was executed by W. On the 27th of March,* 1872, *a fresh bill was executed in pursuance of the agreement, but the first bill of sale remained in the possession of the plaintiff. The fresh bill was registered on the 15th of April,* 1872, *and the plaintiff having learnt that W. was in difficulties, took possession under it on the 20th of April:*—Held (CLEASBY, B., *dubitante*), *affirming the judgment of the Court of Queen's Bench, that the plaintiff was entitled as against an execution creditor who seized on the 24th.*

This was an appeal by the defendant, under the provisions of the Common Law Procedure Act, 1854, against the decision of the Court of Queen's Bench in discharging a rule calling upon the plaintiff to shew cause why the verdict obtained by the plaintiff should not be set aside, and a verdict entered for the defendant instead thereof, pursuant to leave reserved at the trial.

The following is substantially a statement of the case—

1. In the month of November, 1871, W. A. Whyte and Henry David Burn carried on business in partnership at 9, Mincing Lane, in the city of London, as colonial merchants, under the firm of W. A. Whyte & Co., and were engaged in certain sugar speculations, in which, at the request of the said W. H. Whyte, Mr. Francis Engleback, of the firm of Engleback & Keir, accountants, of Gresham Buildings, in the city of London, agreed, on behalf of his firm, to join.

2. The plaintiff, who is a solicitor, was the personal friend and solicitor of the said William Francis Engleback, and the firm of Engleback & Keir agreed with the plaintiff to give him 1-5th of their share of profit or loss in the said speculation.

3. Messrs. Whyte & Co. subsequently purchased certain sugars on behalf of themselves and the said Messrs. Englebank & Keir.

4. On the 8th of January, 1872, W. A. Whyte informed Mr. Engleback that he had sold the said sugars at a profit, the prompt day being the 9th of March, 1872.

5. On the 1st or 2nd of Febuary, 1872, Mr. Whyte informed Mr. Engleback that he, Mr. Whyte, would have to pay the difference between what he could get advanced by his bankers on the sugar, and the price at which it had been bought, and asked Mr Engleback to give him a cheque for 500*l.* which, as Mr. Whyte said, would about represent his, *i.e.* Mr. Engleback and his partner Mr. Keir's, share in the transaction.

6. Mr. Engleback thereupon on the 2nd of February gave to Mr. Whyte a cheque of his firm for 500*l.* payable to W. A. Whyte & Co., which cheque was on the same day paid, and the amount of which was to be repaid on or before the said 9th day of March, 1872.

7. On or about the 8th of March, 1872, account sales were sent by W. H. Whyte & Co. to Engleback & Keir, shewing a profit on the resale of the sugar of 39*l.* 12*s.* 11*d.*

8. About the 5th or 6th of March, 1872, Mr. Whyte called upon Mr. Engleback and said the money would be due in the ordinary course on the 9th of that month, and asked him to allow the repayment of the 500*l.* to stand over as he (Mr. Whyte) was temporarily pressed for money, and Mr. Engleback stated that he did not care for the money so long as Mr. Whyte gave him anything like decent security. Mr.

Engleback asked for some security of some kind, and Mr. Whyte stated that he had no security to give except certain furniture in and upon a house occupied by Mr. Whyte at Teddington, upon which furniture he suggested a bill of sale should be given.

9. Mr. Engleback, after consulting the plaintiff, assented to Mr. Whyte's proposal, and as Mr. Engleback was desirous that his name should not appear in the bill of sale, it was agreed between Mr. Engleback, Mr. Whyte and the plaintiff, that the bill of sale should not be registered, and that it should be made in the plaintiff's name.

10. It was at the same time also agreed between the said three parties, that the bill of sale was to be kept renewed for twelve months, and that neither it nor the renewals were to be registered during that period, unless Mr. Whyte should get into difficulties in the meantime.

11. In pursuance of such agreement, a bill of sale, dated the 8th of March, 1872, was executed by Whyte.

12. On the 27th of March, in pursuance of the said agreement, a fresh bill of sale of that date was executed by Mr. Whyte, but the first bill of sale remained in the possession of the plaintiff uncancelled.

13. On the 13th of April, 1872, a notice in writing dated the 11th of April, 1872, and demanding payment from Mr. Whyte of the sum purporting to be secured by the bill of sale, was served upon him.

14. About the 13th or 15th of April, the plaintiff, as stated in evidence by himself, learnt that Mr. Whyte was in real difficulties, and that a writ had been issued against him, and the bill of sale dated the 27th of March was in consequence on the 15th of April, 1872, registered in due form under the Act.

15. On the 20th of April, 1872, possession of the furniture, which was the subject of the bill of sale, was taken by the plaintiff, and on the 24th of April, 1872, the Sheriff of Middlesex seized the said furniture under a writ of *fi. fa.* issued at the suit of the defendant, upon a judgment obtained by him in the Court of Queen's Bench, against the said Messrs. Whyte & Burn for the sum of 2,510*l.* 8*s.* 1*d.*

On the 2nd of May, 1872, an order was made by Keating, J., in pursuance of which an interpleader issue was settled as follows—

Middlesex. In the Queen's Bench.

The 27th day of May, A.D. 1872.

Hildebrand Ramsden affirms, and Louis Thomas Lupton denies that certain goods and chattels seized in execution on the 26th day of April, 1872, by the Sheriff of Middlesex under a writ of *fi. fa.* tested the 24th day of April, 1872, and issued out of Her Majesty's Court of Queen's Bench at Westminster, directed to the said sheriff for the levying of execution of a judgment of that Court, recovered by the said Louis Thomas Lupton, in an action at his suit against William Athenry Whyte and Henry David Burn, were or some part thereof was at the time of the said seizure the property of the said Hildebrand Ramsden, as against the said Louis Thomas Lupton. And it has been ordered by the Honourable Mr. Justice Keating, pursuant to the statutes in that behalf, that the truth of the matters aforesaid shall be tried by a jury. Therefore let a jury come, &c.

18. The said issue came on to be tried at the sittings after Trinity Term, 1872, before Quain, J., and a common jury, when the facts, as hereinbefore stated, were proved or admitted; and a verdict was directed by the Judge to be entered for the plaintiff, leave being reserved generally to the defendant to move the Court to set aside the said verdict, and to enter a verdict for him.

19. On the 5th of November, 1872, a rule was obtained, calling upon the plaintiff to shew cause why the verdict so entered should not be set aside, and a verdict entered, instead thereof, for the defendant, on the ground that the bill of sale on which the plaintiff relied was not valid, within the Bills of Sale Act, as against the execution creditor.

20. This rule was discharged on the 24th of January, 1873.

21. Due notice of appeal has been given pursuant to the said Act.

22. The question for the opinion of the Court of Appeal is whether or not the defendant is entitled to have the verdict entered for him on the said issue.

23. If the Court shall be of opinion in

the negative, then the verdict for the plaintiff is to stand, and judgment is to be entered for him on the said issue, with costs of suit.

24. If the Court shall be of opinion in the affirmative, then the verdict for the plaintiff on the said issue is to be set aside, and entered thereon for the defendant, with judgment for the defendant accordingly, and with costs of defence.

Thesiger, for the defendant.—The rule should have been made absolute. The Court of Queen's Bench thought that *Smale* v. *Burr* (1) governed this case; but that case is, perhaps, distinguishable. It was decided upon motion only, and is not binding upon this Court Two questions now arise: First. Whether, apart from the Bills of Sale Act, such a bill of sale as the present could stand against a *bona fide* creditor? Secondly. Whether the Bills of Sale Act permits such an arrangement as was made in this case? A bill of sale would not be void under the 13 Eliz. c. 5, merely because it is made with the intention of defeating the expected execution of a judgment creditor, see *Wood* v. *Dixie* (2); but here the first bill of sale was only colourable, and there never was an intention that the property should pass unless something was done. In *Ex parte Cohen* (3) there had been such an arrangement, and Lords Justices James and Mellish held that the last bills of sale were invalid as constituting an act of bankruptcy. They looked at the transaction as an indication of fraud. In *Holbird* v. *Anderson* (4) Lord Kenyon said: "There was no fraud in this case. The plaintiff was preferred by his debtor, Charter, not with a view to any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice. The words of the statute 13 Eliz. c. 5 do not apply to this case, for this warrant of attorney was given on a good consideration; and the other words in the Act—'*bona fide*'—only apply to those cases where possession is not delivered, or where it is merely colourable. Of the former kind was *Twyne's Case* (5), where the vendor continued in possession; and of the latter was *Hodgson* v. *Newman* (6), where, as far as I recollect, the goods were not removed from the vendor's house, and his wife continued in possession of them." So here the transaction is only colourable, and not *bona fide*. No case can be found where it has been held that a bill of sale, given with intent to defeat the provisions of an Act of Parliament and to delay the claims of creditors, is valid. The plaintiff cannot set up his own fraud so as to establish his right against that of the defendant.

[BRAMWELL, B.—Suppose a mere receipt was given instead of a bill of sale, so as to avoid the necessity for registration, might not the property pass?]

Not unless there was a sale; and here there is a distinct fraud upon the Bills of Sale Act. If a contract is made in contravention of an Act of Parliament enacted for the protection of a certain class of persons, or of public morals, no action can be maintained upon it—*Cundell* v. *Dawson* (7), and *Ritchie* v. *Smith* (8). The preamble to the Bills of Sale Act (17 & 18 Vict. c. 36) recites—"Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances, and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors." This clearly shews the mischief that was to be provided against, and the transaction now in question comes

(1) 42 Law J. Rep. (N.S.) C.P. 20; s. c. Law Rep. 8 C. P. 64.

(2) 7 Q.B. Rep. 892.

(3) 41 Law J. Rep. (N.S.) Bankr. 17; s. c. Law Rep. 7 Ch. Ap. 20.

(4) 5 Term Rep. 238.

(5) 3 Rep. 80 b.

(6) Cited in *Holbird* v. *Anderson*, 5 Term Rep. 236.

(7) 4 Com. B. Rep. 376; s. c. 17 Law J. Rep. (N.S.) C.P. 311.

(8) 6 Com. B. Rep. 462; s. c. 18 Law J. Rep. (N.S.) C.P. 9.

within such mischief, namely, that the bills of sale being renewed from time to time without registration, the grantor might be left in the apparent possession, getting credit as the possessor of the furniture, while the grantee would obtain payment of his debt to the exclusion of other creditors. The Act provides, by section 1, that bills of sale shall be null and void unless registered in the manner provided in that section. The 7th section defines what is to be meant by "personal chattels," and declares that "personal chattels" shall be deemed to be in the "apparent possession" of the person making or giving the bill of sale, so long as they shall remain or be in any house, &c., occupied by him. By section 2, if the bill of sale is subject to a condition not expressed in the body of the bill of sale, such condition is to be taken as part of the bill of sale, and must be written upon the paper or parchment upon which the bill of sale is written, before the time when the same, or a copy thereof, is filed, otherwise the bill of sale is to be null and void. The present bill of sale is a conveyance following upon an agreement, which is a fraud upon the statute.

[COLERIDGE, C.J.—In *Cundell* v. *Dawson* (7), and *Ritchie* v. *Smith* (8), the transaction was considered illegal, as being in contravention of an Act of Parliament; but the question here is, whether the transaction is so in contravention of the Bills of Sale Act, which simply provides that the bill of sale must be registered within twenty-one days.]

The law will not permit a thing to be done indirectly which cannot be done directly. In *Stansfield* v. *Cubitt* (9), four successive bills of sale were given to Cubitt, without registration, within the respective periods of twenty-one days; the fifth was registered within the prescribed time, and the others were not cancelled. Stuart, V.C., held that the bills of sale were fraudulent and void, saying (see the Law Journal Report, where his judgment is reported in a note), "A case more unsatisfactory as to the establishment of the relation of debtor and creditor subsisting between Cubitt and Glover, as a *bona fide* transaction, can scarcely be imagined. It is extremely difficult to see how any title at all can be established by Cubitt." That decision was affirmed by the Lords Justices. In the present case, the property passed under the first and uncancelled bill of sale, and the second was inoperative and invalid. It is a continuing transaction, the creditor retaining in his possession the first uncancelled bill of sale. In the Court below reliance was placed upon *Hollingsworth* v. *White* (10), which, if correctly reported, is against the view now submitted as to the cancellation; but it differs from the present case in this respect, that further transactions occurred after the first bill of sale was given. The facts are somewhat loosely given. So also in *Ex parte Harris, in re Pulling* (11), there were new transactions. In *Ex parte Fisher, in re Ash* (12), Lord Justice Mellish, in delivering the judgment of the Court, said, "Although we do not dispute the rule that, where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule protects transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors." See, also, *Ex parte Cohen* (3). Next, as to *Smale* v. *Burr* (1), on the authority of which this case was decided in the Court below, perhaps it may be distinguishable on the ground that, at the time of giving the first bill, there was no finding of an actual agreement in contravention of the Act of Parliament. At any rate, the decision

(9) 2 De Gex & J. 222; s. c. 27 Law J. Rep. (N.S.) Chanc. 266.

(10) 6 Law Times, N.S. 604.

(11) 42 Law J. Rep. (N.S.) Bankr. 9; s. c. Law Rep. 8 Ch. Ap. 48.

(12) 41 Law J. Rep. (N.S.) Bankr. 62; s. c. Law Rep. 7 Ch. Ap. 636.

is unsatisfactory. The cases of *Marples* v. *Hartley* (13), and *Edwards* v. *English* (14), which were referred to by Bovill, C.J., in delivering judgment, do not touch the present case. The agreement in this case was in fraud of the Bills of Sale Act, and cannot be supported.

Powell (*J. O. Griffits* with him), for the plaintiff.—The judgment of the Court below is correct. The transaction was a *bona fide* one, which the Court will support. There is nothing to shew illegality, or that it was in contravention of the Act. The necessary effect of the enactment in the first section was that the bill of sale should be valid up to the expiration of the twenty-one days, within which it might have been registered. The parties, by the arrangement which they have made, bow to the authority of the Legislature, and agree that the bill of sale should be renewed within the period of twenty-one days. It may be an evasion of the Act, but not an infringement as in *Ritchie* v. *Smith* (8). A seizure by the grantee within the first twenty-one days would not have been invalid for want of registration of the bill of sale. The 15th paragraph of the case shews that the plaintiff took possession of the furniture, which was the subject of the bill of sale. He was therefore in actual possession under a valid deed, on the 20th of April, and the property was in him. He only took possession of what was his own, and his title is good against the defendant or against any one else who came in subsequently.

Thesiger did not reply.

COLERIDGE, C.J.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. [His Lordship stated the facts of the case.] It appears that Whyte got into difficulties, and the last bill of sale was registered within twenty-one days of its execution so as to pass the property, unless the objection which has been taken will prevail. It is objected that the original agreement was that the bills of sale should not be registered, but that they should be renewed from time to time, each being capable of being registered if the circumstances in which Whyte was placed made it desirable. Mr. Thesiger says that this agreement was illegal; that it overran the whole transaction; that the bill of sale which was finally registered was the completion of a transaction which was illegal *ab initio;* and that therefore no Court should give effect to any part of it. It seems difficult to put the objection in any other form than that the transaction is in fraud of the Act of Parliament. It is easy to see how this may be so in cases which arise under the bankrupt laws, where a far different question arises, and an attempt to evade the bankrupt laws may be a fraud, and render the bill of sale invalid.

But here we have only to deal with the enactments of the Bills of Sale Act. That Act (in section 1) enacts that every bill of sale of personal chattels, &c., shall be filed within twenty-one days after the making or giving thereof, otherwise such bill of sale shall, as against all assignees and other persons mentioned, among whom the defendant would be included, be null and void to all intents and purposes whatsoever, so far as regards the property in any personal chattels contained in such bill of sale. It directly and indirectly enacts that if such a bill of sale is filed within the period of twenty-one days it is valid. In the present case the second bill of sale has been filed within that time, and the words of the Act are complied with, but it is said that it contravenes the spirit of the Act. If the requirements of the Act are not complied with, if they are contravened or violated, the transaction is illegal. All I say is, that if what has been done is contrary to public policy, the Legislature may pass an Act to make it invalid, but I can see nothing which shews that the omission to register a bill of sale before the expiration of twenty-one days makes it invalid. It is said that there are authorities to that effect, and cases from the Court of Chancery have been cited, but with the most unfeigned respect for the learned persons who have pronounced those decisions, I do not think that they are, upon this inquiry, *ad rem.* They were

(13) 3 E. & E. 610; s. c. 30 Law J. Rep. (N.S.) Q.B. 92.

(14) 7 E. & B. 564; s. c. 26 Law J. Rep. (N.S.) Q.B. 193.

most properly decided. In *Stansfield* v. *Cubitt* (9) the last of a series of bills of sale was registered, and the point to be decided was whether that was sufficient to prevent the operation of the Bankrupt Act, and it was held that there was no contract or dealing within the 133rd section of the Bankrupt Law Consolidation Act, 1849. That case and *Ex parte Cohen* (3) shew that a bill of sale given under such circumstances would be an act of bankruptcy, and that a subsequent bill of sale registered within twenty-one days would not defeat the operation of the statute. I do not think that we dissent from such a proposition, but a different question arises here, and we are to consider whether *Smale* v. *Burr* (1) was rightly decided in the Court of Common Pleas. I am of opinion that it was. Bovill, C.J., put the point upon the right footing, that the first bill of sale was valid, and for a good consideration, and that the effect of the subsequent bills of sale was to annul and cancel those previously given; thus the last was good, if registered within the twenty-one days, as was the fact.

Then as to the question of cancellation. This must be looked at with the other facts of the case: the first bill of sale remained in the possession of the plaintiff. I cannot say that it was cancelled as a physical fact, and the question is whether it can be said to be so by operation of law. I think that what took place, read by the light of the judgment of Bovill, C.J., in *Smale* v. *Burr* (1), brings one to the legal conclusion, that the effect was to cancel the first bill of sale, and that the second was good against the defendant, the execution creditor.

Bramwell, B.—I also am of opinion that the judgment of the Court of Queen's Bench must be affirmed. It is manifest that there is nothing illegal in itself in the arrangement which was made; nor is there anything in the Bills of Sale Act to prohibit that arrangement being carried out. That Act does not prohibit anything; it simply provides that unless something is done, that is to say, unless the bill of sale be registered within twenty-one days certain consequences shall follow. But there is nothing to make the omission illegal. It has been said that it is contrary to the spirit of the Act, but how can that be?

An Act of Parliament evaded is not an Act of Parliament broken. This arrangement is not within the Act in such a sense as that the non-registration of the bill of sale is rendered illegal. The only question then is whether the title of the plaintiff is under the first bill of sale, or under the second, which was duly registered. Upon this question we have the authority of the Court of Common Pleas in *Smale* v. *Burr* (1), and of the Court of Queen's Bench in *Hollingsworth* v. *White* (10), that the effect is that the last bill of sale was valid, and that the first was virtually cancelled. But it matters very little what words were used. I should say that the plaintiff might rely upon the second bill by way of estoppel as between himself and Whyte, and that it prevents the execution creditor from seizing the goods. Suppose a case where there has not been any such bargain as appears here, but that by some accident or misfortune a bill of sale has not been registered within the required time, and the creditor goes and gets another, is it conceivable that he must go through a form of re-assignment to get the title to the goods from the debtor? I think not; it seems to me that the second bill of sale, when registered, is effectual to give a true title to the goods, or such as will operate by way of estoppel. I think also that the parties conceived that each of the bills of sale would pass the property, and that each was executed with that intention.

Keating, J.—I am of the same opinion. This is a good bill of sale, which if registered in time, as in fact it was, would give a title to the goods. It is said that it is invalid because there had been this arrangement between the parties, and that the property had passed by the first bill of sale. There are two ways of getting rid of that. The Court of Common Pleas in *Smale* v. *Burr* (1) thought that the effect of giving the second bill of sale was to annul the other. That seems to be correct. But then it has been suggested that the previous arrangement, that the bills of sale should not be registered unless it became necessary, renders the

last inoperative, but I cannot see why that should be so, unless the arrangement was in itself illegal. The cases cited would be in point if the Bills of Sale Act had provided that unless a bill of sale was registered within twenty-one days, a penalty should be paid. In such circumstances as exist here, such an Act of Parliament, if applicable, might be infringed, and the agreement might be illegal, but the Act contains no such provision. An alternative is given, the bill of sale must either be registered, or the effect of it shall be curtailed. This seems to be a mode of escaping the burthens imposed by the statute, and as such it is not to be commended, but the bill of sale does not become invalid.

CLEASBY, B.—I believe I am the only member of the Court entertaining any serious doubt in this case; but I have done so up to the close of the argument, and I cannot say that it is entirely removed.

I do not at all dissent from the view taken by the rest of the Court upon the general question of the legality of the agreement to renew the bills of sale every twenty-one days, and not to register unless there were unfavourable reports of the debtor. I think this cannot be properly said to be in contravention of the Bills of Sale Act, because the creditors are still protected against unregistered bills of sale, which is all the Act gives them. It enables the debtor no doubt to continue with his apparent property the subject of unregistered bills of sale, but that is all, and there is not enough in the Act to forbid that or make it illegal. The Act only exposes such bills of sale to a certain defeasance.

But my difficulty has arisen upon the particular facts of this case, which it is right to consider carefully when we are dealing with the effect of an agreement so unusual and irregular as the present, which is well described by Lord Justice Mellish in *Ex parte Cohen* (3) as being not an agreement to give a fresh bill of sale for the benefit of the creditor, but as a device to enable the debtor to avoid the registration required by the Act.

The first bill of sale passes the property in the goods absolutely, subject only to the power of redemption—*Maughan* v. *Sharpe* (15). I do not at all question that fresh transactions might be entered into, by which new bills of sale might be substituted for former ones upon a fresh advance of money, or indeed any arrangement by which the old bill of sale was given up or cancelled and a fresh one given. Such a dealing might fairly be regarded as an exercise of the power of redemption, and so the property would pass by the second bill of sale, the first bill of sale having ceased to be operative. This appears to have been the view taken in the case of *Hollingsworth* v. *White* (10).

My difficulty is that in the present case there seems to have been no new transaction at all, but only a keeping alive of the old transaction. This is the proper conclusion from the statement in the case that the first bill of sale remained in the possession of the plantiff uncancelled, bearing in mind that it will be of consequence to retain the title conferred by the bill of sale, and the argument of the learned counsel for the plaintiff warrants this conclusion, for he relied mainly upon the fact of possession having been taken so as to take the goods out of the apparent possession of the debtor, and so the non-registration of the first bill of sale was immaterial.

If it was made out that such possession was taken before the execution, as to make the Bills of Sale Act inapplicable, the plaintiff would clearly be entitled to judgment. And some reference was made in the argument as to the construction to be put upon the words "apparent possession," by the interpretation clause of the Act; but the Court thought that sufficient, and did not appear to justify the conclusion that the registration was immaterial. If that be so, then my difficulty is in seeing how, as long as the first bill of sale was operative, any title to the goods could pass by the second or subsequent bills of sale to the plaintiff, the debtor having no property in the goods to transfer.

The facts of the case of *Richards* v.

(15) 17 Com. B. Rep. N.S. 443; s. c. 34 Law J. Rep. (N.S.) C.P. 19.

James (16) were different, and that case does not remove my difficulty, which is, however, not sufficient to make me dissent from the judgment which all the other members of the Court think the proper one.

GROVE, J.—I agree with Mr. Thesiger that this is an evasion of the Act of Parliament in the ordinary sense of getting away from the operation of the Act, but I think that it is a successful evasion. The object in view in providing for the registration was that people might go to the office of registration and find out whether a bill of sale had been granted, and find it registered. If this can be done, if such an arrangement as the present can be carried out, the mischief intended by the statute to be remedied is actually produced. But the statute has not provided a full remedy. I am confirmed in the opinion I entertained in *Smale* v. *Burr* (1), and I think that the judgment of the Court below is right.

DENMAN, J., and POLLOCK, B., concurred.

Judgment affirmed.

Attorneys—H. Ramsden, for plaintiffs; Phillips & Son, for defendant.

1873. Nov. 19. { THE MERSEY DOCKS AND HARBOUR BOARD (*appellants*) *v.* THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF LIVERPOOL (*respondents*).

Poor-rate—Assessment of Dock Estates —Right to Deduct Tenants' Profits.

The appellants were the occupiers of certain docks and dock-estates. The value of the occupation depended upon the dock rates and dues, all of which were, by Act of Parliament, to be appropriated in payment of the expenses and charges of collecting the rates and dues, and for other purposes therein specified:—Held, *that the appellants were not entitled to any deduction, in respect of tenants' profits, in calculating the rateable value of the hereditaments occupied by them.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 33.]

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(16) Law Rep. 2 Q.B. 285; s. c. 36 Law J. Rep. (N.S.) Q.B. 116.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Queen's Bench.*)

1873. Nov. 28. { THE MERCHANT SHIPPING COMPANY (LIMITED) *v.* ARMITAGE AND OTHERS.

Ship and Shipping—Freight—Right to Lump Freight where part of Cargo Lost.

By a charter-party between the defendants and the master of the plaintiffs' ship it was agreed that "the ship should load at Colombo, or proceed to Cochin, and if ordered to Cochin, there load from the charterers . . . a full and complete lading of legal merchandise, &c., and therewith proceed to London into the East or West India Docks, and discharge there as customary, the act of God, restraints of princes, &c., excepted. A lump freight of 5,000*l. to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House, or under discount at five per cent. The master to sign bills of lading at any rate of freight required without prejudice to this charter-party, but, should the aggregate freight by bills of lading amount to less than the lump sum of* 5,000*l. already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for, except as to the captain's draft for disbursements and commission as before mentioned, in case of default. The charterers to furnish cash for the disbursements of the ship at port of loading at current rate of exchange, not exceeding* 750*l. free of interest, but subject to a commission of* 2½ *per cent., and cost of insurance, for the due appropriation of which the charterers are not to be held responsible, and for which, and agency commission, the master shall give his draft on the owners payable in London at sixty days' sight, and in the event of the bill not being accepted or paid at maturity, the amount to be deducted from freight at settlement thereof," &c.*

The ship proceeded to Cochin, was there put up by the defendants as a general ship,

and loaded with a full cargo under bills of lading. The total amount of the bill of lading freight was estimated by the charterers at 4,995*l.* 10*s.* 6*d.*, *and was payable in London on delivery of the goods there. The ship sailed with her cargo for London, and while at sea a fire broke out, and part of the cargo was so injured by fire and water that it became necessary to sell it. The remainder of the cargo was brought to London, and reported inwards at the Custom House. The bill of lading freight received by the plaintiffs amounted to* 3,482*l.* 7*s.* 10*d.*, *and the defendants advanced to the master at Cochin* 364*l.* 14*s.* 1*d.* *for disbursements of the ship, making together* 3,847*l.* 1*s.* 11*d.*: —Held, *first, affirming the cases of The* Norway *and* Robinson *v.* Knights, *that the plaintiffs were entitled to the balance of the lump sum of* 5,000*l.* *after giving credit for the* 3,847*l.* 1*s.* 11*d.* *received by them, as the* 5,000*l.* *was to be payable on the delivery, not of the entire cargo which had been put on board, but of that which had not been lost by the excepted perils; secondly, that the plaintiffs were not entitled to interest on the balance in question, as it could not be regarded as a sum payable on a day certain.*

This was an action for the recovery of 1,152*l.* 18*s.* 1*d.* and interest. The following case was stated for the opinion of the Court of Queen's Bench without pleadings.

CASE.

The plaintiffs are a company carrying on business as shipowners in the city of London, and were and are the owners of the ship *Clyde*. The defendants are merchants carrying on business at Colombo and London. On the 25th of January, 1872, the ship was lying in the harbour at Colombo, and upon that day the charter-party hereinafter set out was made and entered into by Edward Shrewsbury, the master of the ship, on behalf of the plaintiffs and the defendants. The charter-party was as follows—

"Colombo, 25th January, 1872.

"It is this day mutually agreed between Edward Shrewsbury, of the good ship or vessel called the *Clyde*, classed A 1 in Lloyd's, of the register tonnage of 1,151 tons, or thereabouts, now lying in the harbour of Colombo, whereof he is the master, on the one part, and Messrs. Armitage Brothers, of Colombo, merchants, on the other part. That the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall with all convenient speed load here, or sail and proceed to Cochin (orders to be given on or before the 29th instant), and if ordered to Cochin (orders to be given on or before the 29th instant), there load from the charterers or their agents, completing at Colombo or Tuticorin, if so required by charterers, a full and complete loading of legal merchandise, which full and complete loading the captain binds himself to receive on board, and properly stow, but not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture, and being so loaded, shall therewith proceed to London into the East or West India Docks, and discharge there as customary, the act of God, restraints of princes and rulers, the Queen's enemies, fire and all and every other dangers of the seas, rivers and navigation, of whatever nature and kind soever, during the said voyage always excepted.

"A lump sum freight of 5,000*l.* to be paid after the entire discharge and right delivery of the cargo, in cash two months after the date of the ship's report inwards at the Custom-house, or under discount at five per cent. per annum (or at the bank rate if higher), at option of charterer's agents.

"Thirty-five working days are to be allowed the said charterers (if the vessel be not sooner dispatched) for loading, to commence and be continued from the time of the vessel having a clear hold and ready for that purpose, the master giving charterers or their agents written notice twenty-four hours in advance to that effect. And the charterers to have the option of keeping the vessel fifteen working days on demurrage, paying 20*l.* per day, to be paid to the master day by day.

"All goods to be brought to the vessel and taken from alongside at the risk and expense of the freighters.

"The master to sign bills of lading at any rate of freight required without pre-

judice to this charter-party, but should the aggregate freight by bills of lading amount to less than the lump sum of 5,000*l.* already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for, except as to the captain's draft for disbursements and commission as before mentioned, in case of default. And it is hereby agreed that the charterers are to furnish cash for the disbursements of the ship at port of loading at current rate of exchange not exceeding 750*l.* free of interest, but subject to a commission of 2½ per cent. and cost of insurance, for the due appropriation of which the charterers are not to be held responsible, and for which and agency commission the master shall give his draft on the owners, payable in London at sixty days' sight, and in the event of the bill not being accepted or paid at maturity, the amount to be deducted from freight at settlement thereof, together with interest and cost of insurance.

"The ship to be consigned to owners' agents in London, and in case of the vessel having to put into the Mauritius, the vessel to be consigned to Messrs. Blyth Brothers & Co. there, or to Messrs. Thompson, Watson & Co., at the Cape of Good Hope. A survey certificate to be supplied by the captain (if required) to the effect that the vessel is in every way fitted to carry a dry and perishable cargo to any port in the world. The captain to carry cargo for charterers' benefit in any cabin, stateroom or other place, not absolutely required for use during the voyage.

"The charterers to have the option of appointing their own stevedore at the expense of the master, but at not exceeding current rates; but the captain is not thereby relieved of the responsibility regarding the proper stowage of his vessel. The captain and charterers to be at liberty to add any clause to this charter-party by mutual consent without prejudice to this agreement. In default of performance of this agreement, it is hereby mutually agreed that the amount of freight herein agreed for is to be paid and taken as liquidated damages for such default."

In accordance with the orders of the defendants the ship proceeded to the port of Cochin, and was there put up by the defendants as a general ship, and loaded with a full and complete cargo, the property of various merchants, which cargo was shipped under several bills of lading signed by the captain upon the orders of the defendants. The total amount of the bill of lading freight was estimated by the charterer at 4,995*l.* 10*s.* 6*d.*, and was payable in London on delivery of the goods there.

The ship with the cargo on board sailed from the port of Cochin upon the voyage to London under the charter-party, and on the 2nd of May, 1872, the cargo was found to be on fire. The master of the ship, after attempting ineffectually to extinguish the fire at sea, put into Table Bay which was the nearest port of refuge, and after a survey it was found expedient to scuttle the ship, as it was deemed that the fire could not be otherwise extinguished. The ship was scuttled in Table Bay and the fire was thereby extinguished.

After the fire had been extinguished the water was pumped out, and the greater portion of the cargo was unladen, and as a large quantity thereof was greatly injured by fire and water, surveys as customary were called, and the surveyors pronounced a great part of the cargo unfit for reshipment, and it was therefore ordered to be sold, and it was sold accordingly, and the proceeds thereof were paid into the hands of the plaintiffs, who have since accounted for the same to the owners of the goods sold.

The remainder of the cargo was reloaded on board the ship, and on the 9th of June, 1872, the ship having undergone some repairs resumed her voyage to London with the remainder of the cargo on board, and with no other cargo, and arrived in port and proceeded to the West India Docks, and on the 12th of August, 1872, was reported inwards at the Custom House.

The bill of lading freights upon the cargo which arrived in London have been received

by the plaintiffs and amount to the sum of 3,482*l.* 7*s.* 10*d.*, and the defendants advanced to the master at Cochin the sum of 364*l.* 14*s.* 1*d.* for disbursements of the ship, making together the sum of 3,847*l.* 1*s.* 11*d.*, but the defendants have not paid the plaintiffs the sum of 1,152*l.* 18*s.* 1*d.*, being the balance of the lump freight of 5,000*l.* mentioned in the charter-party, and refuse to pay the same to the plaintiffs.

The question for the opinion of the Court is—

Whether the plaintiffs are entitled to payment by the defendants of the balance of the sum of 5,000*l.* under the charter-party after giving credit for the aggregate sum of 3,847*l.* 1*s.* 11*d.* which has been received by them on account thereof.

Second. Whether the plaintiffs are entitled to any and what sum for interest on the said balance of the sum of 5,000*l.*

The Court of Queen's Bench having decided that the plaintiffs were entitled to payment by the defendants of the balance of the sum of 5,000*l.*, namely, 1,152*l.* 18*s.* 1*d.*, on the authority of the cases of *The Norway* (1) and *Robinson* v. *Knights* (2), the defendants brought error.

Watkin Williams (*Cohen* with him), for the defendants.—The decision of the Court below was wrong. The charter-party in question is one of an ordinary character, and the lump sum of 5,000*l.* is termed in the contract "freight," and was intended to have all the legal incidents of freight. To support their view, and that of the Court below, the plaintiffs must contend that the 5,000*l.* would be payable if only a small parcel of the cargo reached England. The consideration of the 5,000*l.* was the conveyance of one entire cargo on one entire voyage. The plaintiffs may recover freight on what they have really carried under a *quantum meruit*. He cited *Bright* v. *Cooper* (3), *Abbott on Shipping*, 10th edit. 329, *Kent's Comm.* vol. 3, p. 291, *Parsons on Shipping*, vol. 1, p. 293 (note), *Post* v. *Robertson* (4), and referred to the provisions of the charter-party as shewing that the cases of *The Norway* (1) and *Robinson* v. *Knights* (2) were distinguishable. (The nature of this part of the argument is sufficiently stated in the judgments of the Court.)

Manisty (*Petheram* with him), for the plaintiffs, was not called upon to argue.

COLERIDGE, C.J.—I am of opinion that the judgment of the Court below should be affirmed. The Court of Queen's Bench seems to have considered that their judgment was in accordance with the decisions in *Robinson* v. *Knights* (2), and *The Norway* (1), and I think that these two decisions are entirely in point. It is true that the words of the charter-party are not identical in the three cases. In *Robinson* v. *Knights* (2) the words were, "deliver the same on being paid freight as follows, a lump sum of 315*l.* . . . the freight to be paid in cash, half on arrival and remainder on unloading and right delivery of cargo." In *The Norway* (1) the freighter, after undertaking to load the cargo, agreed to pay or cause to be paid "as freight for the use and hire of the vessel, 11,250*l.* lump sum if ordered to the United Kingdom, &c., the master guaranteeing to carry 3,000 tons dead weight of cargo or to forfeit freight in proportion to deficiency." With regard to payment, 2,000*l.* was to be advanced "on the vessel clearing at Liverpool, subject to insurance only, say 1,000*l.*, by freighter's acceptance at four months and 1,000*l.* at six months, sufficient cash for ship's disbursements not exceeding 2,500*l.* to be advanced at Calcutta, and the necessary disbursements if ordered to the rice ports, &c., for six months' bills on London against the captain's receipts. Such advances to be made on account of chartered freight, and the balance as follows, namely, one-third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the port of discharge by good approved bills payable in London, or cash equal to three months' date from the delivery if discharged in the United Kingdom . . . . and so forth. In this case the Judicial Committee appear to have taken a view of the facts different from that of Dr.

(1) 1 Browning & L. 377; 404; 3 Moore P.C.C. N.S. 245.
(2) 42 Law J. Rep. (N.S.) C.P. 211.
(3) 1 Brownl. 21.
(4) 1 Johnson's U.S. Rep. 23.

Lushington, and to have considered that the non-delivery of part of the cargo was not owing to the negligence of the master, so that the contract was satisfied, and the whole lump sum earned. Lord Justice Knight Bruce indeed intimated that even if it had been otherwise the Committee would have been prepared to hold the words of the contract, "true and final delivery of the cargo," would have been complied with, and the only remedy for the merchant would be by cross action.

These then are the two cases which we are called upon to review, for it has always been held that the Courts of Westminster are not bound to follow the decisions of the Judicial Committee unless they are true expositions of the law, although these decisions are entitled to great weight. Now I do not think that the contract in the present case is substantially dissimilar from that in those two cases. Here the ship was to proceed to Cochin and there load from the charterer a full cargo, &c., subject to the usual exceptions, and then come the words, "A lump sum freight of 5,000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom-house, &c. The facts are that the ship performed her voyage with success outwards, but on her way home some portion of the cargo got on fire; that she was taken to Table Bay on fire, and that after making every effort to subdue the fire it was necessary to scuttle the ship, and that she was scuttled and the fire thereby put out. Some of the cargo was destroyed and some damaged, and finally such part of the cargo as remained was delivered, but a great part of it was not delivered, and therefore the freight, in the ordinary sense of the word "freight," had not been earned upon such portion of the cargo as was not delivered in this country. It is also found that the non-delivery was not owing to any negligence or misconduct on the part of the master or any one representing the owners of the ship. Under these circumstances we are asked to decide that this lump sum freight of 5,000*l.* has not been earned under this contract. For myself I must say that if the case stood alone, apart from the two previous decisions, I should have thought that the object of the contract was to ascertain as between the parties the amount of the freight to be earned by the ship on this voyage, the shipowner not choosing to run the risk of earning more or less, and the charterer being content with earning so much; and therefore that the shipowner had let out and the charterer had hired the ship for this voyage at the sum of 5,000*l.*, called "freight," and substantially freight, because it was a sum to be paid for the use of the ship in carrying cargo from the East to this country. Therefore, for the purpose of avoiding risk and inconvenience, the lump sum was taken to represent that at which one party was willing to hire the ship, and for which the other was willing to lend her for the stipulated voyage. This being the interpretation of the contract, the question is whether the cargo, part of it not having been delivered, can be said to have been entirely discharged and rightfully delivered. Upon this subject we have heard a good deal of argument, and if the matter were entirely free from authority, there might be some ground for saying that the words, "entire discharge and right delivery of the cargo," meant the entire discharge and right delivery of the cargo originally put on board. But the fair and reasonable construction of the words, regard being had to the fact that the cargo is for a lump sum, appears to me to be that which the Court has put upon very similar contracts, namely, that the cargo is entirely discharged and rightly delivered if the whole of it is not covered by any of the exceptions in the contract itself. Now, in this case so much as was not so delivered and discharged was prevented from being so delivered by the exceptions in the contract itself, and therefore it appears to me that the contract has been complied with and the lump sum earned. So the matter would stand if we had to deal with this portion of the contract alone. But an argument has been addressed to us founded on a stipulation which calls on "the master to sign bills of lading at any rate of freight required without prejudice to this charter-party, but should the aggregate freight by bills of lading amount

to less than the lump sum of 5,000*l.*, already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo." Now, the argument of Mr. Williams is this—Assume that the lump sum which the charterers undertake to secure is 5,000*l.* They agree to put as much cargo on board as will earn 5,000*l.* Suppose that the freight according to the bills of lading is 4,000*l.* This leaves 1,000*l.* to be provided by the charterers according to the contract. This is to be provided in two ways—First, it is to be paid by the disbursements, and if the amount which it is necessary to provide the captain with for that purpose does not bring the payment up to 5,000*l.* the charterers undertake to pay him, at the port of discharge when the ship clears out, the difference between the disbursements and the 5,000*l.* in cash. This, according to Mr. Williams's argument, shews that according to the real construction of the contract there is not a lump sum in lieu of freight, but a guarantee to provide 5,000*l.* worth of freight, and what is not provided in the shape of actual freight is to be paid for in another way, leaving what is provided subject to the ordinary incidents of freight. I am very far from saying that the construction put by Mr. Williams upon the contract is not the correct one, but I think that it does not interfere with the construction which I have already endeavoured to put on the former part of the charter-party. For, assuming that Mr. Williams is right, it appears to me that the clause in question is nothing more than a means of receiving in a particular event the payment of the whole of the 5,000*l.*, the character of which has been already ascertained by the earlier stipulations, with which the latter part of the contract cannot be permitted to interfere. For these reasons, and upon the authority of the cases I have referred to, I think the judgment of the Court below ought to be affirmed.

BRAMWELL, B.—I am of the same opinion. I certainly at one time felt confident as to the construction of this clause of the charter-party. I thought the "balance, if any," was the balance after the deduction of one sum from another sum. But in this view there is some difficulty in understanding it. The words are, "the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo." This merely shews at what rate you are to ascertain Colombo currency, and that the amount is to be paid in cash. I think if this be so, it shews that the amount was to be paid at Colombo to the master, and if it is the right construction, it may be argued that some other sum than the balance is meant. The balance, I suppose, is arrived at by the deduction of that one sum from the other which has been previously mentioned. In this view it may mean that if the bill of lading freight shall be so much less than the charter-party freight, and the difference between the two shall be greater than the disbursements, then the difference between the disbursements and that difference shall be paid to the master. I must say that if this were the meaning of the parties they have used very inconvenient language to express it. Still, there is some ground for Mr. Williams's construction in the expression which afterwards occurs that the disbursements are to be drawn for (which must mean disbursements less deductions, when there are any), by bills at sixty days' sight. I think it would be impossible for any Court of law to hold that the words, "and the balance, if any, to be paid," meant, not what the words are, but "if when the bill of lading freight has been deducted from the charter-party freight, the sum which shall remain after such deduction shall exceed the amount of disbursements, then the balance shall be paid." And I do not think that the solution of this puzzle is necessary for the decision of the case. Mr. Williams's argument, as I understand it, is that the shipowner having secured by the disbursement money and lien for the 5,000*l.*, trusts to these securities, and not to the covenant in the charter-party, but what is there, supposing that the construction contended for is right,

to shew that the shipowner trusted to his lien? A case might very well arise in which the lien would not be sufficient. Such a case, for instance, as the consignee not taking to the goods, and becoming insolvent, and the shipowner not choosing to rely on his lien. Again, there is nothing to shew that the liability of the charterer is limited. This is an ordinary charter-party, and, except for the difficulties which have been raised as to the lump sum, there is no suggestion that the charterer is not liable. So that there is no reason for Mr. Williams making the second step in his argument, supposing that he is right as to the first. Then he takes another passage, and says that it was a condition precedent to the right to the 5,000*l.* that the whole cargo should be delivered. I do not know whether I have precisely followed his argument. Perhaps he thought it not very safe to tell us whether he meant that if the whole cargo was not delivered there was no right to any lump sum, or whether he meant to say that there is some contrivance by which a fair proportion could be ascertained. Supposing that a lump sum is to be paid, and that the charterer is to be liable to it, subject to the question whether the delivery of the whole cargo is a condition precedent, I cannot see how the defendant would be liable to pay half the lump sum, in the event of half the cargo being delivered. Therefore Mr. Williams must argue that by the non-delivery of a single article the whole amount is lost. The words relied on are that "the ship shall take on board a full and complete cargo, and shall proceed therewith to London, and discharge it." This is the duty, but there is a qualification to this duty, "the act of God, restraints of princes and rulers, the Queen's enemies, &c." Then it is said, "This is only a qualification in diminution of the shipowner's liability, but afterwards comes this, "a lump sum freight of 5,000*l.* to be paid after entire discharge and right delivery of the cargo, in cash two months after the date of the ship's report inwards at the Custom House," and so forth. Now Mr. Williams says that until the ship is discharged, and there is a right delivery of the cargo, the lump sum is not due. It may possibly be that verbally he is right. If so, what is the meaning of "the cargo?" In my opinion it is the cargo which she has to deliver, it does not mean the cargo which she has shipped, but which she is not bound to deliver—which she is excused from delivering. Suppose that 5*l.* worth of these goods had been stolen by the sailors, this would not be within the exceptions; but could it possibly have been said that the whole lump sum was lost, would not the common rule have applied, and the defendants be left to their remedy by cross action? If this be so, would it not be very odd that the shipowner should be worse off because he is not subject to an action for the loss which has occurred, because it has been caused by fire instead of the depredations of the crew?

I venture to think that some interpretation must be put upon the contract to prevent the delivery from being considered as a condition precedent. Then Mr. Williams asked what would happen if nothing were delivered. I say if that were so, the date from which the payment was due would never have arrived, because the words are, a lump sum to be paid in cash after the entire discharge and right delivery of the cargo, two months after the date of the ship's report inwards at the Custom House, and since it must be after the right delivery of the cargo, if none were delivered, I suppose the event would never happen for which the lump sum is to be paid. It may be said that it is very strange that if the ship brought in safety one hundredth part of the cargo home, the entire 5,000*l.* should be paid, whereas if that hundredth part was lost, the shipowner would lose his 5,000*l.* This is a difficulty, but not a technical difficulty. I believe that the case of *The Norway* (1), as my Lord has said, is absolutely undistinguishable from this. There is the same obligation to load a full and complete cargo, the same obligation to deliver, and the same statement that it is only payable on delivery of the remainder at the port of discharge. It is true that there the words used were that it was for the use and hire of the ship. But no reliance was placed upon them in the

judgment of the Court, and I think they are of no consequence. On the authority of this case and that of *Robinson* v. *Knights* (2) I think the plaintiffs are entitled to judgment.

KEATING, J.—I am of the same opinion. I agree with the Lord Chief Justice that Mr. Williams's construction of the clause, as to the disbursements, is the right one. But assuming this to be so, I cannot see how it meets the difficulty unless the security of the freight is to be substituted for the liability of the charterer, not that it is to be merely a collateral security. I cannot agree in such a construction. But putting aside this suggestion, what is the meaning of the charter-party? The charterer agrees to pay a lump sum for the use of the ship for that particular voyage, but the shipowner wishes to be secure, and inasmuch as he has a cargo of goods, it is reasonable he should have the security of them, and various provisions are made to prevent any interference with this security. Mr. Williams is reluctantly driven to contend that the shipowner, unless he brings every ounce of the cargo home, is to be paid nothing. He suggests a mode of meeting this difficulty by saying that although he could not recover upon the contract, yet that possibly, if the consignees accepted the goods, he might recover from them under a *quantum meruit* for services performed. I suppose the answer to that would be that there is a special contract on the bills of lading, but at all events it could scarcely get rid of the difficulty that the contract would be ended and with it the security, without any fault on the part of the shipowner being suggested. I think this would be a very singular construction to put upon the contract; and, therefore, that the judgment of the Court below should be affirmed. With reference to the authorities, I agree with what has been said by my Lord and my brother Bramwell respecting them.

CLEASBY, B.—I am of the same opinion. Undoubtedly the shipowner relies chiefly upon his lien on the cargo for payment. But I never heard it suggested that because he relies on his lien that therefore the charterer is not liable. In the present case, to give the shipowner full security for the 5,000*l.*, various provisions are inserted in the charter-party. There is to be an advance of 750*l.*, and a bill is to be given in respect of it. Suppose this bill to be actually given, and the bill of lading freight to amount only to 4,500*l.*, the master would be in the position of lending 750*l.* to the charterer without any security. In order to guard against this there are various provisions. First, it is provided that the bill which is to be drawn is not to be for the full amount of the advances, unless the bill of lading freight amounts to 5,000*l.* Supposing that the bill of lading freight amounts to 4,500*l.*, you deduct the 500*l.* from the 750*l.*, and the bill will be only for 250*l.* You provide for the balance in that way; but then the balance may be the other way, and I confess I do not feel the difficulty which my brother Bramwell does in applying these words, "and the balance, if any." That means the other balance, if any; because if the balance is that way, it has been already provided for by the bill to be drawn, and the meaning of "and the balance, if any, is to be paid in cash," is to me plain. There is the 5,000*l.* provided for substantially by the goods. With respect to the other point, my brother Brett, in *Robinson* v. *Knights* (2), observes very pertinently, "It was argued that the freight was to be paid only on the delivery of the cargo at the port of discharge, but the question is, what cargo?" The words of the charter-party are not upon the delivery of the entire cargo, though the word "entire" is made use of. It is the entire and complete delivery of the cargo. For the reasons already given, and looking at the authorities, I am satisfied that the judgment should be affirmed.

GROVE, J.—I am of the same opinion. I cannot see that Mr. Williams's argument stopped short of the proposition, for which he cited some cases, that if the entire cargo as laden was not delivered, the clause would so operate that nothing in fact would be earned. It is true that he said that proceedings

might be taken upon a *quantum meruit*, but I do not find anything in the charter-party which is consistent with this proposition. Then the clause does not necessarily bear the meaning put upon it by Mr. Williams. To have this meaning it must not only be altered to "after discharge and delivery of the entire cargo, but to the entire cargo as laden." Why should the Court put a forced construction on these words, which do not necessarily compel the entire delivery of the cargo, instead of the view that the parties hired the ship for 5,000*l.*? And why should they put the person so bargaining in a worse position than he would be in under an ordinary contract? With regard to the other clauses they have been commented on by the Court and I will only say that I find really nothing to support Mr. Williams's arguments.

DENMAN, J., and POLLOCK, J., concurred.

The question as to the liability to interest was adjourned, and on the 29th of November, 1873—

COLERIDGE, C.J., said—We have considered the point, and we cannot see that the money was payable on a day certain. We think therefore that the plaintiffs are not entitled to interest.

Judgment in part affirmed and in part reversed.

Attorneys—E. Saxton, for plaintiffs; Thomas & Hollams, for defendant.

1873. Nov. 12. { HESKETH (*appellant*) *v.* THE LOCAL BOARD OF ATHERTON (*respondents*).

Public Health Acts (11 & 12 *Vict. c.* 63. *s.* 69; 15 & 16 *Vict. c.* 42. *s.* 13; 21 & 22 *Vict. c.* 98. *s.* 63)—*Order for Owners of Houses to Sewer, Pave, &c., Street—Apportionment, how far conclusive.*

By the Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 69, *and the Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 63, 64, *the expenses incurred by local boards in paving, &c. . . . streets (not being highways), under the powers of the former Act, are to be charged upon the owners of premises abutting upon the street, in such proportion as shall be settled by the surveyor, &c., and where such expenses have been so settled as payable by such owners, "such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board or their surveyor, of the amount of the proportion so settled by the surveyor to be due from such owner, he shall by written notice dispute the same."*

The Local Board of A. gave notice to the owners of the houses forming a street, requesting them to sewer, pave, &c., the street, and upon their default executed the work, the cost of which was settled by the surveyor, according to the frontage. The appellant, one of the owners, did not give notice within three months under 21 & 22 *Vict. c.* 98. *s.* 63, *that he disputed the apportionment, but when summoned before the justices to pay his proportion, contended that he was not liable, on the ground that the street was a highway repairable by the inhabitants at large.*

The justices having held that the appellant was not entitled to raise before them the question, whether the street was a highway or not:—Held, *that the decision was wrong, as the certificate of the surveyor was conclusive as to the apportionment, but not as to the original liability of the person charged.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 37.]

1873. Nov. 14. { HAMILTON (*appellant*) *v.* THE VESTRY OF ST. GEORGE, HANOVER SQUARE (*respondents*).

Metropolis Local Management—17 & 18 *Vict. c.* 120. *ss.* 96, 102—*Footway—Cellar—Liability to Repair.*

In front of the house of the appellant, situate in a London square, was an area and cellar. The cellar was formed of brick walls, one forming the outer wall of the area, and another running parallel to such outer wall. The covering to the cellar was formed of large flagstones, the ends of which rested on the walls. From the year 1830, *when the houses were built and the flagstones were laid down, the flagstones were used by the public as a footway, and became by reason of the traffic worn down, cracked and dangerous. The vestry called upon the appellant to repair the cellar and its covering. He refused to do so, whereupon the vestry did the work, and proceeded against him to recover the expenses:*—Held, *that the vestry were bound to keep the flagstones in repair, and could not recover from the appellant any part of the expense of doing so.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 41.]

(*In the Second Division of the Court.*)

1873. Nov. 24. } PURKIS *v.* FLOWER.*

Costs—Admiralty Jurisdiction—County Court—31 & 32 *Vict. c.* 71. *s.* 9; 32 & 33 *Vict. c.* 51. *s.* 4.

A County Court, to which Admiralty jurisdiction is given by 31 & 32 *Vict. c.* 71, *has Admiralty jurisdiction over a claim not exceeding* 300*l.* *for damages for negligence causing a collision between a barge of the defendant and a ship of the plaintiff in a river within the body of a county forming part of its district. Therefore, where an action was brought in respect of such a claim for a collision in the Thames, in which, after judgment in default of a plea, the damages were assessed on a writ of inquiry at* 15*l.*, *and no certificate was given that the cause was a proper one to be brought in the Superior Court, it was held the plaintiff was not entitled to the costs of the action under* 31 & 32 *Vict. c.* 71. *s.* 9.

Rule, calling on the plaintiff to shew cause why the master's taxation should not be reviewed, and the plaintiff's costs be disallowed, on the ground that the action was improperly brought in the Superior Court.

The action was brought for damage caused by the negligent navigation and direction by the defendant or his servants of a barge in the river Thames, whereby the barge ran foul of and struck against a boat and ship of the plaintiff, and destroyed and injured it; and the plaintiff claimed 100*l.* Judgment was signed in default of a plea, and upon a writ of enquiry, the damages were assessed at 15*l.* The sheriff did not certify that it was a proper Admiralty cause to be tried in a superior Court.

Phillimore shewed cause.—The plaintiff is entitled to the costs of the cause notwithstanding that he has not recovered a sum exceeding 300*l.*, because he could not have taken the proceedings in a County Court. The 31 & 32 Vict. c. 71. s. 9, only takes away the right to costs in such a case where the proceedings might without agreement have been taken in the County Court, and the Judge before whom the cause is tried or heard does not certify that it was a proper cause to be tried in the Court. The collision having taken place within the body of a county the High Court of Admiralty would have had no jurisdiction apart from statute. And a County Court appointed under the 31 & 32 Vict. c. 71. s. 2 has only such jurisdiction as the High Court of Admiralty would have had within its district. By section 3 any County Court having Admiralty jurisdiction shall have jurisdiction as to any claims for damage by collision when not more than 300*l.* is claimed. The 32 & 33 Vict. c. 51. s. 4, merely extends and applies the 3rd section of 31 & 32 Vict. c. 71, to all claims for damage to ships, whether by collision or otherwise, when the amount claimed

* Coram Lush, J.; and Archibald, J.

does not exceed 300*l*. The 3 & 4 Vict. c. 65. s. 6 gives jurisdiction to the Admiralty Court only to decide on claims in the nature of salvage for services rendered to, or damage received by any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received in respect of which such claim is made. Then by 24 Vict. c. 10. s. 7, jurisdiction is given to the High Court of Admiralty over any claim for damage done by any ship. The damage received by a ship to be within 3 & 4 Vict. c. 65. s. 6, must have been received from a ship, as process *in rem* was the only mode practically adopted of recovering compensation. *Everard* v. *Kendal* (1) is an authority that the County Court has no jurisdiction in a claim in respect of damage received by a dumb barge from a dumb barge in a collision between them, on the ground that the High Court of Admiralty had no jurisdiction in such a case. In *The Dowse* (2) it was decided that the Admiralty Court having no jurisdiction over a claim for necessaries supplied to a ship before the 3 & 4 Vict. c. 65, the jurisdiction given by that Act was limited by the controlling clauses of the 5th section, that they must have been supplied elsewhere than in the port to which the ship belonged, and that no owner or part owner of the ship so supplied was domiciled in England or Wales, and that the jurisdiction given to the County Court by 31 & 32 Vict. c. 71. s. 3, was limited to cases in which the Admiralty Court had jurisdiction. The case of *The Industry* (3) does not mean to extend the jurisdiction of the Admiralty Court to damages done to a ship otherwise than by collision by anything other than a ship, but is a decision that, under the circumstances of that case, the damage was caused by the acts of the crew of the defendant ship. In *Simpson* v. *Blues* (4), the 32 & 33 Vict. c. 51. s. 2, was so construed as to limit the claims arising out of an agreement made in relation to the use and hire of a ship to claims in respect of which the Court of Admiralty had jurisdiction before that Act. And in the *Cargo ex Argos, The Hewsons* (5), the Admiralty Court followed *Simpson* v. *Blues* (4), though but for that case the Court said that it should have formed a different opinion. In these cases an appeal was allowed to the Privy Council, who came to a conclusion different from the Common Pleas in *Simpson* v. *Blues* (4), holding that the County Courts had jurisdiction in a suit for a breach of a charter-party not involving damage to cargo, and in a suit for payment of freight and demurrage. That decision, however, turned on the language of the 2nd section of the 32 & 33 Vict. c. 51, which is a different section from the one now before the Court.

R. E. Webster, in support of the rule.—In *The Sarah* (6) the Admiralty Court held that it had original jurisdiction over torts committed on the high seas, and therefore over a collision on the high seas, where the vessel doing the damage was a keel or vessel without masts usually propelled by a pole. Then the words of the 4th section of 32 & 33 Vict. c. 51, "all claims for damage to ships, whether by collision or otherwise," cover this case; but secondly, the County Court jurisdiction is wider even than the original jurisdiction of the Admiralty Court. The title of the 32 & 33 Vict. c. 51 says that Act is to give jurisdiction in certain maritime causes. The Privy Council in *Gaudet* v. *Brown* (7) fully considered *Simpson* v. *Blues* (4), and declined to follow it, without attempting to distinguish it.

Phillimore, in reply.—As to the case of *The Sarah* (6), it is not contended that if this case had occurred on the high seas

(1) 39 Law J. Rep. (N.S.) C.P. 234; s. c. Law Rep. 5 C.P. 428.

(2) 39 Law J. Rep. (N.S.) Adm. 46; s. c. Law Rep. 3 Adm. 135.

(3) 40 Law J. Rep. (N.S.) Adm. 26; s. c. Law Rep. 3 Adm. 303.

(4) 41 Law J. Rep. (N.S.) C.P. 121; s. c. Law Rep. 7 C.P. 292.

(5) 41 Law J. Rep. (N.S.) Adm. 89.

(6) 1 Lush. Adm. 549.

(7) 42 Law J. Rep. (N.S.) Adm. 1.

the Admiralty Court would not have had jurisdiction.

[LUSH, J.—The plain object of the Admiralty Court Acts was to give jurisdiction over acts done within the body of a county wherever there was jurisdiction if done on the high seas.]

LUSH, J.—It is unnecessary for us to give an opinion on the points raised as to the construction of the County Court Acts, as we are clearly of opinion, on the authority of *The Sarah* (6), that the Admiralty Court would have jurisdiction under the 3 & 4 Vict. c. 65. s. 6.

ARCHIBALD, J.—I am of the same opinion. As soon as it appeared from the case of *The Sarah* (6) that the Admiralty Court has jurisdiction in such a case as this if it occurred on the high seas, the case was clear, and it became unnecessary to decide between *Gaudet* v. *Brown* (7) and *Simpson* v. *Blues* (4).

Rule absolute.

Attorneys—Stokes & Co., for plaintiffs; J. A. Farnfield, for defendant.

1873. Nov. 10. } THE QUEEN *v.* PERCY AND OTHERS, JUSTICES OF CUMBERLAND.

Justice of the Peace—Rule to Proceed —11 & 12 Vict. c. 44. s. 5—Mandamus.

Where justices refused to proceed with an information against a person under The Licensing Act, 1872, 35 & 36 *Vict. c.* 94, *s.* 11, *for having an untrue statement on his premises as to his license to sell liquor,*—Held, *that the Court could not grant a rule under* 11 & 12 *Vict. c.* 44, *s.* 5, *calling upon the justices to proceed with the case, but that the remedy was by mandamus.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 45.]

1873. Nov. 25. } BOLTON *v.* MADDAN.

Contract—Consideration—Exchange of Votes for Charitable Institution.

The plaintiff and defendant were both subscribers to a charitable society, and were entitled to votes in proportion to the amount of their subscriptions. They agreed together that if the plaintiff would give the defendant twenty-eight votes, defendant would at the next election return twenty-eight votes to the plaintiff for such child as the plaintiff should then favour. The plaintiff performed his part of the bargain, but the defendant made default. The plaintiff in consequence subscribed 7l. 7s. to purchase twenty-eight votes at the next election in lieu of those which the defendant failed to deliver:—Held, *that he could recover the amount subscribed from the defendant.*

This action was brought in the Lord Mayor's Court.

It appeared from the Judge's notes that the plaintiff gave evidence as follows:

"I subscribe to an Orphan Working School. Each subscriber of one guinea has two votes, and can buy four votes for one guinea for that one election. In July last, defendant was interested in a candidate, and I lent him twenty-four votes and four votes, on condition that they should be returned to me at the January election. He did not return them, and in consequence I found my candidate in peril, and bought votes at the cost of seven guineas. I wrote to the defendant on the 20th of January but got no reply. I wrote again on the 30th of January and got an answer on the 31st. This was after the election. My candidate got in. I bought my votes of the secretary. The defendant gave me no authority to buy votes."

The learned Judge directed a nonsuit to be entered, and gave leave to the plaintiff to move to set the nonsuit aside and enter the verdict for himself. Liberty to amend the pleadings as might be necessary.

The jury assessed the damages at 7*l.* 7*s.*

A rule was obtained, accordingly, against which—

Templeton (on Nov. 20) shewed cause. —The nonsuit was right on the ground

that the contract discloses no legal obligation, but only an imperfect one. The promise of the defendant was made in expectation that he would be able to get votes from his friends, by means of which he could repay the plaintiff for those which he had given. It is against public policy that such a bargain should be made between the subscribers to a charity. These societies are formed on the understanding that the subscribers should vote for the most fitting candidate. The sale of votes is analogous to the sale of a public office.

[BLACKBURN, J.—I do not see how, practically, a subscriber can enquire into the respective merits of all the candidates; he can only know about some of them.]

When the defendant made the alleged bargain he could not tell whether at another election there might not be more deserving cases than that which the plaintiff might favour. Further, if the plaintiff, at the first election, gave his votes for the candidate whom he considered to be the best, he has incurred neither trouble nor prejudice. If that be so, there is no consideration for the promise by the defendant. He referred to *Addison on Contracts*, 6th ed. p. 5, and to *Blackford* v. *Turton* (1).

F. Turner, in support of the rule.—At the time the bargain was made, the plaintiff was requested to part with something which both he himself and the defendant considered to be of value. There is nothing against public policy in making such a bargain. There must always be a number of subscribers who have no particular liking for a particular candidate, and if two subscribers choose to make such a contract it is perfectly good. There is no obligation to vote for the most deserving candidate. *Haigh* v. *Brooks* (2) is a very similar case. It lies upon the defendant to shew that there is anything illegal or improper in such a contract; he is unable to do so. It must be assumed that all the candidates are fit and proper persons to be elected. As to the damages, the amount of 7*l.* 7*s.* is correct. The plaintiff simply asks to be put in the same position as if the defendant had performed his contract, and had supplied the plaintiff with twenty-eight votes. He referred to *Lampleigh* v. *Brathwaite* (3), *Bainbridge* v. *Firmstone* (4), *Shadwell* v. *Shadwell* (5), *Richardson* v. *Mellish* (6), *Sterry* v. *Clifton* (7), and *Edgar* v. *Blick* (8).

Cur. adv. vult.

The judgment of the Court (9) was now (Nov. 25) delivered by

BLACKBURN, J.—In this case, tried in the Lord Mayor's Court, the plaintiff was nonsuited, but the jury under the direction of the Common Serjeant assessed the damages at 7*l.* 7*s.*, and leave was given to the plaintiff to move to enter a verdict for that amount, the pleadings to be amended if necessary. From the notes it appears that there was no dispute as to the facts. The plaintiff and defendant were both subscribers to a charity, the objects of which are elected by the subscribers, who have votes proportional in number to the amount they have subscribed. The plaintiff and defendant expressly agreed that if the plaintiff would give twenty-eight votes for one object of the charity whom the defendant favoured, the defendant would, at the next election, give twenty-eight votes for such object of the charity as the plaintiff should then favour. The plaintiff performed his part of this agreement, and voted for the candidate favoured by the defendant, but the defendant made default, and did not furnish any votes for the candidate favoured by the plaintiff at the next election. The plaintiff, in consequence, subscribed 7*l.* 7*s.* to the charity so as to obtain twenty-eight more votes in his own right, which he used in lieu of those which the defendant had promised to supply him.

There can be no doubt that there was an express promise by the defendant and

(1) 8 Term Rep. 89.
(2) 10 Ad. & E. 309; s. c. 9 Law J. Rep. (N.S.) Q.B. 99; in error, 10 Ad. & E. 323; s. c. 9 Law J. Rep. (N.S.) Q.B. 194.
(3) 1 Smith's Leading Cases, 67.
(4) 8 Ad. & E. 743.
(5) 9 Com. B. Rep. N.S. 139; s. c. 30 Law J. Rep. (N.S.) C.P. 145.
(6) 9 J. B. Moore, 435.
(7) 9 Com. B. Rep. 111; s. c. 19 Law J. Rep. (N.S.) C.P. 237.
(8) 1 Stark. 464.
(9) Blackburn, J.; Mellor, J.; and Lush, J.

a breach of that promise, but the doubt raised was whether the consideration was such as to make that promise enforceable at law.

The general rule is that an executory agreement by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced if what the plaintiff has agreed to do is "either for the benefit of the defendant, or to the trouble or prejudice of the plaintiff," see *Com. Dig.*, Action in the case on assumpsit, B. 1. If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced. The argument for the defendant was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff if he gave his votes at the first election to what he thought the best candidate, incurred neither trouble nor prejudice, so that there was in that point of view no consideration, and if he gave his votes to the candidate whom he did not think the best, the whole agreement was void as against public policy.

But though some of us much disapprove of this kind of traffic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power.

We think, therefore, the nonsuit cannot be supported, and as there was evidence justifying the jury in assessing the damages as they have done, the rule must be made absolute to enter the verdict for the plaintiff.

Rule absolute.

Attorneys—Walter & Moojen, for plaintiff.

1873. Nov. 19. { THE METROPOLITAN BOARD OF WORKS (*appellants*) *v.* FLIGHT (*respondent*).

Metropolitan Board of Works—Repair of Dangerous Structure—Expenses to which Owner is liable—18 & 19 *Vict. c.* 122. *s.* 73—32 & 33 *Vict. c.* 82.

Where the Metropolitan Board of Works, acting under the compulsory powers of the Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *s.* 73, *and the Metropolitan Building Act,* 1869 (32 & 33 *Vict. c.* 82), *have taken proceedings before a magistrate for the purpose of compelling the owner of a dangerous structure to repair or secure it, they are entitled to recover the reasonable costs of serving the requisite notices on the defendant, but no costs in respect of the forms for such notices, or general office expenses relating to them.*

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 46.]

1873. Nov. 19. } SKINNER *v.* VISGER.

Turnpike Toll—Exemption—Locomotive Steam Plough—24 & 25 *Vict. c.* 70. *ss.* 1, 12; 3 *Geo.* 4. *c.* 126. *s.* 32.

A steam engine was being taken along a turnpike road for the purpose of working a plough, for hire, and was on its way to take up the plough which was to be used on a farm not occupied by the owner of the engine, and the gear for working the plough was being conveyed on the engine; it passed through a turnpike-gate more than three miles distant from where the plough was: —Held, *that such engine was liable to toll under* 24 & 25 *Vict. c.* 70. *s.* 1, *and was not exempt by reason of section* 12 *of that Act and* 3 *Geo.* 4. *c.* 126. *s.* 32, *inasmuch as it was not a horse or carriage conveying a plough, nor a plough itself.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 49.]

END OF MICHAELMAS TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

HILARY TERM, 37 VICTORIÆ.

1874. Jan. 17. } THE QUEEN *v.* THE OVERSEERS OF HASLINGFIELD.

Jury Lists—Passing of Jury Lists by Overseers—Expenses of Overseers—Fee of Justices' Clerk for Notice to Overseers—Juries Act, 1825, 6 *Geo.* 4. *c.* 50. *ss.* 8, 9, 10—*Poor Law Act*, 1844, 7 & 8 *Vict. c.* 101. *s.* 60—11 & 12 *Vict. c.* 43. *s.* 30—*Disallowance of Fee by Auditor—Search of Parliament Roll.*

By 6 *Geo.* 4. *c.* 50. *ss.* 8 *and* 9, *the churchwardens and overseers of every parish are to make out a true list of every man liable to serve on juries within their parishes, and to cause copies of the same to be fixed on church doors, &c., with notices of the time and place when objections to the list will be heard by the justices of the peace. By s.* 10 *the justices in every division are to hold a special session "on some day and at some place at which notice shall be given by their clerk . . . . to the churchwardens and overseers, who shall then and there produce the list of men liable to serve, by them prepared and made out, and shall answer on oath" all questions put to them by the justices concerning the same.*

By 7 & 8 *Vict. c.* 101. *s.* 60, "*the costs and expenses properly incurred by the officers of the parish in making out, preparing, printing and collecting* (*sic*) *the lists . . . . according to the provisions of* 6 *Geo.* 4. *c.* 50, *and relating thereto, shall be paid and allowed to them out of the poor rates of the parish.*"

By 11 & 12 *Vict. c.* 43. *ss.* 30, *the fees of justices' clerks are payable according to a table to be made out by justices at quarter sessions, and laid before a Secretary of State, who may certify that such fees are proper to be demanded and received by them:—*

Held, *that the payment of fees to justices' clerks "for notice to parish officers to return and verify jury lists, and for allowance of list and return thereof," were not expenses properly incurred within the meaning of* 7 & 8 *Vict. c.* 101. *s.* 60; *and a rule to quash the disallowance of the same in the overseers' accounts by the Poor Law Auditor was discharged.*

Semble, *that if the fees had been payable by the overseers, the amount ought to have been allowed to them out of the poor-rate.*

This was a rule to quash a certain item of disallowance of four shillings and sixpence, made by the Poor Law Auditor of the Cambridgeshire and Huntingdonshire Poor Law Audit District, in the accounts of R. Hall and W.

Coxall, overseers of the parish of Haslingfield, in the county of Cambridge, and within the said audit district.

The proceedings had been brought up by *certiorari*.

The following entry appeared in the overseers' book—

"I hereby certify that in the accounts of R. Hall and W. Coxall, overseers of Haslingfield, I have disallowed the sum of four shillings and sixpence, and that I find the said sum from them to be due. As witness my hand this 6th of December, 1872. Signed, E. B. Prest, Auditor, Cambs. and Hunts District, which comprises the said parish."

"Mem. Justices' clerks' fees for jury list, a payment for charging which on the poor rate the overseers have no statutory authority."

The fees had been charged by the justices' clerk, and paid by the overseers, under the supposed authority both of the enactments the material part of which is set out in the head note, and of the following printed document—

Cambridgeshire.

A TABLE OF FEES.

To be taken by the clerks to the justices of the peace, within the county of Cambridge, made by the justices in General Quarter Sessions assembled, on Thursday, the 29th day of June, 1854, and certified by her Majesty's principal Secretary of State, pursuant to the statute 11 & 12 Vict. c. 43.

Fees.	s.	d.	By whom payable.
Jurors. Notice to high constables and parish officers to return and verify jury lists, with notices to justices, each parish . . .	2	6	By Overseers.
For allowance of list, and return thereof, and oath, each parish	2	0	

By the Court,
ELIOT YORKE,
Chairman.

H. R. EVANS,
Clerk of the Peace.

I certify and declare that the fees set forth in the foregoing table are proper to be demanded and received by the clerks to the justices of the peace for the county of Cambridge.

PALMERSTON.

Whitehall, 4th August, 1854.

It appeared from the affidavit of Mr. Stanley Harris, secretary to the Justices' Clerks Society, comprising about 2,000 members, that unless the overseers were allowed the payment disallowed by the auditor, they would lose the amount, and "on the next occasion of passing the lists would be compelled to sustain a similar loss, or else neglect to pass such lists, and thereby render themselves liable to a statutory penalty" (1).

It was stated in the same affidavit that as differences of opinion existed between the poor law auditors and the justices' clerks as to the liability of the overseers to pay the fees in question, the Justices' Clerks Society were willing to have the question decided at the expense of the said society by a competent Court of law; and the case was in fact a specimen case.

It appeared from an affidavit of the auditor that the grounds of the disallowance were—First, that the overseers had no statutory authority for making the payment to the justices' clerk. Second, that the four shillings and sixpence did not consist of costs, charges and expenses properly incurred by the officers of the parish within the meaning of 7 & 8 Vict. c. 101. s. 60. Third, that the Table of Fees could not impose any liability to pay them; and Fourth, that the justices' clerk was not set in motion by the overseers, and was bound to perform the duty gratuitously.

Lumley Smith, for the defendants.—The justices have no power to make the overseers pay; it is the duty of the church-

(1) By 6 Geo. 4. c. 50. s. 45, any overseer neglecting or refusing "to assist in making out any list required by that Act, ... shall for such offence forfeit a sum not exceeding ten pounds nor less than forty shillings."

(2) 11 & 12 Vict. c. 43. s. 30.—"The fees to which any clerk of the peace, clerk of the special sessions, or clerk to any justice or justices out of sessions shall be entitled, shall be ascertained, appointed, and regulated in manner following, that is to say, the justices of the peace at their quarter sessions . . . . shall make tables of the fees which in their opinion should be paid . . . . which said tables shall be laid before her Majesty's principal Secretary of State; and it shall be lawful for such Secretary of State if he thinks fit to alter such table of fees, and to subscribe a certificate or declaration that such fees are proper to be demanded and received . . . ."

wardens and overseers to prepare the lists, and when that is done their duty is complete. The services for which these fees are charged are not included in those enumerated in 7 & 8 Vict. c. 101. s. 60.

[BLACKBURN, J.—How does the justices' clerk claim a fee?]

Under the 11 & 12 Vict. c. 43. s. 30 (2). A table of fees has been made out and approved under that section.

[BLACKBURN, J.—It would seem that the burden of proof is on the defendants, to shew that the Secretary of State is wrong.]

He has only power to revise the amount of the fees set out in the table; the section gives no power to create new fees.

[QUAIN, J.—The strongest point is, that the fee charged is not for "making out, preparing, printing and collecting" the lists. BLACKBURN, J.—But for the 7 & 8 Vict. c. 101. s. 60, the fees would have been payable by the overseers out of their own pockets, if payable at all.]

Field and *Sills*, for the prosecution.—These fees are—First, properly chargeable by the justices' clerk. Second, properly payable by the overseers; and Third, properly payable out of the poor rate. First. The clerk is the first person set in motion by the legislature under the Juries Act, 1825—see ss. 4, 8.

[BLACKBURN, J.—But why should the overseers pay for what is done under ss. 9, 10? Do you say that at common law, whenever new work is thrown upon a justices' clerk, he is thereby entitled to a reasonable fee for doing it?]

Yes. The general principle is that work is not to be done for nothing. Before 11 & 12 Vict. c. 43 fees were given by 26 Geo. 2. c. 14. s. 1 (3), "such fees as the justices in quarter sessions should think proper."

[BLACKBURN, J.—It is clear that unless the fee be set down in the table, the clerk has no title; but is it equally clear that there was a right to set them down in the table?]

(3) This Act is still unrepealed, but would seem to be impliedly repealed by Jervis' Act, so far as the revising authority is concerned, which was given by it to the judges of assize. See also 57 Geo. 3. c. 91, which is to the same effect, and is also unrepealed.

In *Veley* v. *Pertwee* (4) it is sa Cockburn, C.J., "according to co right a man who is bound to perfor duties of an office and is liable t expenses incidental to that office, i bound to pay out of his own pocke fees of officers for the performance of not connected with that office." Sec "Whoever wants the thing in re of which the fee is made payable pay the fee," said Coleridge, J., i *Queen* v. *Coles* (5), and the principl approved by Erle, J., in *Wray* v. *man* (6). He then cited *The Que Stewart* (7).

[BLACKBURN, J.—It sounds like a ciple, and a just one, that wh wants a thing done must pay for it. how did the overseers want these t done?]

By section 9 the overseers are to notice upon the church doors, they not do that without a previous from the justices' clerk. The "collecting" in section 60 of 7 & 8 c. 101, is probably written inste "correcting," by a clerical error.

[The Court was of opinion that was probably so, and directed the p mentary roll to be searched, having been brought into Court inspected by the master, the word discovered to be "collecting" as prin

The overseers may be considered light of public prosecutors, charged the duty of getting the lists passe judicial proceedings. The judgme the justices as to the correctnes the lists has to be procured by means.

[QUAIN, J., referred to the words i precept in the schedule to the Juries 1825, "You are also required to a and answer."]

The overseers must pay the fe ensure the passing of the lists.

(4) 39 Law J. Rep. (N.S.) Q.B. 195; s. c. Rep. 5 Q.B. 573.

(5) 8 Q.B. Rep. 82; s. c. 15 Law J. Rep. M.C. 10.

(6) 14 Q.B. Rep. 758; s. c. 19 Law J. (N.S.) M.C. 155.

(7) 12 A. & E. 773.

[BLACKBURN, J.—They are not in the position of litigants, and it would seem that till the 7 & 8 Vict. c. 101. s. 60, the fees, if any, would be payable out of their own pockets.]

BLACKBURN, J.—There are three contentions on behalf of the auditor in this case—first, that the justices' clerk is not entitled to the amount disallowed. Second, that if he be entitled it is not the overseers who are to pay it; and third, that if the overseers are to pay it, they are not entitled to be repaid out of the poor rates. Upon the first point there arises an important question, which however it is not necessary to decide, viz. the question whether if fresh work be imposed on the justices' clerk he is not entitled to a reasonable fee for doing it. We give no opinion upon this point, for whether the fees were due to the clerk or not the overseers were not liable to pay them, inasmuch as the work for which the fees are charged was not done at their request.

By the precept in the schedule to the Juries Act, 1862 (25 & 26 Vict. c. 107), the overseers are required to make out the jury lists, and do the other things mentioned in that precept. When the precept is complied with the duty of the overseers is completed. From this point the justices' clerk has no doubt work to do, but he does it at the request of the justices, not by request of the overseers (8).

The third point raised was whether the fees, assuming them to be payable, must come out of the overseers' own pocket, or would be chargeable on the rates. I think that if it were once shewn that the fees were payable at all, there would be a very strong presumption that they were chargeable on the rates. But as we decide that the fees here are not within the wording of the 7 & 8 Vict. c. 101. s. 60, it is not necessary to decide this point.

(8) The precept concludes with the words, "and you are also further required to produce the said list at such petty sessions, and there to answer on oath such questions as shall be put to you by Her Majesty's justices of the peace there present touching the said list; and these several matters you are in nowise to omit, upon the peril that may ensue."

QUAIN, J.—I am of opinion that the justices' clerk is not entitled to the fees claimed. The overseers have done their duty when they have acted upon the notice sent to them; when the precept in the schedule to the Juries Act of 1825 (9), is looked to it will shew this. But the overseers are not interested in the duties of collecting. In no sense is the notice given, or the oath administered, at the request of the overseers; both these services are performed under the statute. It is not necessary to decide whether the imposition of new work authorises the taking of a new fee, the present case not being within the rule. I also think these services are not within section 60 of 7 & 8 Vict. c. 101. What "collecting" means I cannot say, probably "correcting" was intended, but the Parliamentary roll, which is conclusive, has the word "collecting." However that may be, the work was not done at the request of the overseers, and therefore was not payable out of the poor rate. Consequently the auditor was right in disallowing these fees, and this rule must be discharged.

Rule discharged.

Attorneys—Sharpe, Parkers & Pritchard, for prosecution; Stanley Harris Barnet, for defendants.

1874. Jan. 19. } *Re* DENTON AND OTHERS.

Arbitration — Common Law Procedure Act, 1854 (17 *&* 18 *Vict. c.* 125), *s.* 15—*Enlarging Time for making Award—Submission prescribing Time within which Award is to be made.*

An agreement of reference provided that the arbitrator should make his award on or before a day specified, or on or before any other day "not exceeding three months from the date of the agreement, to which the arbitrator should, by endorsement on the agreement, from time to time enlarge the time for

(9) This does not materially differ from that in the Act of 1862.

making the award." On a day exceeding three months from the date of the agreement, a Judge's order was obtained enlarging the time for making the award two months: —Held, *that upon the true construction of the Common Law Procedure Act,* 1854, *s.* 15, *the Judge had power to enlarge the time, notwithstanding the limit fixed by the parties.*

By agreement dated the 22nd of March, 1872, certain matters in difference were referred to an arbitrator. The agreement further provided that the arbitrator should make his award on or before some day in April, or on or before any other day (*not exceding three months from the date of the agreement*) to which the arbitrator should, by endorsement on the agreement, from time to time, enlarge the time for making his award.

On the 26th of November, 1873, no award having been then made, a Judge's order was obtained by one of the parties enlarging the time for making the award for two months under the Common Law Procedure Act, 1854, s. 15 (1).

Gully now moved for a rule *nisi* to rescind the Judge's order.—There would be no objection to this order if the submission had prescribed no time w which the award was to be made. there is no authority to shew th power of a Judge to extend the tim be exercised where the document f limit. The Court will not disregar intention of the parties, which they expressed as clearly as possible.

PER CURIAM (2).—There will b rule. The section applies to docu authorising a reference to arbitration out any exception as to document scribing a limit within which the a is to be made.

Rule refu

Attorneys—Chester, Urquhart & Co., age Norris & Sons, Liverpool, for applican

1874. Jan. 19. } THE QUEEN *v.* CASTLE

Indictment — Removal by Certio Costs of Prosecution—Prosecutor "Party grieved"—5 & 6 W. & M. s. 3—16 & 17 *Vict. c.* 30. *s.* 5.

By 16 & 17 *Vict. c.* 30. *s.* 5, *after r that it is expedient to make furthe vision for preventing the vexatious re of indictments into the Court of Q Bench, "whenever any writ of certio remove an indictment into the said shall be awarded at the instance of a d ant or defendants, the recognisance law required to be entered into before lowance of such writ shall contain the provision following, that is to say, th defendant or defendants, in case he c shall be convicted, shall pay to the cutor his costs incurred subsequent removal of such indictment," &c.:— that the prosecutor is entitled to his c the case of an indictment removed tiorari under this section, though he "the party grieved or injured" to costs are limited by the previous Act, W. & M. c.* 11. *s.* 3.

In this case an indictment for t struction of a highway had been re

(1) By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 15, "The arbitrator acting under any such document (*i.e.* any document authorising a reference to arbitration) or compulsory order of reference as aforesaid, or under any award referring the order back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award, and it shall be lawful for the Superior Court of which such submission document or order is or may be made a rule or order, or for any Judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or extended time to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree."

(2) Blackburn, J.; Quain, J.; and Archi

into this Court by *certiorari*. The defendant having been convicted, a side-bar rule was obtained to tax the prosecutor's costs under 16 & 17 Vict. c. 30. s. 5 (1).

Edward Clarke now moved for a rule *nisi* to rescind the side-bar rule upon affidavits shewing that the prosecutor was not a person aggrieved by the obstruction of the highway.—It is true that the Act 16 & 17 Vict. c. 30. s. 5, requires in the case of a *certiorari* to remove an indictment that a provision shall be inserted in the recognisances binding the defendant, in the event of his conviction, to pay costs. But this section must be read in conjunction with the previous Act, 5 & 6 W. & M. c. 11. s. 3, where the defendant prosecuting a *certiorari* is made liable upon conviction to pay costs, but only if the prosecutor be *the party grieved or injured*. This limitation is not expressly repealed by the later Act, which was not intended to create a fresh liability to costs.

[BLACKBURN, J.—The later Act is quite general in its terms.]

It is contended that it was only intended to secure the payment of costs to which the defendant was already liable.

PER CURIAM (2).—There will be no rule. The Act 16 & 17 Vict. c. 30. s. 5, applies generally to indictments removed into this Court by *certiorari*.

Rule refused.

Attorneys—T. A. Curtis, Guildford, for prosecutor; Ford & Lloyd, for defendant.

1874. Jan. 28. } SEARLE *v.* LAVERICK.

Negligence—Bailee for Hire—Livery Stable-keeper—Warranty of Security of Building.

The defendant was a livery stable-keeper, and had contracted with a builder to erect on part of his yard a building, of which the lower part was to be a shed intended for the reception of carriages, and the upper part to be used for other purposes. Two carriages and horses of the plaintiff were placed under the shed when the lower part of the building had been completed, but whilst the contractor's workmen were still on the upper floor. The building was blown down by a high wind, and the carriages were injured. It was not disputed that the builder was one whom a careful and prudent person might trust, and that the defendant had no notice of any negligence on the contractor's part; but it was proposed to prove that, owing to the neglect of the contractor and his workmen, the building was, in fact, unskilfully built and

(1) By 5 & 6 W. & M. c. 11. s. 2, no indictment is to be removed at the instance of a defendant into the Court of Queen's Bench, unless the defendant enter into recognisances with two sureties to cause the issue to be tried at his own costs.

By section 3, "if the defendant prosecuting such writ of *certiorari* be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tytheman, churchwarden, or overseer of the poor or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said Court, and the prosecutor, for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said Court for such his contempt; and the said recognisance shall not be discharged till the costs so taxed shall be paid."

By 16 & 17 Vict. c. 30. s. 5, after reciting that it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench, "whenever any writ of *certiorari* to remove an indictment into the said Court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment; and whenever any such writ of *certiorari* shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognisance (to be acknowledged in like manner as is now required in cases of writs of *certiorari*, awarded at the instance of a defendant) with the condition following, that is to say, that the said prosecutor shall pay to the defendant or defendants in case he or they shall be acquitted, his or their costs incurred subsequent to such removal."

(2) Blackburn, J.; Quain, J.; and Archibald, J.

unsafe. The Judge, at the trial, ruled that the defendant's liability was that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the plaintiff's carriages; and that if, in causing the shed to be built, he did all that a careful man would do, he would be exempt from liability for an event which was caused by the careless or improper conduct of the builder, of which the defendant had no notice:—Held, *that the direction was right, for it could not reasonably be inferred that the defendant had warranted that the shed was fit for the purpose to which it was applied, inasmuch as this would charge him with a trust beyond what the nature of the thing put it in his power to perform, and although it was reasonable to require him to use due care to ascertain whether the building was secure, and by himself and his servants to take due care to maintain it in a proper state, it would be unreasonable to go further.*

Rule *nisi* for a new trial on the ground of misdirection.

Holker and *Shield* shewed cause on Nov. 21.

Charles Russell and *Lewers* supported the rule.

[The facts and arguments are fully stated in the judgment.]

Cur. adv. vult.

BLACKBURN, J. (on Jan. 28, 1874), delivered the judgment of the Court (1).—

This was a rule obtained to set aside a nonsuit, and have a new trial, against which cause was shewn in the last term before my brothers Mellor, Lush and myself. The trial took place at Durham before my brother Pollock.

The action was brought to recover damages for an injury to the plaintiff's carriages, occasioned by the fall of a building below which they were placed, and the question in the cause was whether the defendant was responsible for the injury so occasioned.

It appears from the learned Judge's notes that the defendant was a livery stable-keeper, and that he had contracted with a builder, not a servant of the defendant, but an indepe contractor, to erect on part of hi a building, of which the lower was to be a shed, intended for t ception of carriages, and the uppe to be used for other purposes. The tiff brought his horses and two car to the defendant about the end o tember, at which time the buildin not completed so far as to permi carriages to be placed under it. (the plaintiff's carriages was housed the other stood at first in the open The plaintiff, finding this to be th complained at some time in Octobe was told in substance, that as soon shed was complete the carriage sho put under cover, and that till th charge would be made for it. The s carriage was placed under the shed last week in October, and from tha a charge was made for both car until the misfortune happened, w will now mention.

In November, at a time when the part of the building had been com but whilst the contractor's workme still in the upper part of it, the bu was blown down by a high wind, a carriages were injured.

It was not disputed that the b was one whom a careful and pruder son might trust, and that the defe had no notice of any negligence on th tractor's part, but the plaintiff's c offered to prove that, owing to th lect of the contractor and his wor the building was, in fact, unskilfull and unsafe, and that this was the of the fall. The learned Judge th stated in his note, ruled "that defen liability is that of an ordinary bai hire, and that all he was bound to d to use ordinary care in the keeping plaintiff's carriages; and that if, in ing the shed to be built, he did all t did, by employing a builder, and wise, with such care as an ordinary ful man would use therein, he wo protected and would be exempt liability for an event which was by the careless or improper cond the builder, of which the defendar no notice." On this, the plaintiff's c declined to give evidence as to th

(1) Blackburn, J.; Mellor, J.; Lush, J.

having been improperly built by the builder, the defendant having no knowledge thereof, and the plaintiff was thereupon nonsuited.

The plaintiff's counsel having raised his point, did right in submitting at Nisi Prius to the ruling of the Judge, and is not precluded thereby from questioning it afterwards, and if proof that the building was unskilfully erected by the builder or his workmen, though the defendant had no knowledge of it, would have established the defendant's liability, the plaintiff is entitled to a new trial, that he may have an opportunity of bringing forward the evidence which, in submission to the Judge's ruling, he abstained from giving at the former trial.

The question, therefore, which we have to determine, is, what was the extent of the obligation of the defendant as to the security of the shed in which he lodged the plaintiff's carriages? We think it is beyond question that he did come under some obligation, but it is a different and a difficult question what the precise obligation was.

We think, in the first place, that it is not in this case material that the building was not finished at the time when the bargain was made. No doubt it may be, under some circumstances, imprudent to lodge a carriage in an unfinished building, as it may thereby be exposed to risk, from the fact that work is going on round it; and if, in the present case, the damage had arisen from the workmen in the course of their work letting fall bricks and mortar on the carriages, or from any similar cause, it would have been a question whether the defendant had not neglected his duty in placing the carriages where they were exposed to that risk. But no such question arises here. What the plaintiff offered to prove was that due care had not been used by the builder (who was employed, not as a servant of the defendant but as an independent contractor), to make the building reasonably safe.

Neither does it, in our opinion, make any difference that the building in which the defendant lodged the carriages had been erected for him on his own ground. It seems to us that the extent of the defendant's obligation to the plaintiff is that of an ordinary livery stable-keeper, who undertakes for reward to receive a carriage, and lodge it in a coach-house which he provides. The customer, in the great majority of cases, does not know or care how the livery stable-keeper obtains the coach-house, though he must know that he is generally a tenant for years, and the obligation of the livery stable-keeper implied by law must, as it seems to us, be the same in each case.

This kind of bailment is included in what, in the celebrated case of *Coggs* v. *Bernard* (2), Lord Holt classes as the fifth sort, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee. As to which, says Lord Holt, "those cases are of two sorts, either a delivery to one that exercises a public employment or a delivery to a private person. First, if it be a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events." The language of Lord Holt is general, and applies this to all that exercise a public employment and in the Prætor's Edict, "Nautæ caupones et stabularii," which is generally considered the origin of this head of the law, stablemen are expressly named, but we take it to be established law that by the custom of England this extreme liability making the bailee an insurer is confined to carriers and innkepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says, "The second sort are bailees, factors and such like." As to this sort, he says, the bailee is only bound to take reasonable care. And, "The true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it." But it is allowed in the other cases, *i.e.* the carrier and innkeeper, "by reason of the necessity of the thing." The obligation to take reasonable care of the thing entrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing therein deposited may be reason-

(2) 2 Lord Raymond 909; s. c. 1 Smith's Leading Cases, 171.

ably safe in it. If the obligation of a livery stable-keeper goes no further than this, the defendant in the present case has fulfilled it, and the nonsuit was right. But the argument of the plaintiff's counsel was that the two cases of *Readhead* v. *The Midland Railway Company* (3) and *Francis* v. *Cockrell* (4), both decided in the Exchequer Chamber, establish that the carrier of passengers, who, for reward, furnishes a carriage, and a person who lets sittings in a temporary stand built for the reception of spectators at a race, are under an obligation as to the sufficiency of the carriage, and the stand which they supply, much more extensive than this. The point decided in *Readhead* v. *The Midland Railway Company* (3) was that the obligation did not extend so far as to make the carrier responsible for a latent defect, which neither he nor those who made the carriage could by proper care have prevented or detected. In *Francis* v. *Cockrell* (4), which was the case of a temporary stand erected by independent contractors for the defendant, and then let out by him in separate sittings to, among others, the plaintiff, the case is treated as strictly analogous to the case of the carrier of passengers, who having got a carriage in the way he finds most convenient for himself, uses it for the carriage of the passenger, and in the judgment in this Court carefully prepared and delivered in writing by my brother Hannen, the question is thus stated: "It becomes necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care should be used not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand. It is said in the judgment in *Readhead* v. *The Midland Railway Company* (3), 'Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.' Applying this rule to the present case we think that the contract by the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work as well as by himself."

This decision was affirmed in the Exchequer Chamber. The judgments there were not written, and in some of them, as reported, expressions are used much more favourable to the extension of the doctrine of an implied warranty, than the language used in the written judgment of the same Court in *Readhead* v. *The Midland Railway Company* (3), but the two decisions are not in conflict and both are binding on us. We think that where the matter is not already decided by authority the principle by which the Court is to be guided in determining what is the obligation implied by law is that given by Lord Holt in *Coggs* v. *Bernard* (2), that it would be unreasonable to charge the bailee with a trust further than the nature of the thing puts it in his power to perform it, which is, we think, the same principle as is expressed in the passage from the judgment in *Readhead* v. *The Midland Railway Company* (3), above cited, by Hannen, J., in *Francis* v. *Cockrell* (4). And we may observe that in *Pothier, du Contrat de Louage*, Partie 2, Chap. 1, No. 118, 119, 120, we find a similar principle laid down, though not in the same language, as being that of the old French law. That very learned author lays it down that where the person who lets a thing on hire knows of a defect in the thing which he lets, making it unfit for the purpose for which it is let, he is responsible in damages for it. And though he does not actually know it, that if the circumstances are such that he ought to have had a suspicion of it and made enquiry, and does not either enquire or inform the hirer so that he may enquire for himself, he is liable, which is so far equivalent to saying that he is bound to reasonable care and good faith, and further that if the letter follows a trade which makes it his duty to know

(3) [illegible] Law J. Rep. (N.S.) Q.B. [illegible]

(4) [illegible] Law J. Rep. (N.S.) Q.B. [illegible].

whether the thing has faults or not, he is liable without proof that he did know. He puts as an example the case of a cooper who supplies wine casks made of bad wood so that they leak. Pothier says, "The cooper shall not be permitted to set up as a defence that he did not know the bad quality of the wood, for his profession bound him to know the quality of the wood he used and to supply none but of good quality." "This seems to us to say in other words that from the nature of the employment a warranty of the quality of the wood should be implied." But says Pothier, "except in those cases, the letter, if he neither knows nor is bound to know the fault in the thing let, is not responsible in damages."

The difficulty in a case not already settled by decisions is to apply these principles, and to say whether the nature of the relation between the parties is such that a warranty to any, and if to any, to what extent, should be implied. On this point of the case the observations of Crompton, J., in *Bass* v. *Maitland* (5), are weighty.

The plaintiff's counsel on the argument relied mainly in this case on the decision in *Francis* v. *Cockrell* (4), and very properly, for we feel that unless there is a real difference between the relation of a person who takes a seat in a temporary stand to the person who furnishes the ticket admitting him to that stand, and the relation of the person who sends his carriage to stand in a coach-house, to the livery stable-keeper who supplies the coach-house, the contract to be implied in the two cases should be the same, and we feel also that it is not desirable to make nice distinctions. It is very difficult to draw the precise line between cases in which the warranty, or obligation—it matters not which it is called—should be implied, and those in which it should not. But, to borrow an illustration from my brother Bramwell, although it may not be easy or indeed possible to say where the line should be which divides day from night, it is quite clear that noon is on the one side of that line and midnight on the other; and it is enough for the decision of this case if we can see that the present case is not one in which this warranty or obligation should be implied by law. And there seem to us to be sufficient reasons for saying that it should not in this case be implied, though it was implied in the cases of the carrier of passengers supplying a carriage, and in the case considered analogous of the person furnishing a seat in a temporary stand.

In the first place, it is to be observed, that in most cases where a bailee takes care of goods he must lodge them, if dead goods, in a building, so as to shelter them from the weather; if live animals, either in a stable or in a fenced field, and it must have often happened that the goods were injured or lost in consequence of some defect in the building or fences. In *Broadwater* v. *Blot* (6) the action was against an agister for losing a horse. On an application for a nonsuit, Gibbs, C.J., said, "All the defendant is obliged to observe is reasonable care. He does not ensure, and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accident which he could not guard against, he would not be responsible. I admit that particular negligence must be proved by occasion of which the horse was lost, or gross general negligence to which the loss may be ascribed in ignorance of the special circumstances which occasioned it. If there were a want of due care and diligence generally the defendant will be liable. *The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist?* Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff who had entrusted the horse to him had a right to expect? I shall leave it to the jury." The above passage printed in italic was cited on the argument as shewing that in the opinion of that very learned and accurate Judge the agister would be liable if the fences were in an improper state, however caused. But it seems to us that when taken with the

(5) 6 E & B. 490 to 493; s. c. 26 Law J. Rep. (N.S.) Q.B. 56.

(6) Holt's N.P. 547.

context the fair conclusion is that the alleged improper state of the fences was such that the agister, if he took proper care, could not have been ignorant of it, and that it was only mentioned by Gibbs, C.J., as an instance of the absence of due care and diligence.

With this exception no case was cited in which it was even suggested that there was any warranty, however limited, as to the state of the place in which goods are deposited beyond what was expressed in the ruling of my brother Pollock at the trial of the case at Nisi Prius. And as far as our own research goes, there is no such case, nor can we find any suggestion to that effect in any of our text-writers. In the case of the carriage supplied by a carrier, either by land or by water, it had been long a debated question whether there was not an absolute warranty, as may be seen from the authorities collected in *Readhead* v. *The Midland Railway Company* (3). We are, therefore, as far as authority goes, at liberty to apply the principles before stated to this case, and see if any warranty or obligation should be implied.

There is, we think, a real difference between the case of one who supplies a carriage or a seat in a temporary stand which is in the nature of a chattel and one who supplies room for goods in a permanent building.

We think that we must take notice of the fact that in the general and more ordinary state of things a warehouseman or livery stable-keeper is tenant of the building in which he lodges the goods entrusted to him, and we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building should be fit for the purpose for which it is let—see *Hart* v. *Winsor* (7).

We think, therefore, that in such cases an implied warranty as to the state of the building would, to borrow Lord Holt's language already cited, be unreasonable, as charging him with a trust beyond what the nature of the thing puts it in his power to perform. It is reasonable to require him to use due ca[illegible] to ascertain whether the building is fi[illegible] and by himself and servants to take du[illegible] care to maintain it in a proper state, b[illegible] it would be unreasonable to go further.

It is true that in some cases the bail[illegible] is owner in fee of the building, and [illegible] some, as in the present case, he has built for him, and even where lessee, [illegible] might take special covenants. But the[illegible] are exceptional cases, and in *ea quæ fr[illegible]quentius accidunt præveniunt jura.* W[illegible] must imply the warranty or obligatio[illegible] which would be reasonable in the or[illegible]nary state of things and no more, ev[illegible] though in exceptional cases it might [illegible] reasonable to imply more, and though t[illegible] particular case may be one of those e[illegible]ceptions.

We think, therefore, that the ruling the learned Judge was right and that t[illegible] rule should be discharged.

Rule discharged.

Attorneys—John Scott, agent for Graham [illegible] Graham, Sunderland, for plaintiff; Bell, Broc[illegible]rick & Gray, agents for W. W. Robson, Sunde[illegible]land, for defendant.

1874. Jan. 24. } MAUND (*appellant*) *v.* MASON (*respondent*).

Poor Law—Relief by Relations—Grandfather — Liability of Children — Grandchildren—43 Eliz. c. 2. s. 7.

By 43 Eliz. c. 2. s. 7, the father and grandfather, and the mother and grandmother, and the children of everg poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person, &c.:—Held, *that the word "children" does not include grandchildren, and therefore that a grandchild cannot be compelled to support his grandfather.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 62.]

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(7) 12 Mec. & W. 68; s. c. 13 Law J. Rep. (N.S.) Exch. 120.

THE QUEEN ON THE PROSECUTION OF WILLIAM SPARLING *v.* THE LOCAL GOVERNMENT BOARD.

litan Poor Act, 1867 (30 *Vict.*
—Deprivation of Office—Compen-
ficer—Attorney.

trustees having the management
f of the poor of a Metropolitan
pointed S. to be solicitor for the ar-
of legal matters, with an annual
fter the passing of the Metro-
or Act, 1867, *the Poor Law Board*
allow the Board of Guardians
der that Act to continue S. in
tment which he had received
trustees :—Held, *that he was*
an award of compensation from
aw Board, under s. 76.

is a rule calling upon the de-
o shew cause why a mandamus
t issue commanding them to
reasonable compensation to
parling.
ared from the affidavit that the
t. Mary, Islington, was formerly
by trustees appointed under a
5 G. 4. c. cxxv. These trustees
as a body, having the manage-
he relief of the poor, after the
9 Vict. c. 61 (the Metropolis
agement Act, 1856), came into
By the 90th section of that
powers of the trustees (except
es as relate to the affairs of the
the management of the relief of
ceased and were transferred to
.
18th of February, 1857, a resolu-
passed by the trustees in the
terms—" The Board having
idered the duties of the clerk
ant clerk, resolve that after
next, the business of the Board
conducted by one clerk, at a
250*l.* per annum, with the aid
or for the arrangement of legal
100*l.* per annum. And that
of solicitor be offered to Mr.
(the prosecutor).
r was accepted by Mr. Sparling.
ssing of the Metropolitan Poor
(30 Vict. c. 6), the Poor Law
ler s. 73 directed that from and

after the 7th July, 1867, the relief of the poor in the parish of St. Mary, Islington, should be managed by a Board of Guardians elected according to the Poor Law Acts. At the first meeting of the Board of Guardians so elected, the appointment of the prosecutor as solicitor was continued by the Board, but the Poor Law Board refused to sanction such appointment as it was not authorised by the regulations to which the Guardians were subject. On the 30th July, 1867, the Board of Guardians gave notice to the prosecutor that his appointment not being sanctioned by the Poor Law Board, would be determined on the 29th of September then next. The prosecutor made application to the Poor Law Board to award him compensation for the loss of his office as to them should seem reasonable. They declined to entertain his claim. Subsequently to the passing of the Local Government Act, 1871 (34 & 35 Vict. c. 70), the application was renewed to the defendants, and they also refused to entertain this claim. This rule was then obtained.

The Attorney-General (Sir J. Duke Coleridge), the Solicitor-General (H. James) and *Lumley*, shewed cause against the rule (on Nov. 13, 1873).—There is no dispute about the facts, but it is contended that the defendants are not bound to award any compensation to Mr. Sparling. His position was changed between the year 1855, when the powers of the trustees became vested in the vestry under 18 & 19 Vict. c. 120, s. 90, and the year 1867, when the Metropolitan Poor Act was passed. He had ceased to be clerk and had accepted the appointment of solicitor at 100*l.* a year. By s. 73 of the last mentioned Act, the relief of the poor of every union or parish in the metropolis is to be administered by a Board of Guardians elected according to the Poor Law Acts, and in conformity with an order of the Poor Law Board. It is contended on behalf of Mr. Sparling that he has been deprived of his office within the meaning of the 76th section of this Act, and that he is therefore entitled to compensation (1). It is true that the

(1) The 76th section is set out in the judgment of the Court.

Board of Guardians, elected in accordance with the provisions of the statute, continued him in his office, and that the Poor Law Board refused to sanction the appointment; but Mr. Sparling has not been deprived of his situation within the meaning of the 76th section, that is to say by reason of the operation of the Act, and moreover, his situation or employment was not an "office" within the meaning of the Act. However reasonable it might be that compensation should be granted, there is no power under the Act to grant it. The Act is not the *causa causans*, the deprivation of Mr. Sparling's employment, although it may perhaps be the *causa sine qua non*. The proper course was taken of informing the Guardians that they had no power to continue the appointment. The old body of trustees were changed into the new body of guardians, under the control of the state, and the new body is informed by the state under whose control it is that the appointment could not be sanctioned.

PER CURIAM.—We think that he was deprived of his employment by the operation of the Act.

Then, secondly, the employment is not an "office" within the operation of the Act. He was an attorney paid by the month, and such an employment cannot be said to be the same as, for instance, the office of town clerk where there are duties to be performed which are incidental to such office. See *The King* v. *The Mayor of Bridgwater* (2), where under 5 & 6 Will. 4. c. 76. s. 66, a town clerk was held to be entitled to compensation. Can it be said that a solicitor employed as Mr. Sparling was to do the Poor Law work at a salary is an "officer?"

[BLACKBURN, J.—In common parlance I think he would be called an "officer," though perhaps not in the strict legal sense of the word.]

He is no more an "officer" than the carpenter would be who was employed to superintend the wood work of the Union Workhouse. Further a meaning has already been put upon the word "officer." By s. 2 of the Metropolitan Poor Act, 1867, "words" in that Act have the same meaning as in the Poor Law Acts, one of which is 4 & 5 Will. 4. c. 76. By s. 109 of that Act the word "officer" shall be construed to extend "to any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant overseer, governor, master or mistress of a workhouse, or any other person who shall be employed in any parish or union in carrying this Act or the laws for the relief of the poor into execution, and whether performing one or more of the aforesaid functions." Mr. Sparling cannot be said to come within any of these descriptions, nor within the earlier part of the 76th section of the Metropolitan Poor Act, 1867.

Coxe in support of the rule.—Upon the facts stated in the affidavit, Mr. Sparling is clearly an officer within the meaning of the 76th section. He was in the service of the Guardians. He comes also within the meaning of the interpretation given to the word in s. 109 of 4 & 5 Will. 4. c. 76, which has been referred to by the other side. The only legal business he was called upon to transact was the carrying the laws for the relief of the poor into execution. *The Queen* v. *The Justices of Cambridgeshire* (3) shews how an interpretation clause is to be construed. Lord Denman, C.J., in delivering the considered judgment of the Court, said—"We apprehend that an interpretation clause is not to receive so rigid a construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term where the circumstances require that it should." He also referred to *Dwarris on Statutes*, 565, 573; *The King* v. *The Mayor of Bridgwater* (2); *The Queen* v. *The Corporation of Warwick* (4); and *The Queen* v. *The Poor Law Board* (5).

Cur. adv. vult.

(2) 6 Ad. & E. 339; s. c. 6 Law J. Rep. (N.S.) M.C. 78.

(3) 7 Ad. & E. 480. 491; s. c. 8 Law J. Rep. (N.S.) M.C. 6.

(4) 10 Ad. & E. 386; s. c. 9 Law J. Rep. (N.S.) Q.B. 265.

(5) 41 Law J. Rep. (N.S.) M.C. 16; s. c. Law Rep. 6 Q.B. 785.

The judgment of the Court (6) was (on Jan. 14) delivered by

BLACKBURN, J.—In this case a rule has been obtained for a mandamus to the defendants to assess the reasonable compensation to William Sparling. Cause was shewn by the late Attorney-General (the present Chief Justice of the Common Pleas), who stated that the board were contented to abide by the decision of this Court as final.

We have, therefore, to determine, not merely whether there is enough doubt to make it proper to let a writ go, but whether we think that the applicant is entitled to have compensation, the amount of that compensation not being a question before us.

It was agreed that the facts were all accurately stated in the affidavit of Mr. Sparling. The material facts are as follows [His Lordship stated the facts as they are above set out.]

We apprehend that it is clear, on the one hand, that he did not thereby acquire any freehold office during life or good behaviour, but also clear on the other, that he did become possessed of a situation or place or employment under the trustees, and that, if he had been dismissed without sufficient cause and without reasonable notice to terminate his employment, he would have had a remedy for such dismissal.

The 76th section of the Metropolitan Poor Act, 1867, provides that—

"Officers and persons appointed or acting under any such local Act for any purpose of the relief of the poor, or otherwise in the service of the guardians, and superintendent registrars of births, deaths and marriages, and registrars of births and deaths, and registrars of marriages, shall be entitled to continue in office after the constitution of the new board of guardians, under this Act, to the same extent as if this Act had not been passed; and their service before the constitution of that board shall be reckoned in the computation of any superannuation allowance to which they may become entitled: Provided that in case any officer of a union or a parish shall be deprived of his office by reason of the operation of this Act, the Poor Law Board may award to him such compensation for the loss of his office and its emoluments, either by way of gross sum, or by way of annuity, as to them shall seem reasonable."

It is on the proper construction of this section that our judgment in the present case depends.

Upon the argument of the rule two points were made for the defendants. First. It was said that the applicant was not deprived of his situation by reason of the operation of the Act. But we expressed our opinion on the argument that, as the effect of the Act was to subject his employers to the regulations which rendered it illegal in them to continue his employment, he had been deprived of it by reason of the operation of the Act.

The second objection was that this employment was not an office within the meaning of the Act. On this question we took time to consider.

We agree that the word "office," in its strict legal meaning, would not include such an employment as this. We doubt very much whether there was any person employed for any purpose connected with the relief of the poor under a local Act, whose employment could be called an "office" in the strict legal sense of the word. If there were such persons, they must have been very few; and to give the word this strict legal sense, would be to render the Act nugatory.

But we think that we must construe the words of this Act with reference to the subject matter and the context. The Municipal Corporation Act, 6 & 7 Will. 4. c. 76. s. 66, gave compensation to those who had lost "an office of profit." In *The King* v. *The Mayor, &c., of Bridgwater* (2), the person claiming compensation was clerk to the justices of the borough, and it was argued that this was not an "office;" but Williams, J., there says—"This may, in some sense, possibly be considered as no office, but not in the sense used in the Act. The effect of the 66th section, especially that part of it in which the party claiming is directed to distinguish 'the office, place, situation,

(6) Blackburn, J.; Quain, J.; & Archibald, J.

employment or appointment,' seems to be that a reasonable interpretation is to be given, and that the word 'office' must be understood in a greater latitude than an office strictly legal." And this was, we think, the ground of the decision in that case. And we think that we ought to apply the same principle to this case. Now, when we find in the enacting part of the section that "officers and persons appointed or acting under any such local Act for any purpose of the relief of the poor, shall be entitled to continue in office after the new constitution of the board," and that then, in the proviso immediately following, the words "officer" and "office" are again used, we think that the word "office" must be understood in a greater latitude than an office strictly legal, and must be construed to include the situation of those persons appointed or acting for the relief of the poor, who, under the earlier part of the section, would be entitled to continue in office. And we are the more induced to put this construction on the Act, because we think that, to put the strict legal construction on the word "office," would render the Act nugatory, and give compensation to very few, if any, persons. This we cannot believe to have been the object of the Legislature.

It was argued that, in the 2nd section of the Act, it was enacted that, "words shall have the same meaning as in the Poor Law Acts," and that this Act, therefore, incorporates the interpretation clause of the 4 & 5 Will. 4. c. 76. s. 109, which enacts that "officer" shall be construed to extend to any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant-governor, master or mistress of a workhouse, or any other person who shall be employed in carrying this Act, or the laws for the relief of the poor, into execution;" and it was said that a solicitor is not there named. We do not agree that where, from the context, it appears that a word is used in a particular sense, we are to depart from that sense because, in the interpretation clause, it appears that the word is to be extended to include other things; but if we did, we should say that a solicitor employed to transact th poor law business of the parish, is son employed in carrying the Ac the relief of the poor into operation it may not unreasonably be said solicitor employed at a fixed salary this, is very much *ejusdem generis* medical man who receives a fixed for attending the sick poor; and dical man is mentioned as an "o: But our judgment does not depe the interpretation clause contained Act of 1834, though brought in Act of 1867. We proceed on what to us, from the object of the 79th of the Act of 1867, and the la there used, to be the intention ex in that enactment.

We are therefore of opinion th defendants ought to enquire in circumstances, and award such co sation as to them shall seem reaso We give no opinion as to wha should be.

Rule abso

Attorneys—Satchell & Chapple, for p Sharpe, Parker & Co., for defendant

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1874. Jan. 27. } PEIRCE *v.* CORF.

Frauds, Statute of—29 Car. 2. s. 17—Connection between two W by internal Reference—Auctioneer's Ledger and Conditions of Sale—L of Auctioneer for not making Contract.

The plaintiff sent a grey mare defendant for sale by auction. The dant circulated a catalogue, form document with the conditions of sale in the mare was described and nu and the sale advertised for a day The sale took place on such day, mare was knocked down to M. Prio sale the defendant had prepared ledger, containing in several colun particulars of each horse to be offe sale, with blanks for the purchase prices, which blanks were filled up

clerk of the defendant as soon as each horse was knocked down. The number and description of the plaintiff's mare as entered in the sales ledger corresponded exactly with the number and description in the catalogue, and immediately after the sale M. wrote to the defendant (to return the mare as not up to warranty) a letter identifying her by number and description:—Held, *that the defendant was liable to the plaintiff for negligence in not having made a binding contract with M., and that the letter of M. was not sufficient to shew that there was a contract which would be binding upon M.*

Appeal from the County Court of Lancashire holden at Liverpool.

The plaint was to recover 30*l.* "for loss sustained by the plaintiff through the negligence of the defendant in or about the matter of a certain grey mare sent by the plaintiff to the defendant's repository to be sold by the defendant, by reason of the defendant not making a binding contract with Thomas Maguire, to whom the said grey mare was knocked down at the sale, and for not otherwise observing the printed conditions under which the said grey mare was offered for sale." The learned County Court Judge had directed a verdict to be entered for the plaintiff for an amount agreed upon.

The facts proved were these—

The plaintiff, being the owner of a grey mare, sent her to the repository of the defendant, an auctioneer holding periodical sales of horses by auction, with directions to offer her for sale at one of his public sales.

The defendant advertised the mare with a number of other horses for sale by auction on the 28th of March, 1872, and circulated a printed catalogue, which with the conditions of sale formed one document, wherein the plaintiff's mare was catalogued in numerical order as follows—

DESCRIPTIVE CATALOGUE.

Lot

. . . . . .

. . . . . .

49. Grey mare, 6 years old, 15·3 hands high, steady to ride and drive.

Prior to the sale, the defendant caused to be made in such of the columns in his "sales ledger" as were applicable to matters ascertainable before the sale, entries relating to the horses described in the catalogue, the ledger and the catalogue following the same numerical order. The sale took place as advertised, and the plaintiff's mare was in turn, according to numerical order, put up, and knocked down to Thomas Maguire for 33 guineas.

Thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for the purpose, opposite to the lot in question, the name of the purchaser and the price.

The entry in the sales ledger was—

Select Sales by Auction, Thursday, 28th March, 1872.

Owner.	Lot.	Description.	Age.	Warranty as to Harness.	Reserve.	Purchaser.	Amount.
Pearce.	49	Grey Mare.	6	Rides and drives.	C. E.	T. Maguire.	33

The sales ledger also contained columns headed "paid or entered," "commission," "livery," "total charges," "net proceeds," "when paid," "entered C. B.," "owner's receipts," &c., and "remarks." Neither the catalogue nor the conditions of sale were annexed or affixed to the sales ledger, nor were they referred to therein, but the defendant during the sale held the catalogue and conditions of sale in his hand.

Immediately after the sale, the purchaser being dissatisfied with the mare, refused to take to her, and wrote as follows to the defendant—

"Liverpool, 28th March, 1872.

"Gentlemen,—I herewith return the grey mare, Lot 49, bought at your sale this day as not being steady in harness as warranted.

"Thomas Maguire."

The mare was afterwards re-sold for 29*l.* 8*s.* only, and the plaintiff having been nonsuited in an action against Maguire, in which neither the sales ledger nor the above letter were put in evidence, afterwards sued the defendant for negligence as above stated. At the hearing the defendant put in evidence the catalogue and conditions of sale, the sales ledger, and Maguire's letter, and proved by his own mouth that the entries No. 49 in page 7 of the catalogue and in the sales ledger related to the same animal. It was then contended for the defendant that this was sufficient evidence of a signed note in writing of the bargain within the 17th section of the Statute of Frauds, but the learned Judge being of opinion that there was no proof of a sufficient connection by reference or otherwise between the conditions of sale and the entries in the sales ledger, gave judgment for the plaintiff.

The question for the opinion of the Court was, whether, under the circumstances above stated, there was evidence of a signed note or memorandum in writing sufficient to satisfy the 17th section of the Statute of Frauds.

Herschel, for the defendant.—There are two questions in this case: First, whether there is a sufficient connection by internal reference between the sales ledger and the conditions of sale to give them the force of one document? Secondly, whether the letter of Maguire is sufficient to supply the deficiency of connection, if any? On the first point it will be necessary to distinguish *Hinde* v. *Whitehouse* (1). That case is distinguishable, because there the auctioneer simply held the conditions of sale in his hand at the time of sale, whereas here there is a sufficient internal reference from one writing to another to make a good contract. Taking these two documents together, a reasonable inference might be drawn that they refer to the same thing. The date, the number of the lot, the name of the seller and of the thing sold, all alike correspond. In *Hinde* v. *Whitehouse* (1) the date alone corresponded.

(1) 7 East, 558.

[BLACKBURN, J.—There would se be no doubt that the same mare is r but it is necessary to shew that the conditions of sale were meant.]

"Lot" is a well-known word ir nection with auctions, and it is a r able inference that Lot 49 means I in the catalogue.

[QUAIN, J.—Is not the principle that there must be such reference one document to the other as will them one document?]

It is contended that there is s reference here made by the word ' meaning thereby "lot in the catalo He also cited *Allen* v. *Bennet* (2), *bell* v. *Hutchinson* (3) and *Buxt Rust* (4).

Wheeler, for the plaintiff, was d to confine his argument to the s point.—The letter of Maguire doe contain any mention of the price. was then stopped.]

Herschel, in reply.—*Bird* v. *Boult* is an authority to shew that the dant's clerk in making the entry sales ledger is an agent for a purcha the sale.

BLACKBURN, J.—I am of opinion the judgment of the County Court should be affirmed. The ordinary tice at auctions—a practice so well k that we should take judicial notice —is for the auctioneer to sign the logue under his authority from parties to sign it and bind them. such a catalogue must contain a conditions of sale, otherwise there sufficient memorandum within the St of Frauds. The ordinary usage is fo auctioneer to sign, and he generally still if the auctioneer had a sales l in which all the conditions of sale copied out, and were to sign that, si signature might be binding. It is, ever quite clear that such a signatu made by the auctioneer's clerk, woul under ordinary circumstances be bir

(2) 3 Taunt. 169.

(3) 3 Ad. & E. 355; s. c. 4 Law J. Rep K.B. 201.

(4) 41 Law J. Rep. (N.S.) Exch. 1–173 Law Rep. 7 Exch. 1–279.

(5) 4 B. & Ad. 443.

although there may be circumstances in which it would, such as those in *Bird* v. *Boulter* (5), where there was evidence that the clerk was seen by all parties to make the entries. But here there is nothing to shew that the sales ledger was open or known to the bidders, and upon inspection it appears that there are ciphers in it, which would seem to shew that it was not so known. The defendant's clerk in fact was signing for his master's information, not as agent for the bidders. However, even supposing that the clerk had authority to bind the bidder by his signature, I can find no sufficient reference in the sales ledger to the conditions of sale. In *Hinde* v. *Whitehouse* (1) it is said by Lord Ellenborough that "the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale." Now Mr. Herschel has argued that because the lot was the same and the day the same, therefore the sale of the particular lot was equivalent to a sale subject to the conditions of the catalogue. But this cannot be so, because there is no custom of auctions that every sale is subject to the conditions of the catalogue; on the contrary, the conditions of the actual sale are sometimes varied from the conditions named in the catalogue. I think, therefore, that the sales ledger contained no sufficient reference to the catalogue so as to satisfy the Statute of Frauds.

The second point is a more doubtful one, and if money had been given in earnest the bidder would have been bound. But what the bidder does here is to write a letter saying, "I return the grey mare which I bought at your sale." But the not stating the price is a fatal objection, and when it is sought to remove it by saying that the price written down in the sale ledger is intended, it is to be answered that it should have been so written down by the clerk as to make all the bidders aware that the entry made by him was a memorandum of the contract. I am sorry that the defendant has been beaten on a technical point, but it is his own fault for departing from the ordinary practice of auctioneers.

QUAIN, J.—I am of the same opinion. As to the first question, I think the catalogue and the sales ledger are not sufficiently connected to form a memorandum within the Statute of Frauds, on the ground that there is no reference from one to the other on the face of them. The second question turns on nearly the same point. If the letter of Maguire had any reference to the document containing the price and the name of the purchaser, it would then be a question for further consideration how far that reference was sufficient. But as it is, "Lot 49" refers to the catalogue which everybody sees, whereas the sales ledger is a private document for the auctioneer's own use. If "Lot 49" in the letter refers to anything, it refers to the catalogue, and inasmuch as neither the letter nor the catalogue contain the price, I do not think the letter carries the case any further. The judgment of the County Court Judge was consequently right.

ARCHIBALD, J.—I am of the same opinion. On the first point it is undoubted law that to satisfy the Statute of Frauds, there must be a complete contract either on one paper, or on different papers referring to one another in such a manner as to make the reference clear. But in this case it is impossible to complete the reference, except by parol evidence. On the second point I was at first impressed by the argument that the letter must be taken to refer both to the sales ledger and the catalogue. But, on reflection, I see that this argument goes too far, for the reference in the letter would thus take in every statement in the sales ledger. It refers, therefore, to the catalogue only, which does not contain the price.

Judgment for the plaintiff.

Attorneys—Thomas Speechly, for the plaintiff; Chester, Urquhart, Bushby & Mayhew, agents for Tyrer, Smith & Kenion, for the defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Queen's Bench.*)

1874. Feb. 2. } SWIFT *v.* JEWESBURY AND GODDARD.

Banking Company — Misrepresentation by Manager—Credit of Customer—Lord Tenterden's Act, 9 *Geo.* 4. *c.* 14. *s.* 6 — *Writing signed by the Party to be charged.*

The plaintiff, a customer of the S. & H. Bank, was asked to sell some iron to Sir William Russell. At the request of the plaintiff the manager of the S. & H. Bank wrote to the manager of the C. Branch of the G. Banking Company of which one of the defendants was public officer, "I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of Sir William Russell, and whether you consider him responsible to the extent of 50,000*l.*" *The defendant, Goddard, who was the manager of the C. Branch, wrote in answer, "I am in receipt of your favour of the* 8*th instant, and beg to say in reply that Sir William Russell is the Lord of the Manor of Charlton Kings, near this town, with a rent roll, I am told, of over* 7,000*l. per annum, the receipt of which is in his own hands, and has large expectancies, and I do not believe he would incur the liability you name unless he was certain to meet the engagement." Signed, J. B. Goddard, Manager. The representation contained in the last mentioned letter was false to the knowledge of Goddard, who, in writing it, acted within the scope of his authority as manager to answer such enquiries, but without making any communication to the directors or other officers of the company. The plaintiff acted on the statements contained in the answer; Sir William Russell became insolvent, and the plaintiff sustained loss thereby:*—Held, *reversing the judgment of the Court of Queen's Bench, that the bank was not liable in respect of the misrepresentation, inasmuch as under the* 9 *Geo.* 4. *c.* 14. *s.* 6, *it is necessary that the representation as to credit, &c., should "be made in writing signed by the party to be charged therewith," and inasmuch as there was no signature by the bank.*

But held, affirming the judgment of the Court of Queen's Bench, that the defendant Goddard was liable.

This was an appeal by the defend Frederick Charles Jewesbury, as p officer of the Gloucestershire Ba Company, and Theophilus Bartlett dard, respectively, against a decisi the Court of Queen's Bench discha two rules obtained by the said Fred Charles Jewesbury and the said Theop Bartlett Goddard, respectively. (Se report of the case in the Court belo Law J. Rep. (N.S.) Q.B. 111.)

The first of the said rules was a obtained by the said Frederick Ch Jewesbury calling upon the plaint shew cause why the verdict obtain this cause should not be set aside, verdict for the said Frederick Ch Jewesbury or a nonsuit entered in thereof, in pursuance of leave reserv Cockburn, C.J., on the ground that was no writing signed by the said ba company: that the defendant Go was not the agent of the said ba company to sign; that the said ba company were not liable for a false r sentation by the defendant Goddard; there was no representation by the banking company to the plaintiff, that there was no representation b said banking company, or false state by them.

The second of the said rules was a obtained by the said Theophilus Ba Goddard calling upon the plaintiff to cause why the verdict obtained in cause should not be set aside, and a trial had between the parties, on ground that the verdict was agains weight of evidence, and on the gr that there was misdirection in the le Chief Justice in not telling the that the defendant Goddard had not himself liable, the representation o 9th of November, 1869, not being si by him in his personal capacity, an misrepresentation being signed by within Lord Tenterden's Act, or w verdict should not be entered for th fendant Goddard, on the ground tha alleged misrepresentation was not to the plaintiff, and that the Sheffiel Hallamshire Bank were not the age the plaintiff to make the enquiry tained in the letter of the 8th of No ber, 1869.

The following is the Case stated on appeal.

1. This is an action brought against Lindsey Winterbotham, sued as registered public officer of the Gloucestershire Banking Company, for whom Frederick Charles Jewesbury, also a registered public officer of the said company, has been substituted on the record, on a suggestion of the death of the said Lindsey Winterbotham, and against Theophilus Bartlett Goddard, sued in his personal capacity, to recover damages for an alleged false and fraudulent representation, contained in the letter hereinafter set forth.

2. The cause was tried at Guildhall before the Lord Chief Justice of the Queen's Bench and a special jury at the sittings after Hilary Term, 1872, and the following evidence was then given.

3. The plaintiff, at the time hereinafter mentioned, carried on and still carries on the business of a steel manufacturer at Havelock Mills, Sheffield.

4. The Gloucestershire Banking Company at the time aforesaid carried on and still carry on the business of bankers, under the statute 7 Geo. 4. c. 46, at Gloucester, and at various other towns in the county of Gloucester, and the adjoining counties. The said Lindsey Winterbotham was general manager of the said company during the time hereinafter mentioned and until his death, which happened before the trial of this cause.

5. The defendant Goddard is manager of a branch bank of the said company at Cheltenham, in the said county of Gloucester.

6. In the month of November, 1867, Sir William Russell, Bart., opened an account at the Cheltenham branch of the said bank, and he continued to be a customer of the said bank at the said branch until his insolvency in or about February, 1870.

7. In the early part of the month of November, 1869, one Hislop applied to the plaintiff to supply Sir William Russell with 500 tons of iron rails, to be paid for by a bill for 2,937*l.* 10*s.*, to be drawn by one Thomas Hutchings upon and accepted by the said Sir William Russell.

8. The plaintiff asked for a reference, and the said Hislop then referred him to the Gloucestershire Banking Company at Cheltenham.

9. The plaintiff was desirous of having the said bill discounted by the Sheffield and Hallamshire Bank, of which he was a customer, and he requested Alfred Holdsworth, the manager of the said bank, to enquire of the said Gloucestershire Banking Company at Cheltenham whether the said Sir William Russell was good for the said bill.

10. The sub-manager of the said Sheffield and Hallamshire Bank thereupon, by the direction of the said Alfred Holdsworth, filled up in manner following and sent to the manager of the said Cheltenham branch of the Gloucester Banking Company, after shewing it to the plaintiff, one of the forms used in the office for the making of such enquiries.

"Sheffield and Hallamshire Bank,
"Sheffield, Nov. 8, 1869.

"*Sir,—I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing* of Sir William Russell, Bart., M.P. for Norwich, *and whether you consider him responsible to the extent of* 50,000*l.*

"*I am, Sir, yours faithfully,*
"Henry J. Wells,
"Sub-*manager.*

"The Manager,
"Gloucestershire Banking Company,
"Cheltenham."

The words in italics were printed.

11. The sum of 50,000*l.* mentioned in the said letter was not mentioned by the plaintiff to the said Alfred Holdsworth or his sub-manager, but was inserted in the said letter without any instructions from the plaintiff.

12. In answer to the said letter, the defendant Goddard wrote and sent to the said manager of the Sheffield and Hallamshire Bank the following letter—

"Gloucestershire Banking Company,
"Cheltenham, 9th Nov. 1869.

"The Sheffield and Hallamshire Bank,
"Sheffield.

"Gentlemen,—I am in receipt of your favour of the 8th inst., and beg to say in reply that Sir William Russell, Bart., M.P. for Norwich, is the Lord of the Manor of Charlton Kings, near this town, with a rent roll, I am told, of over 7,000*l.* per

annum, the receipt of which is in his own hands, and has large expectancies, and I do not believe he would incur the liability you name unless he was certain to meet the engagement.

"I am, gentlemen, yours faithfully,
"J. B. Goddard,
"Manager."

13. Upon the receipt of the said letter of November 9, the said Alfred Holdsworth laid the same before the directors of his said bank, who thereupon consented to discount the said proposed bill.

14. The said Alfred Holdsworth then told the plaintiff that the reply was satisfactory, and thereupon the plaintiff, acting solely upon the faith of the said representation, completed the sale of the said rails by handing a delivery order for the same to the said Heslop, and receiving from one Pooley, who was then a clerk of the said Sir William Russell, the following bill, endorsed by Thomas Hutchings, the drawer of the said bill.

"London, November 22, 1869.

"2,937*l.* 10*s.*

"Four months after date pay to my order the sum of two thousand nine hundred and thirty-seven pounds ten shillings, for value received.

"Thomas Hutchings.

"To Sir Wm. Russell, Bart., M.P.,
"London.

Across the face of the bill was written—*Accepted, payable at Messrs. Glyn, Mills & Co. William Russell.*

"Endorsements— Thos. Hutchings.
J. G. Poole & Co.
Geo. E. Swift & Co."

15. The said Sheffield and Hallamshire Bank afterwards discounted the said bill, relying on the representations contained in the said letter of November 9.

16. In the month of February, 1870, and before the said bill arrived at maturity, the said Sir William Russell became insolvent. The said Hutchings also became insolvent, and the plaintiff has never received payment of the said bill or any part thereof.

17. It was stated by the said Alfred Holdsworth to be the ordinary practice of bankers to make, on behalf of their customers, enquiries of other banks as to the solvency of the customers of those other banks, and also to answer such enq when addressed to them by other b but not when addressed to them by p persons, and that it was also the c for managers of joint-stock banks to and answer such enquiries without sulting the board of directors, and th Alfred Holdsworth further stated th words "in confidence" meant th bank would make no undue use c information conveyed to them by the and it was also stated by William I Price, who had been for the last nine chairman of the said Gloucester Banking Company, and who had since 1840, a director of the said com that the making and answering of enquiries was done as a matter of co and convenience among bankers, that by a sort of freemasonry a bankers, and in confidence with other, they do ask and answer questions.

18. The said letter of November 9 written by the defendant Goddard, out any communication with any c other officers, or the directors of th Gloucestershire Banking Company was not seen by or known to a them.

19. Evidence as to the constitutio management of the Gloucestershire I ing Company was given by the said liam Philip Price, who has been cha of the said company for the last years, and a director of the con since 1840, to the following effect.

20. The head office of the said con is at Gloucester, and the compan fifteen branch banks at various tow Gloucestershire and the adjoining ties, of which Cheltenham is one.

21. A full board of directors me Gloucester on the first Friday of month, and a managing comm known as the weekly committee, at Gloucester every Saturday.

22. It is the practice of the mana any particular branch to open acc with customers at his branch wi communication with the general ma or the board of directors, and after to report them to the general ma who reports them to the board, but i cial cases, or where the amount is

the manager refers the applicant to the head office, and in some cases the applicant himself makes the preliminary arrangements at the head office.

23. It is the duty of the general manager of the company to report to the chairman any accounts which he deems in an unsatisfactory state, and it is the duty of the said chairman to report the same to the board.

24. No suspicion was entertained by the said chairman as to the account of the said Sir William Russell, and no report was made by the said chairman to the board on the subject of the account of Sir William Russell, until the first meeting in February in 1870. In the ordinary course of business, communication would have been made by the general manager to the chairman of any account of which he entertained a suspicion, or as to which he was uneasy; the general manager was in constant communication with the chairman both personally and by letter, but no such communication was made by him with respect to the said account. He died before the trial of this cause.

25. The Lord Chief Justice directed the jury that if they thought that the defendant Goddard wrote the said letter of November 9 with an intention of misleading the parties who were making the enquiry, and for the purpose of inducing them to give credit to Sir William Russell, not to the amount of 50,000*l.*, but whatever this amount might be, they should find a verdict for the plaintiff, and he also left to the jury the question whether it was within the scope of the authority of a manager of a banking company, such as the Gloucestershire Banking Company, to answer enquiries not merely in his individual character, but as a representative of the banking company, whose manager he was; saying that it might become a question of considerable importance by-and-by, with a view not to the liability of Mr. Goddard himself, but of the company whose representative he was, as manager of that branch of the bank, and that, therefore, although his Lordship thought it would depend more on the law than on the fact, he would ask them to say what, upon the evidence they had heard, in their opinion, was the answer that ought to be given to the question. Was it within the scope of the authority with which the manager of a branch bank of this description was invested, to answer such enquiries? But his Lordship reserved leave to the defendant Jewesbury to move to enter a nonsuit or a verdict for him, and to the defendant Goddard leave to move to enter a verdict for him on the grounds mentioned in that behalf in the rules hereinbefore stated.

26. The jury found a verdict for the plaintiff for the sum of 3,059*l.* 17*s.* 11*d.*, and they also answered the second question left to them by the learned Judge in the affirmative.

27. The rules hereinbefore set forth were afterwards obtained on behalf of the defendant respectively, and, after argument, the same were, on the 17th day of February, 1873, discharged, but leave was given by the said Court of Queen's Bench to the defendant Goddard to appeal against the said decision as to the alleged misdirection by the learned Lord Chief Justice. Due notice of appeal has been given.

The questions for the opinion of the Court of appeal are—

First. Whether the defendant, F. C. Jewesbury, as such public officer, is entitled to have the verdict entered for him?

Second. Whether the defendant, T. B. Goddard, is entitled to have the verdict entered for him?

Third. Whether the defendant, T. B. Goddard, is entitled to a new trial on the ground of the said alleged misdirection?

Benjamin (*Sir J. B. Karslake* and *Anstie* with him), for the defendant Jewesbury.—The Court below has given judgment against the bank, and also against the manager Goddard, but it is clear that there was not any cause of action against the bank. The language of Lord Tenterden's Act, 9 Geo. 4. c. 14. s. 6, is conclusive. No action could be brought in respect of a misrepresentation of the credit of Sir W. Russell, unless it were made in writing and signed "by the party to be charged therewith." Similar words to these have been construed to mean that there must be the personal signature of

the party to be charged, and in order to make the matter still more clear, the Mercantile Amendment Act, 19 & 20 Vict. c. 97. s. 13, provided that the signature of a duly authorized agent should be sufficient under the first section of Lord Tenterden's Act, but it left untouched the law as it stood under the sixth section; see also *Hyde* v. *Johnson* (2). This view of the law was acquiesced in by the Court below, but the judgment delivered was in favour of the plaintiff, because the Court thought that the signature of the manager was the signature of the bank, inasmuch as the bank being a fluctuating and numerous body could not affix its signature to documents otherwise than by the hand of certain individuals, who by the articles of co-partnership are appointed to represent the general body in such matters. But it must be borne in mind that Goddard was not a partner, nor was he the general manager; he was only the manager of one of fifteen branches. A letter cannot be written by the manager and also by the bank. Upon the face of the letter of November 9, 1869, it does not purport to be written by the bank, nor was the opinion of the bank asked in the letter of November 8.

[BRAMWELL, B.—It is no part of the business of bankers to answer such enquiries, although one knows that they are in the habit of doing so. If this was the signature of the bank, the verdict ought to have been entered for Goddard.]

Yes, but the bank is not liable. The result of the judgment below would be that every individual shareholder in the bank would be liable. The articles of co-partnership were not produced, and the Court ought not to have inferred that there was anything in them to confirm the finding of the jury. But, again, that finding will not justify the judgment of the Court, for it is not found that there was any express authority to answer the question so as to bind the bank.

[He was then stopped.]

The Attorney-General (*Sir H. James*) (*Jeune* with him), appeared for the defendant Goddard, but admitted that he could not dispute the correctness of the judgment below against him.

Day (*E. Clarke* with him), for the plaintiff.—*Barwick* v. *The English Joint Stock Bank* (3) was a case very like the present, and shews that corporations of this kind may be liable for the misrepresentations of their manager.

[LORD COLERIDGE, C.J.—But in the present case the knowledge of the manager and not of the bank is asked for.]

The question put by Cockburn, C.J., to the jury, and the answers of the jury are set out in the 25th and 27th paragraphs of the case; and it will be found that the facts of this case are stronger in favour of the plaintiff than they were in *Barwick* v. *The English Joint Stock Bank* (3). The manager must necessarily have authority to do what is in accordance with the custom of bankers. The bank must have some living organ or instrument to transact their business. The public officer is not such an instrument, as he is appointed simply for the purpose of suing and being sued. The answer of the 9th of November is not written in the personal capacity of Goddard, but as "manager," that is, as the organ of the bank. It is said that under 9 Geo. 4. c. 14. s. 6, the bank cannot be liable in this action, because the representation is not signed by the bank. One answer is that the signature of an agent is sufficient, in accordance with the maxim, *qui facit per alium facit per se*. It is not to be supposed that the Legislature intended to exclude the signature of an agent in such a case; and there is nothing to shew that there was such an intention. It may be admitted that there are decisions against the view now contended for, but they are not binding upon this Court.

[LORD COLERIDGE, C.J.—The Legislature, by subsequent legislation, seems to have recognised them.]

But that subsequent legislation only professes to deal with the matters involved in those decisions—*The Queen* v. *The Justices of Kent* (4) is an authority to shew

(2) 2 Bing. N.C. 776; s. c. 5 Law J. Rep. (N.S.) C.P. 291.

(3) 36 Law J. Rep. (N.S.) Exch. 147; s. c. Law Rep. 2 Exch. 259.

(4) 42 Law J. Rep. (N.S.) M.C. 112; s. c. Law Rep. 8 Q.B. 305.

that the maxim *qui facit per alium facit per se* should apply. In that case the name of an appellant against a rate had been written upon the notice of appeal by the clerk to the appellant's attorney. The statute 12 & 13 Vict. c. 45, by section 1, provides that the "notice of appeal shall be in writing, signed by the person or persons giving the same, or his, her or their attorney, on his, her or their behalf." It was argued that the notice was not signed sufficiently, but the Court of Queen's Bench held that it was, there being nothing in the statute to shew that the personal signature was required. But even if the 9 Geo. 4. c. 14. s. 6, is to be construed in general as requiring the personal signature of the person charged, such a construction does not apply to the present case, for the consequence would follow that, even if all the shareholders were to agree that a false representation should be made, and their manager made it in writing, no one but himself would be liable.

[LORD COLERIDGE, C.J.—The bank did not use the hand of Goddard to give the information about Sir W. Russell. GROVE, J., referred to *Williams* v. *Mason* (5), where the Court of Common Pleas held that the defendants' firm were not liable in an action brought in respect of a false representation made as to the credit of a third party, the representation having been signed merely by the son of one of the partners.]

It is contended that as the bank has no common seal, and must have some organ to carry on its business, it is liable for a false representation made by its manager within the scope of his authority as found by the jury.

Benjamin was not called upon to reply.

LORD COLERIDGE, C.J.—This is an appeal from a judgment of the Court of Queen's Bench, in which the facts material for our decision are as follows.

It is an action brought by a person who had supplied Sir William Russell with a quantity of rails, and who had lost the money which he had expected to get in payment for those rails. An action was brought against the Gloucestershire Banking Company, in the name of its public officer, and Theophilus Bartlett Goddard, who is the manager of a branch of the Gloucestershire Bank at Cheltenham, for a misrepresentation alleged to have been made by them as to the means of Sir William Russell, whereby the plaintiff was induced to part with his rails, and did not get the money he ought to have had for them. It was sought to bring the matter home to the Gloucestershire Banking Company in this wise:—The Gloucestershire Banking Company are a co-partnership, and they have to sue and be sued by a public officer. They are sought to be fixed in this way: Mr. Goddard, who is sued individually, was the manager of one of fifteen branch banks of the Gloucestershire Banking Company, established at Cheltenham, and at this bank Sir William Russell used to bank, and the manager of the Cheltenham branch of the Gloucestershire Banking Company was a person who might be supposed to have, and probably had, the means of knowing the condition of the money matters of Sir William Russell. The plaintiff banked with the Sheffield and Hallamshire Bank, and he applied to the Sheffield and Hallamshire Bank before he dealt with Sir William Russell, to ascertain, if possible, the general condition of Sir William Russell; and the manager of the Sheffield and Hallamshire Bank, a person of the name of Wells—a sub-manager—writes a letter of the 8th November, 1869, in these terms: "I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of Sir William Russell, Bart., M.P. for Norwich, and whether you consider him responsible to the extent of 50,000*l*. I am, Sir, yours faithfully, Hy. Wells, sub-manager." This is directed to the manager of the Gloucestershire Banking Company, Cheltenham. It ought to be observed here, in passing, that the liability as to which Mr. Swift was interested, was a liability very much less than 50,000*l*., and was a sum of only 2,937*l*. 10*s*. In answer to that the defendant, Mr. Goddard, wrote and sent to the manager of the Sheffield and Hallamshire Bank this letter—"Gloucestershire Banking Company, Cheltenham,

(5) 21 W.R. 386.

9th November, 1869," directed to the "Sheffield and Hallamshire Bank, Sheffield — Gentlemen, I am in receipt of your favour of the 8th inst., and beg to say, in reply, that Sir William Russell, Bart., M.P. for Norwich, is the lord of the manor of Charlton Kings, near this town, with a rent-roll, I am told, of over 7,000*l.* per annum, the receipt of which is in his own hands, and has large expectancies, and I do not believe he would incur the liability you name unless he was certain to meet the engagement. I am, gentlemen, yours faithfully, T. B. Goddard, manager."

Then Sir William Russell becomes insolvent before the bill which he accepted becomes due, and the plaintiff loses his money. The paragraph of the case which was pressed upon us as the important paragraph upon which the right of the plaintiff to recover could be sustained was the 17th. [His Lordship read it, and continued.] The matter came on to be tried before the Lord Chief Justice of the Queen's Bench, and this evidence was given, and the Lord Chief Justice directed the jury in the terms of the 25th paragraph. [His Lordship read it.] But his Lordship reserved leave to the defendant, Jewesbury, to move to enter a nonsuit or a verdict for him, and to the defendant Goddard leave to move to enter a verdict for him, on the grounds mentioned in that behalf in the rules hereinbefore stated. Then the questions for us are, "Whether the defendant, Jewesbury, as public officer, is entitled to have a verdict entered for him? Second, whether the defendant, Theophilus Bartlett Goddard, is entitled to have the verdict entered for him? Third, whether the defendant, Theophilus Bartlett Goddard, is entitled to a new trial on the ground of the said alleged misdirection?"

The way it has been placed before us by Mr. Benjamin for the appellant is this: He says this is an action, in truth, founded upon the enactment of the 9 Geo. 4, c. 14; and the 6th section of that Act is as follows—"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, al trade, or dealings of any other pers the intent or purpose that such othe son may obtain credit, money, or upon (*sic*), unless such representati assurance be made in writing signed l party to be charged therewith." No says, this is not signed in writing b party charged therewith, as indeed not, because so far as the Banking pany is concerned, with whose case I am dealing at this moment, when signed by Goddard it is not signed matter of fact by the party to be ch therewith; and, he says, nothing els do. The words of the statute are ex and I am confirmed in that argumen the signature of anyone but the pa be charged therewith will not be cient, because when the Mercantile Amendment Act came to be passe 13th section of that Act provided, in rence to the provisions of the Act c 9 Geo. 4. ss. 1 and 8, that "an ack ledgement or promise made or cont by or in a writing signed by an agent party chargeable thereby, and duly a rised to make such acknowledgeme promise, shall have the same effect such writing had been signed by party himself." Then, says Mr. Benj that is strong to shew when the legisl were dealing with the Act of 9 G and had before them certain decision authority of which they were wishing to impeach or to confirm, that they th it right that with regard to other se the signature of the agent should b same as the signature of the princi the agent was duly authorised; and expressly enact that that shall l with regard to two of the se of the 9 Geo. 4, but they exp refrain from so enacting with r to the 6th section, upon which question arises. Therefore, he that is in truth a legislative declar that whereas it was necessary to fere with regard to the 1st and th sections, it was not necessary to int in regard to the 6th section, becaus 6th section stood on its own groun was sufficient as it stood. It may l marked further that there is very ground antecedently for the observ

because the object of this 6th section is to charge an individual for an act of fraud; and without diving very deep for motives, one cannot help seeing that there was an excellent motive for that enactment, that a person should not be made fraudulent for the purpose of having a remedy obtained against him upon an act of fraud without the matter which is the evidence of his fraud resting on his own signature to a document to be produced; that it should not rest, as before that time it might have rested, on the conflict of evidence as to oral communications. If you mean to charge an individual with a fraudulent act whereby you have been damnified in respect of the conduct of another, you shall not charge that individual until you can produce his own handwriting for the statement of fraud by which you say you have been misled. Whether, therefore, one looks to the antecedent reason of the thing, or whether one looks to what may be called a Parliamentary exposition of the statute, upon both grounds it seems to me that the true construction is the one which has been contended for by Mr. Benjamin, namely, if you want to charge a person under the 6th section of the 9 Geo. 4. c. 14, you must produce the document upon which you propose to charge him, signed by the hand of the person whom you seek to charge.

It does not rest quite there either, because there is distinct authority, and authority of a very cogent kind, for so construing the statute. It is admitted that there have been decisions, such as *Hyde* v. *Johnson* (2), which have put a construction upon a similar matter, and which have determined that there must be the signature of the persons to be charged. All those cases came under review in the Court of Common Pleas in the case, with his recollection of which my brother Grove has furnished us, the case of *Williams* v. *Mason* (3). This does not at all conflict with the case of *Barwick* v. *The London Joint Stock Bank* (5), and cases of that description which have been brought before us, because I apprehend there can be no doubt that a different set of principles altogether arises, where an agent of a corporation or a joint stock company, at any rate in conducting the business of the joint stock company, does something of which the joint stock company take advantage, and by which they profit or by which they may profit; under such circumstances, if it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and authority supports justice in maintaining, that where a corporation takes advantage of the fraud by an agent, they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable. If Parliament could so enact, well and good; but Parliament not having so enacted, the Courts have held what seems to me, if I may venture to say so, exceeding good sense as well as justice, and which in no manner conflicts with the judgment I am pronouncing today. Therefore, whether one looks at the strict construction of the statute or at the interpretation which the statute may derive from antecedent reasoning, or from subsequent Parliamentary legislation, or from the authority not only of one Court but of several Courts before this case was brought to appeal here, it seems to me that the reason, the construction and the authority are all one way, namely, that the bank cannot be made liable, because the document on which it is sought to be made liable does not come within the statutory terms, which alone can make it liable.

But there is another ground upon which, it appears to me, that this case may be perfectly properly determined in favour of the defendants, and apart from the general construction, upon which I have not thought it right to shrink from expressing my opinion. Apart from the general construction upon the facts of this case, and upon the language of the documents themselves, there was neither any intention to consult the bank nor was the answer the answer of the bank. In point of fact, the application is not made to the Gloucestershire Banking Company, but to a manager of the Gloucestershire Banking Company. The answer is not an answer of the bank, but is an answer in the first person; it is not a representation of the bank at all, but is a representation made by Mr. T. B. Goddard (who no doubt was, in fact, the manager of the branch bank at Cheltenham) as to certain matters which

were within his personal knowledge, and as to which, whether they were true or whether they were false, he was pledging his personal knowledge to the person who made the inquiries of him. The answer is: "I say, in reply, that Sir William Russell, Bart., M.P., is the lord of the manor of Charlton Kings"—a thing which he, as a Cheltenham man, would know—"with a rent roll, I am told, of over 7,000*l.* per annum"—that is, giving the inquirer the benefit of that hearsay which he himself had received; and I am of opinion, he says, "that he is a kind of person who, if he undertakes a liability, is likely to pay it"—shewing that, throughout the whole matter, he is applied to, and he is answering as an individual person who, no doubt, because he is manager, and being manager, has peculiar means of information to which the people of the Sheffield and Hallamshire Bank very reasonably had recourse. That is a very different thing from giving an answer which, if it could be so in point of law, even purports or was understood in any-way to bind the bank whose manager he was. Supposing, as it has been very well suggested by my brother Bramwell on the bench, instead of the man being the manager of the Gloucestershire Bank at Cheltenham, he had ceased to be the manager for twenty-four hours, the inquiry might just as well have been addressed to him, and the answer might just as well have been made by him, and would have been of exactly the same value. All the knowledge that he had as manager he would have had as ex-manager; and, supposing him to be an honest man, and to have intended to tell the truth, all the information that he could convey to them would have been just as valuable twenty-four hours after he ceased to fill the situation as it was twenty-four hours before, when he happened to fill it. I say that merely for the purpose of illustrating that there is a very great difference between applying to a man for a question to be answered who happens to fill or chances to fill a particular capacity, and applying to him in that particular capacity, and asking him in that capacity to answer a question, because he may have certain means of knowledge to which it is exceedingly reasonable th course should be had. I am of opinio only upon the general ground, but up specific particular ground of this cas there is no pretence for saying th was either applied to as the bank o he answered as the bank. If there be any such contention, Mr. Day w if any man in the world could, hav tinguished between what he calls a instrument and an agent. He has no such distinction, nor can he mak such distinction. An instrument i thing, but a living instrument is an a and this manager, Mr. Goddard, wa the mere instrument in the sense in a pen is the instrument in the hanc writes, but he was a living instrume the sense of an agent; and if he w agent, then, on the grounds I have al stated, he was not the principal, and not make those who were his prin liable as such. In fact, as I under the judgment of the Court below, rightly read it, they do not say th was the agent; they say, he was the itself. I confess, with the greatest sible respect for the Judges of the Qu Bench, I am unable to understand in sense a man can be something th neither principal nor agent.

This judgment, of course, implies we are of opinion that the public c of the bank is entitled to have a nc entered in his favour. I do not s follows, but the reasoning upon I have endeavoured to base that de implies that.

I am of opinion that a different clusion must be arrived at with r to Mr. Goddard, and that, at all ev with regard to Mr. Goddard, he signed this representation—is foun the jury to have signed it—with a k ledge that it was untrue, and with tinct intention to mislead those, wh they were, to whose knowledge that representation should come. The pla is a person to whose knowledge i come, and upon him it has acted vourably to the extent of the loss c money. Therefore it appears to clearly, as far as Mr. Goddard is cerned, the action can be maintaine the whole sum that the plaintiff ha

and that at all events, as against Mr. Goddard, he will be entitled to retain the verdict that he has got.

The judgment of the Court below must be reversed as far as the bank is concerned, but must be affirmed as far as the original liability of Mr. Goddard is concerned.

BRAMWELL, B., PIGOTT, B., GROVE, J., and DENMAN, J., concurred.

CLEASBY, B.—I concur on the last ground mentioned by my Lord.

Judgment affirmed as to the defendant Goddard, and reversed as to the defendant Jewesbury.

Attorneys—Harper, Broad & Battcock, for plaintiff; Waterhouse & Winterbotham, for defendants.

1874 Jan. 27. } CAPE *v.* SCOTT AND ANOTHER.

Common pour cause de Vicinage—Cattle damage feasant—Commoner—Distress.

If cattle which are levant and couchant upon a common stray on to another, there being no inclosure, a commoner upon the latter common has no right to distrain them. He has no right to take the law into his hands, the cattle being upon the common under some colour of right.

Declaration.—For that the defendants on certain land bounded on the north-east by common and waste lands of the manor of Caldbeck, on the north-west by parts of the common and waste lands of the manor of Uldale, and on the south by Skiddaw Forest, took the goods of the plaintiff, that is to say, twenty Hadwick sheep, and unjustly detained the same against sureties and pledges until, &c.

The defendants avowed and made cognizance—

2. That the said goods in the declaration mentioned were sheep, and that the said land on which the said sheep were taken was a portion of the common and waste land of the manor of Caldbeck, in the county of Cumberland, and the defendant Richard Scott well avows, and the defendant, Thomas Hudson, as bailiff and agent of the said Richard Scott, well acknowledges the taking of the said sheep, because they say that before and at the time when, &c., the said defendant, Richard Scott, was and still is the possessor and occupier of certain lands and tenements in the manor and parish of Caldbeck, in the said county of Cumberland, the occupiers whereof have for thirty years before this suit enjoyed as of right, and without interruption, common of pasture over the said common or waste lands of the said manor of Caldbeck, for all their sheep and other commonable cattle, levant and couchant, upon their said lands and tenements, so in the possession and occupation of Richard Scott as aforesaid, at all times of the year, as to the said lands and tenements of the said Richard Scott appertaining, and because the said sheep in the declaration mentioned at the said time when, &c., were wrongfully in and upon the said common and waste lands of the said manor of Caldbeck, depasturing and doing damage there, so that the defendant Richard Scott could not enjoy his said right of common as he otherwise could and might have done, the defendant, Richard Scott, well avows, and the defendant, Thomas Hudson, as his bailiff and agent, well acknowledges the taking of the said sheep on the said common or waste lands of the said manor of Caldbeck, and justly, &c., as a distress for the said damage.

4. That the said goods in the declaration mentioned were sheep, and that the said land on which the said sheep were taken was a portion of the common and waste lands of the Manor of Caldbeck, in the said county of Cumberland, and the defendant, Richard Scott, well avows, and the defendant, Thomas Hudson, well acknowledges the taking of the said sheep because they say that before and at the time when, &c., the said defendant, Richard Scott, was and still is seized in fee of certain lands and tenements in the manor and parish of Caldbeck, and that he and all those whose estate he then had therein from time immemorial enjoyed common and pasture over the said common or waste lands of the said manor of Caldbeck, for all their sheep and other commonable cattle, levant and couchant,

upon the said lands and tenements of the said Richard Scott, at all times of the year as to the said lands and tenements of the said Richard Scott appertaining, and because the said sheep in the declaration mentioned at the time when, &c., were wrongfully in and upon the said common and waste lands of the said manor of Caldbeck, depasturing and doing damage thereto, so that the defendant, Richard Scott, could not enjoy his said right of common as he otherwise could and might have done, the defendant, Richard Scott, well avows, and the defendant, Thomas Hudson, as his bailiff and agent, well acknowledges the taking of the said sheep in the said common or waste land in the said manor of Caldbeck, and justly, &c., as a distress for the said damage.

The plaintiff pleaded, seventhly, as to said second and fourth avowries and cognizances, among others that the said land, in the declaration mentioned, was at the time when, &c., a common hereinafter called Caldbeck Common, forming part of the common and waste lands of the manor of Caldbeck, and by and from time immemorial had been contiguous to a common hereinafter called Uldale Common forming part of the common and waste land of the manor of Uldale, and had never been divided or separated from the last-mentioned common by any hedge or fence whatsoever, sufficient to prevent cattle from time to time feeding on either common, going or escaping on to the other common, and the plaintiff says that from time immemorial the cattle duly put on either of the said commons in exercise of rights of common over such common, have gone and escaped and been accustomed to go and escape on to the other common, and there to intermix with and feed with the cattle from time to time feeding on such other common, and the plaintiff further says that the plaintiff is possessed of a messuage and lands in the parish of Uldale, the occupiers of which for thirty years before this suit enjoyed as of right and without interruption, common of pasture over Uldale Common for all their cattle, levant and couchant, upon the said land of the plaintiff at all times of the year as to the said land of the plaintiff appertai And the plaintiff says that being in session of such messuage and lar aforesaid, just before the time when he put the said sheep being his own s levant and couchant, upon the said la the plaintiff upon the said Uldale mon in exercise of his said right of mon, and the said sheep of the pl afterwards and just before the said when, &c., of their own accord and out the knowledge and consent o plaintiff went and escaped out of th Uldale Common on to the said Cal Common, and intermixed and fed wi cattle then and there feeding on th Caldbeck Common, and remained an tinued on the said Caldbeck Comm the occasion aforesaid, without the k ledge of the plaintiff, and then neces and unavoidably a little trod dow depastured, &c., and necessarily damage, &c., as in the said avowrie cognizances respectively mentioned.

Eighth Plea. As to the said avo and cognizances of the defendant bered 2, 3, 4, 5, 6 and 7, the pl repeats the seventh plea, changin word thirty to sixty.

Demurrer and joinder.

Replication.—As to the pleas b plaintiff pleaded, and which are num 4, 5, 6, 7, 8 and 9, the defendants al that the avowries and cognizances h before mentioned are not merel respect of the said matters and a the said pleas attempted to be jus but also in respect of the said sheep tioned in the said pleas being more were levant and couchant on th land of the plaintiff, and also in re of the sheep put upon the said co of Uldale by all the persons having r of common of pasture thereon, being than the number of sheep proportio to the extent of the said comm Uldale as compared with the said co of Caldbeck, and also in respect c plaintiff having committed acts tioned in the said avowries and nizances, to a greater extent an other purposes than those mention the said pleas, and attempted t justified.

Demurrer and joinder.

Bompas, for the plaintiff.—The 7th plea is good. The passage at the end of the replication is calculated to embarrass and ought to be struck out. But, further, the replication raises the question whether a commoner can distrain the cattle of another on the ground that he has surcharged the common. It is contended that he cannot distrain for such a cause.

[BLACKBURN, J.—The judgment delivered by Lord Mansfield, C.J., in *Hall* v. *Harding* (1), is important upon that question. He cites the cases.]

Yes; and among others, *Robert Mary's Case* (2) in which it was determined "that an action on the case would lie," and Lord Mansfield further says—"But in *all* those remedies as the lord or the other commoners have a colour of right, the question whether he has *exceeded* that 'right,' must be determined by an indifferent and competent jurisdiction, and not by the commoner himself. The commoner therefore could not lawfully *distrain*, for that would be making himself his own judge in a matter that was uncertain in itself, and taking an immediate execution upon his own judgment." He also referred to *Morris's Case* (3); *Atkinson* v. *Teasdale* (4); *Pritchard* v. *Powell* (5); *Jones* v. *Robin* (6); *Ellis* v. *Rowles* (7); *Hoddesdon* v. *Gresil* (8); *Dixon* v. *James* (9); and *Corbet's Case* (10).

Charles Crompton, for the defendant.—There was no other remedy but to distrain. It is consistent with the 7th plea that there were a larger number of cattle upon Uldale common than could properly be put there. Although the plaintiff may only have put on his proper number, the lord or some other commoners may have put on more than they ought, so that the common may have been surcharged as alleged in the replication. Common *pour cause de vicinage* is only an excuse for a trespass. *Sir Miles Corbet's Case* (10) shews that only the proper number of cattle can be put on by all the commoners. The two bodies of commoners must be looked at; if one of such bodies puts more cattle on to the common than ought to be there, the right of common *pour cause de vicinage* is gone. It is a mere excuse for a trespass, a permitted trespass; but the plaintiff cannot have the same right on Caldbeck common as the commoners of that common have. *Hall* v. *Harding* (1) is not an authority for the decision of this case, for that was not a case of common *pour cause de vicinage*. In that case both plaintiff and defendant had an interest in the herbage, while here there has been a trespass in respect of which the defendant might distrain.

BLACKBURN, J.—I think we need not trouble Mr. Bompas to reply. The real question has resolved itself into this, whether upon replevin, the avowant is entitled to a return of the cattle. In order to establish that, he must shew that he distrained them damage feasant when he had a right to distrain cattle damage feasant. In the case of *Hall* v. *Harding* (1), where the cattle had been distrained damage feasant by one commoner and the other had surcharged by putting on more cattle than the common could support, it was held that the distress could not be made, because a man must not take the remedy into his own hands, where there is a colour of right and a doubtful question, and that there was in that case a doubtful question. Then the result is that upon the whole the right of distress turned upon this, whenever there was a colour of right for putting in the cattle a commoner cannot distrain, because it would be judging for himself in a question that should be considered upon a more competent enquiry. But where cattle are put upon the common without any colour or pretence of right, the commoner may distrain them, and therefore he may distrain the cattle of a stranger. The plaintiff had a colour of right for putting on his cattle, although in fact he might have exceeded the due number, therefore the Court held the distress illegal and bad.

(1) 4 Burr. 2426.
(2) 9 Co. 112.
(3) Godb. 185.
(4) 3 Wils. 278.
(5) 10 Q.B. Rep. 589; s. c. 15 Law J. Rep. (N.S.) Q.B. 166.
(6) 10 Q.B. Rep. 581; s. c. 15 Law J. Rep. (N.S.) Q.B. 15.
(7) Willes 638.
(8) Yelv. 104.
(9) Freeman 273; s. c. 2 Lutw. 1238.
(10) 7 Rep. 5*a*.

Now, in the present case, the commoner seeks to distrain the cattle of the plaintiff on the ground that his original right being to put his cattle on Uldale common which is adjacent to Caldbeck common, the two commons lying open to each other, and by prescriptive right there being a common *pour cause de vicinage*, and that the plaintiff having put his cattle on to his own common, they strayed on to the adjoining common, and were there distrained by the defendant on the allegation that the plaintiff had put on more cattle than he had a right to do. The very point to be made out is just a matter which is debateable and doubtful, and which would depend upon an investigation to see whether the plaintiff had originally put on to the common any more cattle than he had a right to do. And that is exactly what Lord Mansfield says, "that where it is a doubtful matter and there is a colour of right, the commoner shall not take it into his own hands, and determine it himself, and distrain damage feasant." That reason applies exactly to the facts of this case. The matter which the avowant has taken upon himself to determine in his own favour is that he may have a summary remedy, and that is precisely the same matter which Lord Mansfield in *Hall* v. *Harding* (1) said, was a matter which was to be investigated by the Courts of law and not by the person who summarily takes it into his own hands.

Then Lord Wensleydale in delivering the judgment in *Jones* v. *Robin* (6) says, "This right, though not a profit *à prendre*, nor properly an easement, but rather an excuse for a trespass, has its origin from a presumed mutual grant or covenant between the owners of each farm, that neither of them or their servants should sue the other or his tenants, or distrain or perhaps even drive their cattle away so long as the farms should respectively lie open to each other." That irrevocable license given by prescription can only be put an end to by enclosing the farms, so that they would not lie open to each other, but while they did remain open, that irrevocable license gives a man as much colour of right for his cattle to go on to the adjoining farm, as there would be when they were upon his own farm, wit having wandered, as against a fellow-moner. If he has done wrong in pu on too many cattle, he has done w against his own fellow-commoner as i as against those of the neighbou common. According to *Hall* v. *Ha* (1), his own fellow-commoner ca decide this case against him, because a doubtful matter of a colour of right not to be determined by either part his own behalf. Nor could the adjoi owner decide the question in the self-manner and distrain. It seems to that it needs an authority to shew th can do so.

Then there was some question as t lord having a right to distrain when is a colour of right. We will decide when the question arises, but in *G on Distress*, p. 23, it is determined tha lord cannot distrain where a man i in his cattle under some colour of of common. We need not further ac to that.

I am therefore of opinion that the tress was a wrongful distress, and c quently that the plaintiff is entitle judgment.

I should only further observe tha last three lines of the replication as new assignment are to be understoo struck out, because we cannot under what they are, and they simply emba the issue which we have to dispose o

QUAIN, J.—I am of the same opi although I had some doubt whethe commoner cannot distrain upon the who has surcharged to the extent to w it is put in the case now before Yet Mr. Crompton has cited no auth nor has he given any reason satisfa to my mind, why the rule that ap between commoners of the same com does not also apply where there is mon *pour cause de vicinage*. Now clearly decided in *Dixon* v. *James* (9) where one commoner surcharges, an commoner cannot distrain. It was p Lord Mansfield, in *Hill* v. *Harding* (1 the ground that the commoner puttin the cattle had a colour of right, and in case a distress was not a proper ren Here it is stated in the replication

the plaintiff, a commoner of Uldale Common, did surcharge that common, that is, he put on more cattle, I suppose, than Uldale Common could supply. Then those cattle being there, there being a common *pour cause de vicinage*, between the two commons, they strayed on to Caldbeck Common, and a commoner of Caldbeck Common distrained. He therefore seeks to put himself in a better position with regard to those cattle which strayed by virtue of this right, whatever it may be, than he would have had if he had been a commoner of Uldale Common itself.

If the general principle which is laid down in *Hall* v. *Harding* (1) is correct, the plaintiff there having done nothing except under a colour of right, having surcharged his own common, it seems to follow that the commoner of Caldbeck Common, when the cattle strayed there by virtue of this right of inter-commonage, has no better right against the owner of these cattle than he would have had if he had been a commoner of Uldale Common. No authority is cited to shew that he was in a better position, and although I had some doubt about it at first, I have come to the conclusion that no valid distinction can be suggested between the two. If, where a man puts his cattle on a common under colour of right, distress is not the proper remedy, then it follows, as it seems to me, that these cattle having by virtue of this right strayed upon the other common, the right which one of those commoners has is only the same right to bring his action for surcharging Uldale Common, as he would have had against a commoner of Caldbeck Common if he had done the same thing. I think that the plaintiff is entitled to our judgment.

ARCHIBALD, J.—I am of the same opinion. I think it is impossible to distinguish this case, in principle, from the case of *Hall* v. *Harding* (1). The only mode in which it has been attempted to distinguish it by Mr. Crompton, is that this right of common *pour cause de vicinage* was, in its origin, a mere excuse for a trespass; but although that may explain the way in which the right came originally into existence, yet unquestionably it has grown into a right by a sort of prescriptive license, always subject to this, that by an act, lawful in itself, the lord may enclose, or the person who has a common on the land upon which the cattle are put may enclose, so as to prevent his own cattle from straying, and so by that means put an end to the right. But upon the principle which is laid down in *Hall* v. *Harding* (1), as applied to the circumstances of this case, there was clearly here a colour of right. I think that principle is not confined to cases of this description, but is one which has many analogies in law, that where there is a colour of right the party shall not take the law into his own hands; therefore, whether or not there is any other remedy, this is not the remedy applicable to this case, and our judgment ought to be for the plaintiff.

Judgment for plaintiff.

Attorneys—Bischoff & Co., agents for Waugh, Cockermouth, for plaintiff; Sharp & Ullithorne, for defendant.

1874. Feb. 3. { SNEESBY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Negligence—Railway Company—Cattle frightened and escaping from Control—Remoteness of Damage.

Cattle belonging to the plaintiff were at about eleven o'clock at night driven along an occupation road which crossed a branch line of the defendants' railway on a level. As they were passing over the crossing they became frightened owing to a number of trucks being shunted by the defendants in a negligent manner, and six or seven of them escaped from the control of their drovers and were not seen till four o'clock in the morning, when they were found dead or dying on the main line of the defendants' railway, which they appeared to have reached owing to the defects in the fence of a garden and orchard adjoining the railway:—Held, *that there was sufficient evidence, that the death of the cattle was the natural result of the defendants' negligence.*

Declaration—That the defendants were possessed of a railway and certain railway

sidings near Wakefield, and of divers trucks, used by them for the conveyance of goods on and over the railway and the sidings, and the sidings crossed an occupation road near Wakefield on a level, yet the defendants so carelessly and negligently managed their railway and sidings and the trucks that the trucks were suddenly driven down upon and against certain cattle of the plaintiffs, while the cattle were lawfully passing over the crossing along the occupation road without any notice or other warning having been given by the servants of the defendants to the persons then in charge of the same or other precaution having been taken; and by reason of the premises some of the cattle were divided from the persons in charge of them, and were frightened and escaped on to another part of the railway, and were killed by a passing train, and others of the cattle, being so frightened and divided from the persons in charge of them, ran along the occupation road to a place where the fences dividing the road from the railway were imperfect, and escaped through a fence on to certain land, and thence through another place on to the railway and were killed by a passing train, and were lost to the plaintiff; and the plaintiff has been deprived of the profits which would have accrued to him from the sale of the cattle. Second count for breach of duty by the defendants in not maintaining, according to the Railways Clauses Consolidation Act, a proper fence between land taken by them and an occupation road, whereby the plaintiff's cattle escaped on to the railway, and were killed by a passing train.

Pleas—Not guilty; that the cattle were not the plaintiff's; to the first count, that the cattle were not lawfully passing on the crossing; to the second count, that the cattle were not lawfully passing on the occupation road; and, secondly, that the defendants were not, so far as the railway was concerned, subject to the Railways Clauses Consolidation Act. Joinder of issue.

At the trial before the late Bovill, C.J., at the Leeds Spring Assizes, 1873, the following facts were admitted.

The plaintiff was a cattle dealer, carry-

ing on business at Sheffield, and regu
attending the Wakefield cattle ma
On the night of the 24th of Septe
1872, a drove of twenty-nine fat b
belonging to the plaintiff, were drive
four or five persons through an arc
under the main line of the defend
railway, and then along an occup
road which crossed a branch line o
railway on a level. Near this l
crossing there were sidings, and
the cattle were crossing the railw
number of trucks were shunted b
defendants down the sidings in a negl
manner so as to frighten the cattle
cause part of them to escape from
in charge of them. The drovers
unable to overtake six or seven of t
and they were not seen till four o'
in the morning, when they were f
dead or dying on the main branch o
defendants' line, which they had rea
by passing through a garden and orc
in the occupation of a tenant of
defendants, and adjoining the rail
The fence of this garden was not
cient to keep the cattle from gettin
or from going on to the railway
they had gone in. The Chief Ju
directed a nonsuit, with leave for
plaintiff to move to enter a verdic
153*l.* 13*s.*; the Court to draw infer
of fact. A rule having been obt
accordingly,

Price and *Beasley* shewed cause.—
plaintiff has no cause of action. As
ing that the manner in which the tr
were pushed down the siding was a
of negligence, the fact remains that
cattle were not injured by the trucks.
cattle got on to the main line by run
along the occupation road, and brea
through the fence of the garden
orchard. It may be that this fence
insufficient, but the company were u
no obligation to maintain it. By
Railways Clauses Act, 1845 (8
c. 20), s. 68, "The company are to
sufficient posts, rails, hedges or
fences for separating land taken from
use of the railway from the adjoining l
not so taken . . or the cattle of the ow
and occupiers thereof from stra
thereout." But this section has

construed to mean that the company are only bound to maintain the fence as between themselves and the owner of the ground, but that there is no corresponding obligation towards the public—*The Manchester and Sheffield Railway Company* v. *Wallis* (1). It cannot be doubted that if the cattle had been frightened by the servants of a different company there would have been no cause of action against the present defendants.

Field (*J. W. Mellor* with him) in support of the rule.—Assuming that the cattle were trespassing in the orchard, they were driven there by the negligence of the defendants' servants in shunting the trucks upon them, and causing them to escape from the care of those who had charge of them. In *Holbach* v. *Warner* (2) the plaintiff and defendant were possessed of adjoining closes, and the cause of action was that the occupiers of the defendant's close had been accustomed from time immemorial to make the hedges and fences between his close and the river Avon which ran between the closes, so that the cattle in the plaintiff's close should not come into the defendant's close, and the defendant did not repair the hedges, &c., whereby the plaintiff's cattle went out of his close into that close, and from thence into the close of one Wilcocks, who sued and recovered against him in trespass; and in *Powell* v. *Salisbury* (3), where the plaintiff declared in case against the defendant for not repairing his fences, by which the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of an haystack, it was held that the damage was not too remote, and that the action was maintainable.

[QUAIN, J., referred to *Sedgwick on Damages*, 4th ed., p. 98, where the case is mentioned of a shopkeeper who was held liable for selling spirits to a slave, by means of which the slave became intoxicated, lay out and died. BLACKBURN, J.—It could scarcely be said that a publican who sold brandy to a railway guard would be responsible to the widows of passengers killed by the guard's negligence.]

The case of *Lee* v. *Riley* (4), where, through the defect of a gate which the defendant was bound to repair, the defendant's horse got out of the defendant's farm into an occupation road, and strayed into plaintiff's field, where it kicked the plaintiff's horse, and the damage was held not to be too remote, is, if anything, stronger than the present case. If it had not been for the mismanagement of the trucks the cattle would have escaped uninjured. He also cited *Hill* v. *The New River Company* (5) and *Lawrence* v. *Jenkins* (6).

BLACKBURN, J.—This is a case which I think we may decide at once. I am of opinion that the defendants, the railway company, are liable, and that the rule must be made absolute. It appears that a drove of cattle belonging to the plaintiff became frightened owing to the negligence of the company's servants in allowing some trucks to run down an incline. The cattle were scattered in different directions, and although the drovers recovered control over some of them, the rest escaped, and were not found till the afternoon of the next day upon another part of the defendants' railway when they were dead or dying from injuries which they had received. Now it seems that the cattle after escaping from control got on to the railway through a defective fence in a garden and orchard in the occupation of a tenant of the defendants, but I think that we must look at the case, and I will treat it, as if the cattle had gone off on to another unfenced railway and had been there injured. The question is, are the defendants responsible for the death of the cattle? The well-known rule as to the liability for damage is *causa proxima non remota spectatur*, and Lord Bacon says—"It were infinite for the law to consider the causes of actions and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by

(1) 14 Com. B. Rep. 213; s. c. 23 Law J. Rep. (N.S.) C.P. 35.
(2) Cro. Jac. 665.
(3) 2 Y. & J. 391.
(4) 34 Law J. Rep. (N.S.) C.P. 212.
(5) 18 Law Times Rep. 355.
(6) 42 Law J. Rep. (N.S.) Q.B. 147.

that without looking to any further degree." Bac. Max. Reg. 1. The rule is occasionally difficult of application, but in the present case I think it clear that when the cattle got off and escaped from control without the fault of the plaintiff, that whatever reasonably resulted from their being unprotected was the *causa proxima* of the escape. In earlier times it might have been held that one who frightened a tame falcon so as to cause it to escape from its owner was answerable to the owner, for there the loss of the falcon is the direct result of anything which causes it to escape from custody. But in the case of tame animals like cattle, the question will be, was their loss or death the natural result of their being deprived of control? Now it is quite natural that such animals, if left at large, should wander about and fall into ditches, and a cow if uncontrolled would quite naturally make its way on to a line of railway and run the risk of being killed there. In the present case it is admitted cattle were driven out of the control of the plaintiff by the defendants' negligence, and as I think that the accident which subsequently befell them was the natural result of their being deprived of control, the defendants must be held to be responsible. I do not think that any of the cases which have been referred to are in point, except that of *Lawrence* v. *Jenkins* (6), which, so far as it goes, is an authority in favour of the plaintiff.

QUAIN, J.—I am of the same opinion. I think that the death of the cattle was the proximate and natural result of the defendants' negligence. The rule *causa proxima non remota spectatur*, has been often stated, but there is considerable difficulty in applying it. All that can be said is that in actions of tort the defendant is liable for all the natural and reasonable consequencs of his carelessness. Examples of this rule are to be found in the case of the squib thrown among a crowd of persons, and then being tossed about till it exploded and injured the plaintiff. The distinction always is between those cases in which the damage immediately results from the incautious and illegal act and those where it has no direct connection with any such act. Applying this principle, I think tha damage to the plaintiff was not so re from the injurious act as to prevent from recovering. Here the injuriou was, that about eleven o'clock at the plaintiff's cattle were frightene an accident which was the result o defendants' carelessness, and esca from control wandered into a dang place, where they were killed by a pa train. I think these facts are sufficie bring the case within the authorities to shew that the damage is not too re from the defendants' breach of duty.

ARCHIBALD, J.—I am of the opinion. I think that as soon as the are understood, there can be no doul to the application of the law. It s clear that it was impossible to regai control of the cattle before the acc happened, for there is nothing to that every proper effort was not mac the drivers to overtake them. The of the cattle would not have occurre less they had been removed from co and it was therefore the result o negligence which was the original of their escape.

Rule absolu

Attorneys—Clarke & Son, agents for Wain & Mander, Wakefield, for plaintiff; C Woodcock & Ryland, agents for T. A. Grundy & Co., Manchester, for defendant

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1874. Jan. 17, 31.

THE QUEEN ON THE P CUTION OF THE SI COLDFIELD OVERSEER THE ASTON UNION AS MENT COMMITTEE *v.* LONDON AND NORTH TERN RAILWAY COMPA

Quarter Sessions — Appeal — Pow state Case.

Upon an application to enter an spite an appeal, the Court of Qu Sessions has no power to state a sp case; and the Court of Queen's Bencl take no notice of the facts of a case so s

[For the report of the above cas 43 Law J. Rep. (N.S.) M.C. 57.]

1874. Jan. 29. } RAEBURN *v.* ANDREW.

Security for Costs—Plaintiff resident in Scotland—Judgment Extensions Act (31 & 32 *Vict. c.* 54), *s.* 2.

By s. 2 *of* 31 & 32 *Vict. c.* 54, *a certificate of a judgment obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer, may be registered in Edinburgh, and from the date of registration shall be of the same force and effect as a decreet of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate, as if the judgment of which it is a certificate had been a decreet originally pronounced in the Court of Session, &c.:*—Held, *that the effect of this enactment is that the reason for the old practice of staying proceedings unless a plaintiff who permanently resides in Scotland gives security for costs, has now ceased, and that proceedings will not be now stayed on such grounds.*

This was an application for a rule calling upon the plaintiff to shew cause why the proceedings in the action should not be stayed, unless the plaintiff gave security for costs in case a verdict was given against him.

The plaintiff resided in Scotland, and a summons was taken out by the defendant to compel the plaintiff to give security. The Master refused to make any order, and upon appeal to Martin B., at Chambers, the learned Judge referred the matter to the Court.

Lanyon moved for the rule.—There is no reason why the prevailing practice should be altered. The defendant has a right to call upon the plaintiff to give costs, because although the 31 & 32 Vict. c. 54. s. 2, enables him, on production at the office in Edinburgh of a certificate of the judgment which he has obtained, to register such certificate, he is not thereby placed in the same position as he would be if the plaintiff had been resident in England, in which case they would be on equal terms. The practice is described in 2 *Ch. Arch. Pr.* 12 ed. p. 1,414, as follows—"If the plaintiff, whether sueing in an individual or in a representative capacity, and whether for his own benefit or that of another, permanently reside abroad, or even in Ireland or Scotland, or elsewhere out of the jurisdiction of the Court, the Court or a Judge will stay the proceedings in the action until he give security for costs to the satisfaction of one of the Masters." All the cases are there referred to. So here the master should have stayed the proceeding. The defendant has not the same security as the plaintiff has. The 31 & 32 Vict. c. 54 in itself affords some evidence that it was not intended to deprive the defendant of his right to have the proceedings stayed, unless the plaintiff gave security for costs. The fifth section refers to the certificate mentioned in s. 2, and provides that it shall not be necessary for any plaintiff in any of the aforesaid Courts in England, resident in Ireland or Scotland, or any plaintiff in any of the aforesaid Courts in Ireland resident in England or Scotland, in any proceeding had or taken on such certificate, to find security for costs in respect of such residence, unless on special grounds a Judge or the Court shall otherwise order. There being a special provision as to the security for costs in this matter, it must be presumed that it was not intended that the old practice should be altered. There is no actual decision on the point.

Lewis appeared to shew cause in the first instance.

BLACKBURN, J.—I think that there is no occasion to grant a rule *nisi*. This seems to be plain when we look to the origin of the rule of practice which is to be found in *Pray* v. *Edie* (1). In that case a rule had been obtained to shew cause why the proceedings in the cause should not be stayed till the plaintiff, who resided in Georgia, in North America, gave security for the costs, in case a verdict was given against him. Cause was shewn against the rule on the ground that such a rule was never granted unless under very peculiar circumstances, and some cases were referred to, but Buller, J., said: "There have been several late cases to the contrary, and for this reason,

(1) 1 Term Rep. 267.

that if a verdict be given against the plaintiff he is not within the reach of our law so as to have process served upon him for the costs," and the rule was made absolute. And the practice was applied in *Fitzgerald* v. *Whitmore* (2), where the plaintiff was an Irishman, residing in Ireland. But now the question is whether the reason for the practice, as explained by Buller, J., has not ceased. By the 31 & 32 Vict. c. 54, plaintiffs resident in Ireland and Scotland are brought within the reach of our law. The substance of the enactment in s. 1, as to Ireland, and in s. 2, as to Scotland, is that where a judgment has been obtained in England for costs, upon the production of a certificate of such judgment in the office in Edinburgh or Dublin respectively, registration may be had and process issued in the Courts in those countries respectively. The practice is thus assimilated to that which prevailed in the county palatine of Lancaster, into which, until the passing of the Common Law Procedure Act, 1852, s. 122, our writs did not run; it has not been the practice to require a plaintiff resident in the county palatine to give security for costs. Mr. Lanyon contends that the defendant has not the same remedy as the plaintiff has, because the process of the Courts in Scotland is not identical with the process of our Courts, but I think that we must take it to be as effective as our process is. I think, therefore, that the reason for the old practice having ceased, *cessante ratione cessat lex*. The Master was right in refusing to stay proceedings. I do not think that upon the enactment in the fifth section any sound argument can be founded to shew that the Legislature intended the old practice should continue in use.

QUAIN, J.—I am of the same opinion. The reason for the old practice is that which is given by Buller, J., in *Pray* v. *Edie* (1). That reason is now gone, and the practice founded upon it is no longer applicable to the case now before us. A defendant has now the power of issuing process against an Irishman or Scotchman bringing an action against him in our Courts, and the rule of practice is abolished so far as such p tiffs are concerned. I was at first s at what has been said upon the section. Probably there was some whether security for costs might n required in cases coming withir proviso in s. 3, which provides for cates of extracts from decrees obtai the Court of Session being register England, but at any rate the fifth s does not shew that the old practice i Courts is to be kept up.

ARCHIBALD, J.—I am of the opinion. The practice of staying ceedings, unless security for co given, has grown up gradually. *Tidd's Practice*, 8th ed. p. 57 find how it has grown up, is there stated as follows: "But, although a plaintiff is not compella give security for costs merely foreigner if he reside in this co yet, whether he be a foreigner or n if he reside abroad out of the reach process of the Court, the proceeding in general, be stayed till his retu security be given for the payme costs." The reason, therefore, is th process of the Court will not reac as he is resident abroad. But we that a remedy is given to the defe by the 31 & 32 Vict. c. 54, and the r having ceased, so also does the pr cease. I agree with what my br Quain has said as to the fifth section third section provides that no certi shall be registered more than t months after the date of the de &c., and the fifth section provides t shall not be necessary for any pl under the circumstances mentioned t to find security for costs.

Rule refu

Attorneys—Lewis, Munns & Co., for pla
Hollams, Son & Coward, for defendan

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(2) 1 Term Rep. 362.

1874. Feb. 16. } WALL *v.* THE CITY OF LONDON REAL PROPERTY COMPANY.

Action—Damages—Nominal or Substantial—Agreement to grant an Entrance—Failure to carry out Agreement.

The plaintiff was entitled to the residue of a lease of the Bell Inn, part of which had been underlet. The defendants became the assignees of the underlease and of a term of 100 *years, the reversion of the lease. They had contracted for the purchase of the freehold and other premises, all of which were shortly to be conveyed to them. The plaintiff agreed to surrender part of the premises in his lease, and the defendants agreed to grant to him a certain entrance which should be made upon the premises which the defendants had contracted to purchase, and which he was to enjoy during the residue of the term for which he held the Bell. The defendants also agreed within eight months to execute a lease of the entrance with a covenant for quiet enjoyment. The plaintiff carried out his agreement to the substantial advantage of the defendants, who also made the entrance and put the plaintiff into possession of it. The defendants bona fide believed that they had power to do all that they promised to do, but they were unable to give possession of the entrance to the plaintiff, inasmuch as part of the ground upon which it was made, turned out to be the property of other persons:—* Held, *that the plaintiff was entitled to maintain an action against the defendants for more than nominal damages, but that the rule of law laid down in* Flureau *v.* Thornhill, 2 *Wm. Bl.* 1,078, *did not apply to the case.*

This was a CASE stated by an arbitrator.

1. By deed, dated the 14th day of January, 1857, made between James Pascall of the one part and John Pearce of the other part, certain premises therein described consisting of "The Bell Tavern" and a House adjoining thereto, No. 4, Bell Yard, were leased by the said James Pascall to the said John Pearce, for twenty-seven years, from the 24th June, 1856, in consideration of a premium of 400*l.*, and at a rent of 126*l.* per annum.

2. By an indenture dated the 23rd day of November, 1868, the plaintiff had become the assignee of this term in consideration of a premium of 2,750*l.*

3. By an indenture of underlease dated the 10th day of January, 1870, the house No. 4, Bell Yard (except the cellar and a room on the first floor), was underlet by the plaintiff to Robert Johnson, for thirteen and a half years (less three days) from the 25th December, 1869, at 75*l.* per annum.

4. The plaintiff then was and has continued to be up to the present time, and still is in the occupation of the "Bell Tavern," and was and is carrying on there his trade and business as a tavern keeper and licensed victualler.

5. At some time previous to the making of the agreement of the 6th September, 1871, hereinafter mentioned, the reversion in all the premises comprised in the said lease of the 14th January, 1857, immediately expectant on the determination of that lease, had become vested in the defendants, and they had also become entitled to the term created by the underlease of the 10th January, 1870.

6. The defendants caused to be served upon the plaintiff a notice or notices under the Building Acts, for the purpose of enabling them to make certain alterations in the premises No. 4, Bell Yard, and in other premises belonging to the defendants adjoining the "Bell Tavern." Differences arose thereon between the plaintiff and the defendants, and in the result an agreement bearing date the 6th day of September, 1871, was entered into between them.

7. The questions in the present case relate only to the new entrance to the "Bell Tavern," from St. Michael's Alley, and subject thereto and to some minor questions immaterial for the purposes of this case, it may be taken that the said agreement has been performed and carried into effect.

8. The defendants have pulled down No. 4, Bell Yard, and erected new buildings upon the site thereof, and have derived substantial and permanent benefit from the said agreement.

9. The defendants in order to carry out the provisions of Article 5 of the said agreement removed these walls over a width of four feet, so as to make a new

side entrance four feet wide, to a luncheon bar in the "Bell Tavern," as provided in article 8 of the said agreement. The work was completed by the 20th September, 1871, but was not opened for the use of customers until after the completion by the plaintiff of the alterations in his premises, mentioned in the next succeeding paragraphs of this case.

10. For the purpose of complying on his part with the provisions of article 8 of the said agreement, and in order to make the new entrance available and have the intended benefit therefrom, the plaintiff incurred certain expenses in and about making a new side door to the "Bell Tavern," fitting up a luncheon bar and otherwise.

11. The new entrance was first opened for the use of customers upon the 19th day of February, 1872, and remained open during the 19th and part of the 20th February, 1872, and was used by customers of the plaintiff on those days as an entrance to the new luncheon bar. But in the course of the latter days the following notice was served upon the plaintiff (among others) on behalf of the rector, churchwardens and trustees of the parish of St. Michael, Cornhill, and by their authority—

"To the City of Londen Real Property Company Limited, Mr. Edwin A. B. Crockett, their surveyor, Mr. Charles Wall, the tenant of the 'Bell' public-house, and to all others whom it may concern:

"Take notice that you, and each and every of you, are hereby required by the rector, churchwardens and trustees of the parish of St. Michael, Cornhill, in the City of London, forthwith to reinstate the boundary wall of the said parish of St. Michael, Cornhill, at the east end of St. Michael's Alley, Cornhill, adjoining the 'Bell' publichouse, and to shut up and effectually close the door leading from the said publichouse to the area, the property of the said parish, running from the said publichouse to St. Michael's Alley aforesaid. And further, that in the event of your non-compliance with this notice within forty-eight hours, it is the intention of the said rector, churchwardens and trustees, immediately thereafter to enclose the area and shut up the same. Dated this 20th day of February, 1872. Yours, &c.

"Hy Hoppe,

"3, Sun Court, Cornhill, vestry clerk and solicitor for the said parish, rector, churchwardens and trustees."

12. This notice not having been complied with, the said rector, churchwardens and trustees, some two or three days afterwards, caused two hoardings to be erected, one across the whole width of the new entrance. These hoardings have remained there ever since, and from the time of their erection the plaintiff and his customers have had no access to the tavern.

13. So far as concerns a strip of land of the width of about one foot eleven inches next St. Michael's Alley, and of two feet three inches next the "Bell Tavern," the said parish authorities were clearly justified in giving the said notice and in erecting so much of the said hoarding as fences off the same. The piece of land in question had been duly conveyed to them by a Mr. Arthur Saltmarshe, by deed dated the 1st August, 1857, and has ever since continued and still is vested in them in fee.

14. The parochial authorities claim to be entitled to the wall between the piece of land and St. Michael's Alley, which had been so removed by the defendants as aforesaid, and contend that the defendants were not entitled to remove the said wall or to make any entrance or give any access to the "Bell Tavern" through the said wall or over its site. It has not been made out to my satisfaction whether this claim and contention is well founded or not, but it appears to me to be immaterial, for the purposes of the present case, to decide this, inasmuch as I find as a fact that an entrance would have been of no practical use or value to the plaintiff, and that the damage to him has not been to any appreciable extent increased by the erection of the hoardings.

15. The defendants before and at the time they made the agreement of the 6th September, 1871, and from thence until and after the 20th February, 1872, were in the *bona fide* belief that they were owners in fee simple in possession of the whole of the land and that they were entitled to remove the said walls and to make such entrance four feet

wide and grant the use of it. The conveyance under which they held the adjoining property on the north of that land purported to convey to them the whole of the said land, including the walls so pulled down by them, and they had no notice of the conveyance by Mr. Saltmarshe in August, 1857. I find as a fact that no negligence or want of due care can be imputed to the defendants for not becoming aware of the last mentioned conveyance, or for acting on the assumption that they were themselves owners in fee simple of the whole.

16. No negligence or want of due care can be imputed to the plaintiff.

17. The action is brought upon the agreement of the 6th September, 1871, and the breaches alleged (so far as they are material to this case), are that the defendants did not "make an entrance to the said 'Bell Tavern' from the said St. Michael's Alley, four feet wide, nor grant to the plaintiff the use of the said entrance from St. Michael's Alley, at all times during the residue of the said term for which the plaintiff was possessed of the said 'Bell Tavern,' nor execute a lease at the expense of the defendants of (*inter alia*) the said entrance to the 'Bell Tavern' as aforesaid, to the plaintiff, his executors, administrators and assigns." The plaintiff claimed as special damage arising from this, that he had been unable to obtain an entrance to the luncheon bar before mentioned, and had been unable to use the luncheon bar, and had thereby lost the moneys expended by him in the building, construction and fitting up of the said luncheon bar, and had lost other divers large sums of money and profits which he would have derived from the use thereof.

To this the defendants pleaded a denial of the agreement as alleged and a denial of the breaches.

18. No lease of the said entrance to the luncheon bar or of any part of the land over which the same was to be made, has been executed by the defendants to the plaintiff under article 9 of the agreement of the 6th September, 1871. The action was commenced upon the 9th day of May, 1872.

19. It is to be assumed for the purposes of this case, that if the new entrance had remained open and unobstructed, and if during the residue of the term created by the lease of the 14th January, 1857, it could have been used by customers in conformity with article 8 of the agreement; the plaintiff or any other person carrying on the business of a tavern keeper and licensed victualler in the "Bell Tavern," could and would have made a certain additional profit by reason of such entrance way and the access thereby given to the luncheon bar, and it is further to be assumed that such lease would in that case have been of greater value in the market than it would have been without such entrance and access.

20. The plaintiff contends—

First. That under the agreement of the 6th September, 1871, he was entitled to have the use and benefit of the new entrance as an access to his luncheon bar, and for the purposes contemplated by that agreement, during the whole residue of the term of the lease of the 14th January, 1857, and is entitled to estimate his damages upon that footing.

Second. That in estimating his damages upon that footing he is entitled to such a sum as will fairly compensate him as the occupier of and as carrying on his business in the "Bell Tavern," for the loss of the profits which he might have expected to make if he had the use and benefit of such new entrance.

Third. That if not entitled to this extent, he is entitled to the difference in value in the market between the value which his premises would have had in the market, if the defendants had been able to carry out and had carried out their agreement, and their value without such entrance and access.

Fourth. That at any rate he is entitled to damages in respect of his expenditure as mentioned in paragraph 10 of this case, or so much of such expenditure as for want of such entrance and access has become useless and unprofitable.

21. The defendants contend—

First. That the action is not maintainable except in respect of their not having executed the formal lease by the appointed day.

Second. That for this breach the plaintiff is entitled to recover nominal damages only, inasmuch as he was entitled only to a

lease of the said entrance subject to covenants and conditions similar to the covenants and conditions contained in the said indenture of lease of the 14th January, 1857, in which indenture the covenant for quiet enjoyment is limited to the acts of the lessor, his executors, administrators or assigns, or of any other person or persons lawfully claiming or to claim by, from or under him or them.

Third. That even if the plaintiff is entitled to substantial damages upon this or any of the other breaches alleged in the declaration, he is not entitled to recover more than so much of his expenditure mentioned in paragraph 10 of this case as become useless and unprofitable for want of such entrance, way and access.

22. The Court is to be at liberty to draw all inferences of fact which a jury might draw.

23. The questions for the opinion of the Court are—

First. Whether the plaintiff is entitled to nominal damages only.

Second. Whether the plaintiff, if entitled to substantial damages, is right in either or any of his contentions as to the manner of estimating such damages stated in paragraph 20 of this case, or whether such damages. ought to be assessed upon any other and what principle.

The Court is respectfully requested to remit this case to me with its opinion thereon, so that I may proceed to make my final award upon the matter so referred to me.

The following extracts from the agreement of the 6th of September, 1871, are taken from the written judgment of the Court—

By the recitals in the agreement of the 6th of September, 1871, it appeared that the plaintiff was entitled to the residue of a lease for twenty-seven years, from 1857, of the Bell Inn situated in Bell Yard, part of which had been underlet. That the defendants had become assignees of that under lease, and also of a term for 150 years, being the reversion immediately expectant on the lease of the Bell Inn vested in the plaintiff.

There was then a recital that the defendants had contracted for the purchase of the freehold of the Bell Inn together with other premises, situated in the Bell Yard, and that the same would sl be conveyed to them in fee simple that for the purpose of enabling th fendants to make alterations both i Bell Inn and in the other premises, tracted to be sold of them, it had agreed that the plaintiff should surr part of the premises in his lease, and the agreement should be entered thereafter expressed. The operative of the agreement, as far as material that it is agreed that the defendants sl *forthwith* give a grant to the plainti the term thereinafter mentioned, of, *alia*, the use and enjoyment of an ent to the Bell from St. Michael's All shewn upon the plan attached to the a ment. This entrance was on the pre contracted to be purchased by the de ants, and formed no part of the Bell

There were then stipulations tha plaintiff should surrender part of leasehold interest in the Bell Inn, that the defendants should make al tions described in the agreement, amongst others, that the defendants sl remove a portion of the existing bui between St. Michael's Alley and the Inn, and make an entrance to the four feet wide, and should grant to plaintiff the use of the said entran all times during the residue of the t for which he held the Bell subje certain provisions.

Then followed an agreement tha defendants should complete part o alterations within six months, and sl within eight months execute a lease pepper-corn rent to the plaintiff of, *alia*, the entrance aforesaid for a ter years, co-extensive with the term which he held the Bell, and contai covenants and conditions similar to t contained in his present lease.

One of the covenants in that lease v covenant by the lessor, that the l should quietly enjoy the premises wit disturbance from the lessor, or t claiming under him.

The Special Case was argued Jan. 20) by—

J. Browne (*Ledgard* with him), fo plaintiff.

Watkin Williams argued for th fendants.

In consequence of the special nature of the case, and the point upon which the judgment of the Court turned, it is not considered that the arguments need be reported.

The following authorities were cited—*Flureau* v. *Thornhill* (1), *Roper* v. *Coombes* (2), *Souter* v. *Drake* (3), *Sikes* v. *Wild* (4), *De Medina* v. *Norman* (5), *Stranks* v. *St. John* (6), *Woodfall's Landlord and Tenant*, 9*th ed.* 568, *Dart's Vendors and Purchasers*, 540, *Sugden's Vendors and Purchasers*, 599, *Lock* v. *Furze* (7), *Pounsett* v. *Fuller* (8), *Smith's Landlord and Tenant*, 139, *Church* v. *Brown* (9), *Bandy* v. *Cartwright* (10), *Winterbottom* v. *Ingham* (11).

Cur. adv. vult.

The judgment of the Court (12) was (on Feb. 16) delivered by

BLACKBURN, J.—The answers to the questions in this case depend upon the true construction of a very special agreement made between the parties on the 6th of September, 1871. [His Lordship then read those parts of the agreement which are set out above, and which follow the Special Case.] He then continued as follows—Such being this agreement, it appears that the plaintiff did surrender the part of his premises; that the defendants pulled them down and erected other buildings in their place, and have, as the case finds, derived substantial and permanent benefit from the agreement. They also completed the alterations, and in fact removed the part of the buildings between the Bell Inn and St. Michael's Alley, and made the entrance four feet wide as stipulated for, and put the plaintiff in possession of it. But the day after they had done so, the rector and churchwardens stopped up the entrance. It is found as a fact, that the rector and churchwardens were owners in fee of so much of the entrance as to make the residue of no practical use. It is stated that this portion of the entrance had been conveyed to the rector and churchwardens by Mr. Arthur Saltmarsh in fee, by a deed dated the 1st of August, 1857. It is not expressly stated, but we may infer that Saltmarsh was one of those through whom the persons who had contracted to sell the adjoining premises to the defendants made title. He certainly was not a person claiming through the defendants. It is expressly found in the case that the defendants *bona fide* believed that they had title to do all that they promised to do, that they had no notice of the conveyance by Saltmarsh, and that no negligence or want of due care can be imputed to the defendants. No lease has been executed. Under these circumstances the questions asked in the case are—

First. Whether the plaintiff is entitled to nominal damages only?

Second. On what principle the damages are to be assessed?

It is not necessary to wait for the decision of the House of Lords in *Bain* v. *Fothergill* (13), now standing for judgment in that house, as we think that the rule in *Flureau* v. *Thornhill* (1) cannot possibly apply to a case like the present where it appears on the face of the agreement that the defendants had not yet got any title, and that no abstract of title was to be waited for, but that the plaintiff was forthwith to execute his part of the agreement, and it appears did in fact execute it in a way that can never be undone, and which, as it is found, has conferred on the defendants substantial and permanent benefit. And this was scarcely contested on the argument. A more plausible point was made on account of the terms of the covenants in the lease which the defendants were to

(1) 2 Wm. Bl. 1078.
(2) 6 B. & C. 534.
(3) 5 B. & Ad. 992.
(4) 4 B. & S. 421; s. c. 32 Law J. Rep. (N.S.) Q.B. 375.
(5) 9 Mee. & W. 820; s. c. 11 Law J. Rep. (N.S.) Exch. 320.
(6) 36 Law J. Rep. (N.S.) C.P. 118.
(7) 19 Com. B. Rep. N.S. 96; s. c. 34 Law J. Rep. (N.S.) C.P. 201.
(8) 17 Com. B. Rep. 660; s. c. 25 Law J. Rep. (N.S.) C.P. 145.
(9) 15 Ves. 258.
(10) 8 Exch. Rep. 913; s. c. 22 Law J. Rep. (N.S.) Exch. 285.
(11) 7 Q.B. Rep. 611; s. c. 14 Law J. Rep. (N.S.) Q.B. 298.
(12) Blackburn, J.; Quain, J.; and Archibald, J.
(13) 40 Law J. Rep. (N.S.) Exch. 34.

grant to the plaintiff. And it was argued that the promise as to the defendant's title and power to grant to be implied from the agreement to grant the plaintiff this entrance, must be cut down to a promise to the same limited extent as that in the lease. We do not, however, think that we ought to put this construction on the agreement. It appears on the face of the agreement, that at the time when the defendants agreed forthwith to give and grant to the plaintiff the use and enjoyment of the entrance, they were purchasers who expected to have a title conveyed to them, but had not yet got it, and the plaintiff was in consideration of this grant immediately and without waiting to see what title they should get, to give up his property. It is impossible to suppose that the plaintiff intended to part with it merely for a promise that the defendants should hereafter grant him this entrance, if they should succeed in getting title thereto, and that if they could not, he was to have nothing.

We think that we may well hold that the true meaning of this particular agreement is that the promise as between the plaintiff and defendants was absolute, but that the covenant to be inserted in the lease which would run with the land and regulate the rights of the assignees of the lease was to be restricted.

We answer the first question by saying that the plaintiff is not confined to nominal damages only. To the second we answer that the arbitrator must apply the general rule of common law, and ascertain, as well as he can, what the pecuniary amount is of the difference between the present state of things, and what it would have been if the contract had been performed, and that the plaintiff had got a title to this entrance.

The various matters mentioned in the case are all material in estimating what that difference is, but do not in themselves form the measure of it.

Judgment accordingly.

Attorneys—Symes, Sandilands & Co., for plaintiff; Tathams, Curling & Pym, for defendants.

1874. Jan. 24. { MUSGRAVE *v.* THE INCLOSURE COMMISSIONERS FOR ENGLAND AND WALES.

General Inclosure Act (8 *&* 9 *Vict. c.* 118), *ss.* 27, 33, 34, 47, 75, 76, 77—*Quasi Right of Common claimed by Lord—Omission to dispute Claim before Valuer—Disallowance of Claim—Provisional Order.*

By the General Inclosure Act (8 *&* 9 *Vict. c.* 118), *s.* 27, *power is given to commissioners appointed under the Act by provisional order to set forth the terms and conditions on which they shall be of opinion that the inclosure should be made, and, in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, &c., should be allotted to the lord of the manor in respect of his right and interest in the soil either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be inclosed, as the case may appear to the commissioners to require, or as the parties interested with the approbation of the commissioners may have agreed. . . . By sections* 33, 34, *a valuer is to be appointed, who* (*section* 46) *is to hold meetings for the examination of claims; and by section* 47 *all persons claiming any common or other right or interest, in any land proposed to be inclosed, are to deliver their claims in writing to the valuer; and no claim shall be received by the valuer after the last meeting to be held for that purpose* (*of which notice shall be given*), *except for some special cause to be allowed by the commissioners. By section* 48 *the valuer is to hold meetings, and examine and decide upon the claims subject to appeal to the assistant commissioner.*

The plaintiff was lord and owner of the soil in the waste of a manor, and also owner of demesne lands consisting of seven different farms. A provisional order was made for the inclosure of the waste, which directed that one-sixteenth in value of the lands

to be inclosed should be allotted to the plaintiff as lord of the manor in lieu of his right and interest in the soil exclusively of his right to the mines, &c., under the same:—Held, *first, that the words "right of pasturage which may have been usually enjoyed by the lord or his tenants," must be taken to mean rights of common or pasturage, de facto enjoyed by the lord and his tenants in respect of the demesne lands, for such a period as but for the fact that the lord was the freeholder both of the dominant and servient tenement, would be evidence of an immemorial right. Secondly, that the provisional order being silent as to any such rights must be assumed to have omitted to take them into account in the allotment to the lord.*

The plaintiff having sent in claims to pasturage over different parts of the waste in respect of his seven farms, no objection was made before the valuer and assistant commissioner to one of these claims:—Held, *that these officers had no power in the absence of any such objection to disallow the claim.*

This was an action upon a feigned issue pursuant to section 56 of the General Inclosure Act (8 & 9 Vict. c. 118), to try whether the plaintiff was entitled to common of pasture in respect of certain freehold farms in the manor of Kirkoswald, Cumberland.

The action came on for trial at the Cumberland Summer Assizes, 1866, when a verdict was by consent entered for the plaintiff subject to the opinion of the Court on a Special Case to be settled by an arbitrator.

The following were the material facts found by the arbitrator—

5. The plaintiff is lord of the manor of Kirkoswald, which is co-extensive with the township of Kirkoswald, in the parish of Kirkoswald, in the county of Cumberland, and as such lord he is seised of four tracts of waste land, parcel of the manor, and lying within the township of Kirkoswald, called Harescengh Fell, containing 2,343 a. 1r. 10p.; Viol Moor, containing 127a. 1r. 3p.; Tod Bank Hill, containing 7a. 2r. 25p.; and Berry Moor, containing 12a. 2r. 33p.; subject to such rights of common, of pasture, or rights of pasture as can be legally established over them.

6. The plaintiff is also seised of certain farms and lands situate in the township and manor of Kirkoswald, viz.—1, A farm consisting of lands called respectively High Mains and Low Mains; 2, a farm called Fog Close, or Fog Closes, sometimes called the Fog, and consisting of lands called respectively High Fog Closes and Low Fog Closes; 3, a farm called the Demesne Farm; 4, a farm called Housegills, sometimes High Housegill and Low Housegill; 5, a farm called Park's Farm, sometimes Park House Farm, consisting of lands formerly called respectively Park's Farm and Lodge Park Farm; 6, a farm called High Bank Hill; and 7, certain woodlands.

7. These farms and woodlands, together with the manor of Kirkoswald, have been held by the plaintiff and his ancestors for many years last past. No evidence was adduced to shew that the manor had ever been held under a title separate and distinct from the farms and woodlands. Several of the leases refer to the farms and woodlands as portions of the demesnes of the manor, and all the farms and woodlands are in fact demesnes of the manor.

8. The township of Kirkoswald is divided into the High Quarter and Low Quarter. The High Quarter comprises Harescengh Fell, Viol Moor and Tod Bank Hill; the Low Quarter comprises Berry Moor and the farms and woodlands of the plaintiff above mentioned.

9. An inclosure of the four tracts of waste was commenced under the General Inclosure Act (8 & 9 Vict. c. 118) in the year 1860, and is still pending.

10. The defendants issued their provisional order under section 27 of the Act, dated the 25th of April, 1861.

The provisional order, after reciting that the plaintiff, as lord of the manor of Kirkoswald, was entitled to the soil of the waste lands, declared the following to be the terms and conditions on which they were of opinion that the proposed inclosure should be made, that is to say—

That four acres on Berry Moor, at such spot as the valuer shall select, be allotted for the labouring poor.

And that one-sixteenth part in value of the said lands, to include the ground where the limestone crops out, be allotted under the provisions of the said Acts to the said Sir George Musgrave, as lord of the said manor, in lieu of his right and interest in the soil of the said lands, to be enclosed, exclusively of his right and interest in all mines, minerals, stone and other substrata under the same.

That a right to enter the lands when inclosed for the purpose of opening, working or winning such mines, minerals, stone and other substrata, be reserved to such lord, compensation to be made by the person exercising such right for any damage to the surface which may thereby be done.

And that there be reserved to the lord of the manor all manner of game upon the lands to be inclosed, together with the right of hunting, hawking and fowling over the same, with full power and authority to enter upon the land for the convenient exercise of such rights.

11. The claims of persons claiming to be interested in the tracts were duly delivered to the valuer appointed in the inclosure, and amongst them the plaintiff claimed rights of common of pasture over all the four tracts, in respect of all the farms and woodlands above mentioned.

The plaintiff's claim in regard to the farms and woodlands was objected to in the following form—"Your claim is objected to for Haresceugh Fell, Viol Moor, Tod Bank Hill, for the Mains Farm, Demesne ditto, High Bank Hill ditto, Woods, for the Parks Farm by Walton; Housegills by Joseph Longrigg. Objected to for Haresceugh Fell and Tod Bank Hill."

13. The valuer's determination, on hearing the claims, disallowed certain of them and allowed others. All the claims made in respect of the Mains Farm were disallowed.

14–22. The plaintiff gave notice of dissatisfaction with the valuer's determination. Upon appeal from the valuer's determination, the assistant inclosure commissioner to whom the matter was referred, determined, under section 55 of the Act, as follows—That the claim of the plaintiff in respect of the Mains Farm, containing 257a. 2r. 15p., be disallowed; that his claim in respect of the Demesne Farm, containing 181a. 2r. 38p., be allowed over Haresceugh Fell, and that the remainder of the claim be disallowed.

24. In regard to the Mains Farm containing 257a. 2r. 15p., in respect of which the entire claim was disallowed by the assistant commissioner,

The arbitrator found—

25. That Mains Farm is situate about three or four miles from Haresceugh Fell. The tenants who held the farm prior to the year 1826 are dead. In the year 1826 John Longrigg took the farm and held it till 1859. George Carruthers then took the farm, and held it until the year 1866.

26–28. In the year 1828, Longrigg turned a mare from the Mains for one summer into Haresceugh Fell, and also sent some young horses to the Fell at the same time, and they were sent there on more than one occasion. He also sent a pony to the Fell in the summer of the years 1844 and 1845. He also sent from the Mains sixteen or eighteen sheep to the Fell for one summer, when he sent the mare there. George Carruthers also sent some sheep from the Mains to Haresceugh Fell during the whole summer of 1859, and also during the years 1860, 1861, and 1864.

29. Occasionally during the eight years ending about the year 1844, Longrigg turned some sheep from the Mains to Viol Moor, and wintered them on the Mains. They were driven to Viol Moor sometimes through the Parks and sometimes through Housegills. Longrigg did not keep a Fell flock. The way-going sheep on the Mains were not sent to Haresceugh Fell because there was better pasture on the Mains.

30. In the year 1858, about two years before the commencement of the present inclosure, the plaintiff entered into an agreement with G. Carruthers for letting him the farm, and Carruthers thereupon covenanted to keep it up and maintain the right of the plaintiff upon Haresceugh Fell by sending yearly, and every year, more or less stock to depasture on the portions of the waste belonging to the High and Low Quarters.

31. Leases referred to in an appendix were put in evidence, by which the Mains Farm was let, "together with all

pastures, feedings, commons of pasture and husbandry ways thereunto belonging." In one of the leases dated the 28th of September, 1727, the Lodge Park and the Mains were leased subject to an agreement that the tenant shall have liberty at all seasonable times of the year to drive cattle and carry lime through the lands, now in lease to David Graham, as soon as the said lease shall expire, to and from the Fell. Another lease, dated the 7th of April, 1753, by which the farm called Oak Parks was leased for fourteen years, contained a proviso that it should be lawful during the term, to and for the farmers of the Lodge Park and Mains and their agents and servants, to carry lime from the Fell through the said farm, and likewise drive the sheep through the same to and from the Fell. [The case set out other old leases, and evidence of acts of user, to prove the exercise by the tenants of the right of pasturage in respect of each of the farms.]

32 and 33. As to Fog Close, containing 422 acres, in respect of which the entire claim was disallowed by the Assistant Commissioners, the case set out evidence of user over the Fell by the tenants from 1807 to 1862.

34. Leases of Old Parks Farm, dated 1767, 1776, 1779, 1785, 1791, contain a proviso that the tenants of that farm should allow the farmers of the Mains and of Fog Close the privilege of a way through the said farm, in as full and ample a manner as they had heretofore used and enjoyed the same.

35–50. These paragraphs stated evidence of user as to Demesne and to the other farms.

51. It was contended on the part of the plaintiff that in the circumstances stated in this case, he is entitled, independently of any evidence of enjoyment of pasturage by himself or his tenants, to claim as a person interested, in respect of a right of pasturage for all cattle, levant and couchant, on the said farms and woodlands.. That, at all events, he is entitled so to claim in respect of such right of pasturage on the demesne lands.

52. That in the event of the Court determining that proof of any enjoyment is necessary to support the right, it has been shewn by the facts so found that the occupiers of the farms have in right and on behalf of the plaintiff sufficiently used and enjoyed the privilege of depasturing the wastes, and that it is not necessary for him to prove such enjoyment of pasturage as is required by law in the case of commoners claiming rights of common over the lords' wastes, and that it is sufficient for him to give such evidence of enjoyment as would in the case of a right once found to exist be sufficient to rebut an intention to abandon the right, and that at all events these propositions are true of the demesne lands. And it was further contended that as all the four tracts are waste of the same manor, it must be held that they are all subject to the same rights of common or rights of pasturage as between all the owners of common right land situate within the manor.

54. On the part of the defendants it was contended that the leases which were produced from the custody of the plaintiff are not legal evidence to shew that the farms above mentioned are demesne land of the manor of Kirkoswald, or that any of the farms are entitled to rights of pasturage over the wastes of the manor.

55. It was further contended on the part of the defendants that, inasmuch as the plaintiff is the owner of the said farms and woodlands, and also of the wastes over which his alleged rights of common or pasture are claimed in respect of such farms, all his rights in the tracts are merged in the freehold, or exerciseable only in respect of his ownership of the soil, and that such alleged rights do not separately exist in law. It was further contended that the plaintiff's right, if any, cannot exist independently of user; that the early acts of user were infrequent, and wanted notoriety; that the few animals turned on would have escaped the attention of the commoners, and would not have challenged enquiry; that in the year 1826 the cattle from the farms were not turned on as of right, but in consequence of the want of pasture on the farms, and that no person under the circumstances ventured to object to the trespass; and further, that the suspension of the exercise of the right for many years in succession is fatal to the

claims, and that the user of late years took place illegally and solely in consequence of the inclosure of Kirkoswald wastes, or other wastes in the neighbourhood having been contemplated or commenced, and that such user must be discarded from consideration.

56. It was further contended that the right of pasturage, if any, cannot be extended beyond the particular tract or tracts of waste over which it has been actually exercised, and that no user in respect of any of the farms or woodlands has been shewn over Tod Bank Hill nor over Berry Moor, except as to High Bank Hill Farm.

57. And lastly, that the conversion of land to plantations, and the continuous exclusion therefrom of all commonable cattle, and the severance of the plantations from the farms of which they were originally parcel, is conclusive evidence of an abandonment of all rights of common or pasturage in respect of such plantations, if any such rights ever existed.

The questions for the opinion of the Court are, first, whether the leases, or any of them, are admissible in evidence to shew that the farms of the plaintiff are demesne lands of his manor of Kirkoswald, or to shew that in respect of such farms he is entitled to rights of pasturage over the said four tracts of waste, or any of them. Secondly, whether the Provisional Order of the Inclosure Commissioners for England and Wales, issued in the matter of the Kirkoswald Inclosure of the 25th of April, 1861, has not debarred the plaintiff from the rights and interests under the inclosure claimed by him in the present action. Thirdly, whether the valuer had any jurisdiction to disallow the claim as to Berry Moor. Fourthly, whether the Assistant Commissioner had any jurisdiction to disallow the claim as to Berry Moor. Fifthly, whether the rights of common of pasture or rights of pasturage claimed by the plaintiff in the waste land of his manor, are not merged in the freehold of the waste land, or exerciseable only in respect of his ownership of the soil, and whether by reason of such merger he is not precluded from claiming any rights of pasturage in the waste in respect of the farms and woodlands, which together with the said waste land are now vested in him. Sixthly, whether in order to establish the rights of pasturage claimed by him, it is not necessary that the plaintiff should prove such exercise and enjoyment of the rights as is required by law in the case of commoners claiming rights of common of pasture over the lord's wastes, or whether the plaintiff is entitled to such rights independently of any such user or enjoyment. Seventhly, whether the conversion by the plaintiff of portions of his land into plantations, and his continuous exclusion therefrom of commonable cattle, is not sufficient evidence of the relinquishment or cesser of the rights of pasturage, if any, which theretofore existed in respect of such converted land. Eighthly, whether the plaintiff, in case he has established a right of pasturage over one or more of the tracts of waste in respect of his said farms and woodlands is not entitled in respect of the same farms and woodlands to similar rights over all the four tracts so lying within and parcel of his said manor. Ninthly, and whether in respect of the said farms and woodlands, or any of them, the plaintiff is entitled to rights of common or rights of pasturage over the said four tracts of waste, or any of them, so far as he has claimed such rights in this action. Tenthly, and generally upon the facts above stated, how the verdict upon the several issues in the said action ought to be entered.

Manisty (*Kemplay* with him), for the plaintiff.—The question in the present case turns upon the construction of different sections of the General Inclosure Act, 8 & 9 Vict. c. 118 (1). It is quite

(1) Sect. 27 of the General Inclosure Act (8 & 9 Vict. c. 118). "The commissioners, by provisional order under their seal, shall set forth the terms and conditions on which they shall be of opinion that the inclosure should be made. . . . . And in case the lord of the manor should be entitled to the soil of the land proposed to be inclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses in case the expenses shall, under the provisions hereinafter contained, be so directed to be paid by sale of land, and after deducting the allotments to be paid for public purposes, shall be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or

clear that the plaintiff as lord of the manor could claim an allotment not only in respect of his interest in the soil of the waste, but also in respect of the right of pasturage belonging to the farms upon his demesne lands. In *Arundell* v. *Lord Falmouth* (2), in the case of a private enclosure Act containing similar sections, the Court held that the lord had a two-fold interest, first, as lord of the soil; and secondly, in respect of that part of his estate which in the hands of another person would have been entitled to a right of common. Now confining the argument for the sake of convenience to the case of "The Mains Farm," it is immaterial whether the words "any right of pasturage which may have been usually enjoyed &c.," in section 27 be taken to mean the right to the surplus herbage which the lord has as owner of the soil (subject to the rights of the commoners) or the *quasi* right of common which he may claim as incident to his demesne lands. Under the first construction which is undoubtedly the right one, the *quasi* right of common is not touched by the provisional order, but may be considered as if it were claimed by some person other than the lord. Under the second construction the provisional order does not dispose of the claim, for the allotment is in respect of the ownership of the soil of the waste, and not of that of the demesne lands. Secondly,

interest in all or any of the mines, minerals, stone, and other substrata, under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord, or his tenants, or any other right or interest of such lord in the land to be inclosed as the case may appear to the commissioners to require, or as the parties interested with the approbation of the commissioners may have agreed," &c.

By sect. 48, after providing that a statement of all claims shall be delivered to the valuer, "the valuer shall give notice on the church door, ... and shall in such notice limit such time for the delivery of objections to claims as the commissioners, under the circumstances, of each inclosure shall think reasonable, and by order under their seal direct; or in case no direction shall have been given by the commissioners in this behalf, then such time as the valuer shall think reasonable, not being less in any case than twenty-one days after such notice shall have been given; and every person who shall object to a claim shall deliver his objection in writing to the valuer, and also deliver a copy of such objection at the place of abode of the claimant or his agent within the time limited for delivery of objections to claims as aforesaid; and no objection to any such claim shall be received by the valuer after the time so limited for the delivery of objections to claims, unless for some special cause to be allowed by the commissioners; and after the time limited for the delivery of claims shall have expired, the valuer shall cause fourteen days' notice to be given of the time and place of the meeting for the examination of such claims, and for the attendance of all parties concerned therein; and at such meeting the valuer shall proceed to examine into and determine such claims, and shall and may allow or disallow the same in whole or in part, and make such order therein as shall to him appear just," subject to appeal to the commissioners.

By sect. 76, "after the several allotments hereinbefore directed shall have been set out and made, and after making provision for the payment of the expenses by sale of land, in case the expenses shall be so directed to be paid, the valuer acting in the matter of any inclosure shall allot and award to the lord of the manor so much and such part of the land proposed to be inclosed as shall in the judgment of the valuer be equal (quantity and value considered), to such part of the residue of such land as shall be apportioned to his right or interest therein, according to the directions of the provisional order of the commissioners, in lieu of his right and interest in the soil of the said land, exclusive of any other allotments which may be made to such lord in lieu of or in satisfaction for any other rights or interests in such lands to which he may be entitled, and which shall not have been included in the estimate in such provisional order of his right and interest; and in case it shall have been declared by such provisional order that the right or interest of the lord has been estimated exclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under the land to be inclosed, then the valuer shall and may, on the request in writing of the lord, reserve or award to the lord such rights and easements for searching for, working and carrying away such mines, minerals, stone or other substrata, which shall not have been included in such estimate of his right and interest, subject to such provisions for compensation for damage to be done to the surface in the exercise of such rights and easements as by the valuer, with the approbation of the commissioners, shall be thought reasonable and as shall not be inconsistent as to the terms of such provisional order."

By sect. 77, "after the allotments hereinbefore directed shall have been set out and made, and after making provisions for all or any part of the expenses of the inclosure by sale of lands, in case all or any part of the expenses shall be so directed to be paid, the valuer acting in the matter of the inclosure shall divide, allot and award, all the remainder of the land to be inclosed unto and amongst the several persons who shall be interested therein, and in such shares and proportions as he shall adjudge and determine to be proportionate to the value of their respective rights and interests which shall have been claimed and allowed under the provisions hereinbefore contained."

(2) 2 M. & S. 440.

the evidence of user of the right of pasturage over the Fell is sufficient, having regard to the distance of the farm and the want of proper cattle to turn out. Thirdly, the right claimed over Berry Moor, not being objected to before the valuer, should have been allowed by him.

Herschell (*F. M. White* with him), for the defendants.—Upon the true construction of the provisional order, the plaintiff can claim no allotment for rights of common in respect of the farms. Under section 27, the order may make provision for rights of pasturage "usually enjoyed" by the lord, and these words apply to the *quasi* right of common claimed by the plaintiff—*Lloyd* v. *Powis* (3). The provisional order in the case expressly excludes minerals, and ought therefore to be taken to include rights of pasturage. The words, "right of pasturage usually enjoyed by the lord," apply to rights of the lord which he has acquired apart from his right as owner of the soil in the waste. Secondly, the evidence of user set out in the case shews only an occasional enjoyment which is not sufficient proof of the right claimed. Thirdly, with regard to the jurisdiction of the valuer to disallow claims, there is nothing in the Act to shew that his power to disallow them is confined to cases where the claims have been objected to. The claimant must make out his title.

Manisty in reply.

Blackburn, J.—I think we are able to deliver judgment upon this matter now, though the facts are a little complicated, and I may pass over some small points which will require to be disposed of afterwards. The first question, which is one of a general character, is—How are we to interpret the Inclosure Act, and particularly the 27th section. The scheme of the Act is that the lord of the manor has a veto in case of a proposal for inclosure; a certain majority of the persons interested must also assent before an inclosure can be effected, and the Inclosure Commissioners must also approve of it, and therefore the provisional order contains the terms which the Commissioners are prepared to sanction, and it really is a record of the terms on which the inclosure is to proceed if there is no objection on the part of the lord. The 27th section of the Act says that, "in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed (which is generally the case), the Commissioners, by their provisional order, "shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, &c., and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right or interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord, or his tenants, or any other right or interest of such lord in the land to be inclosed as the case may appear to the Commissioners to require, or as the parties interested, with the approbation of the Commissioners, may have agreed," &c. Now we have to see first what is the meaning of the words "right of pasturage which may have been usually enjoyed" by the lord or his tenants. The lord is, by supposition, in this case, owner of the soil in the waste which it is proposed to inclose, and, as such owner, would have the minerals under the soil. The legislature, in rather inartificial terms, has provided that his right to the minerals may be either included or excluded in the allotment made to him in respect of his right and interest in the soil. Afterwards come the words "any right of pasturage which may have been usually enjoyed by such lord or his tenants." What is the meaning of that? The owner of the soil, unless there is something to shew the contrary, as pasturage is incident to the soil, would enjoy it as part of the soil. When his right is subject to the rights of common of other persons, he still has the right, subject to this that he must exercise it so as not to interfere with the rights of other people. But it may happen that besides the right of pasturage, which he has as owner of the soil, the lord of the manor may become proprietor of a farm with a right of common attached to it, and he and his tenants con-

(3) 4 E. & B. 485; s. c. 24 Law J. Rep. (N.S.) Q.B. 145.

tinue to deal with the right of common on the farm as if it still existed; though, according to the technical rules of English law, when the owner of the fee simple of the dominant tenement is also owner of the ground on which the right is exercised, there cannot in strict law be any such right at all. But where the land, in respect of which such a right exists, has been severed and then brought together again, as where the lord buys back a farm, and when he gets it back, instead of taking a transfer to a trustee for himself, takes a transfer to himself, he thereby *de facto* loses the rights of common. At the same time, it is not an uncommon thing, and I take it to have been the case here, that the lord has demesne farms, which have always been his freehold, and which, therefore, could never strictly acquire a right of common; but, nevertheless, owing to this distinction not being recognised, the tenants of the lord's demesnes did *de facto* enjoy the right of common, just as if the freeholder was not possessed of the soil over which the right was exercised. The tenants of these farms did, in fact, enjoy rights of common just as if the lord had not been the owner of the common land. This being so, I cannot but construe the Act of Parliament when it speaks of "any right of pasturage which may have been usually enjoyed by such lord or his tenants," otherwise than as meaning such rights of pasturage as have been enjoyed in such a manner as—were it not for the technical rule that the lord being the freeholder of the dominant and servient tenements—could not have a right of common, would prove and establish a user, beyond the memory of man, of a right of common of pasturage over the waste. That, I think, is what is meant by the statute: that the Inclosure Commissioners, in their provisional order, may make an allotment to the lord of the manor in respect of his right and interest in the soil in the waste, including any rights of pasturage which he may have of the nature which I have described, so as to have done with the whole thing at once. Or they may say—"We will make an allotment to the lord in respect of his right and interest in the soil, but we will exclude from it any rights of pasturage which have been usually enjoyed by him or his tenants in respect of these farms," leaving him to come in in respect of these claims as if the dominant tenement had been vested in a trustee, so as to keep the estate in the waste and the estate in the farms separate and distinct from the legal estate. The first question we have to consider is whether in the provisional order in the present case they have included or excluded these rights of pasturage. If I were to hold that the provisional order had said that this allotment was in lieu of these *quasi* rights of pasturage as well as of the lord's right and interest in the soil, then upon this issue I must determine whether he has lost this *quasi* common of pasturage by assenting to the order for the purpose of the enclosure, and has lost his right to further compensation for these *quasi* rights of common, because they were taken into account in the allotment made under the provisional order. It is important to see, therefore, whether these rights of pasturage were included or excluded by the provisional order. The provisional order is framed in these terms —"That four acres in Berry Moor at such spot as the valuer shall select be allotted for the labouring poor, and that one sixteenth part in value of the said lands, to include the ground where the limestone crops out, be allotted under the provisions of the said acts to the said Sir George Musgrave, as lord of the said manor, in lieu of his right and interest in the soil of the said lands to be enclosed, exclusively of his right and interest in all mines, minerals, stone, and other substrata under the same." The provisional order is absolutely silent as to rights of pasturage, if any there may be, which have been "usually enjoyed by the lord or his tenants." It really comes round to this —if there are any such rights of pasturage in existence, and the provisional order does not say anything as to their being either included or excluded in the matter for which compensation is to be given, which are we to take to be the case? I have come to the conclusion that where nothing is said on the subject by the provisional order, these rights of pasturage cannot be taken to be included. Where we find a right of pasturage existing, which but for the technical objection

which I have mentioned, would be a separate right, I think that when we have a right which, except for the legal and technical objection that the same person is freeholder in both cases, would be a separate right independent of the soil, a right which if in a third person or trustee would not be considered an interest in the soil, but as a matter in respect of which an allotment could afterwards be made accordingly, there, unless there is something in the provisional order shewing an intention to include such a right, we ought not to hold it to be included. The words, "exclusive of any right of pasturage that may have been enjoyed by the lord or his tenants," ought to be carefully considered, and I take it they must mean enjoyed so long as would have established the right as against the rest of the tenants of the manor and the commoners which would generally be from time immemorial. What we have next to see is whether in respect of these different forms there was reasonable proof of such a right over these lands as would be covered by the terms, right of pasturage usually enjoyed, &c. I cannot agree with Mr. Herschell's argument that it means enjoyed continuously without let or interruption for a year down to the present day. I think that when in the words of section 77 the valuer makes allotments according to the value of the respective interests which shall have been claimed and allowed, it would be a fair question to submit to him, that supposing it to be established that the farm has had a right of common from time immemorial, yet that for twenty years or more, perhaps from the distance, or for some reason or other, the farmers did not think the right worth exercising, that this fact ought to be taken into account in making the allotment as bearing on the value of the right. I cannot think that the fact that the allotment has been neglected of late years deprives the claimant of all right to any allotment in respect of it.

We come now to the evidence that the right of pasturage was "usually enjoyed." (The learned Judge referred to the evidence in the case and stated that it led him to the conclusion that there was a right of pasturage in respect of Main's Farm over the Fell.) Then comes the qu which applies to six of these farms, the right of pasturage over Berry The question is, could the commiss and the valuer properly say when was no objection made to the which was sent in generally for farms so far as regards Berry M could they of their own motion w any objection from any third perso "we disallow the claims?" I a formed the impression that the val the time when he settled whethe claim should be allowed, settled how he would allot in consequence of it. when we look at section 77, claims be allowed or disallowed subject peal, and when they are settled an till then, some minute allotments be made, according to value, amor persons whose claims are allow disallowed, according to the val their respective rights and int "which have been claimed and al under the provisions hereinbefore tained." Now seeing that it is car provided that all parties interested the right to object, and that the are to be investigated afterwards, i tainly seems to me that a claim sho considered as admitted, if not object during the time when they are con ing whether claims shall be allow not, and that consequently the and the assistant commissioner h right to enter into the question an allow the rights claimed and not ob to, and that we should take it, as Berry Moor is concerned, that the ant is entitled to the right of con The amount is very small, only t acres, of which four are allotted for purposes, so that eight acres only ar divided among the claimants in r of these farms. I think the claim not have been disallowed, and th lord of the manor was entitled in r of Berry Moor.

DENMAN, J., and ARCHIBALD, J., conc

Judgment accordin

Attorneys—J. L. Morris, agent for Bleay Shepherd, Penrith, for plaintiff; White, & Co., for defendants.

1874.
Jan. 24.
Feb. 2.

ALLAN (*appellant*) *v.* THE OVERSEERS OF THE PARISH OF LIVERPOOL (*respondents*).
INMAN (*appellant*) *v.* THE OVERSEERS OF THE TOWNSHIP OF KIRKDALE (*respondents*).

Poor Rate—Occupier—Dock-sheds appropriated to Use of Shipowner—Rateability.

The appellants were rated as occupiers of a shed situate upon docks, within the rating parish. These docks were managed by a board, according to the provisions of a local Act, which by section 64 enacted that the board might from time to time, upon payment of such rents or other sums of money, and subject to such restrictions and regulations as they should think proper, set apart and appropriate any particular portion or any dock, sheds, &c., or any other works for the exclusive accommodation and use of any company, &c., engaged in carrying on any trade, who should be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed or conveyed by them, provided that every company, &c., to whom such exclusive accommodation should be afforded, and their vessels, crews, servants, &c., should be subject to the general rules and regulations of the board applicable to their docks, sheds, &c., and the vessels entering the same, and the crews and other persons employed in and about such vessels. By s. 82 the Board might construct such depots and sheds for the reception of goods, and might provide such other conveniences upon or near the quays as they should think expedient for the accommodation of the trade of the port of Liverpool, and might let any such sheds, and also any portion of the quays which with or without such sheds they might think fit to appropriate as special berths for ships, for such periods, and on such rents, terms, and conditions as they might deem expedient.

The appellants requested the board to appropriate a berth and other accommodation for their line of steamers, and in reply the board wrote a letter stating they had appropriated for the use of the steamers owned by the appellants the south side of the Wellington Dock, with the sheds attached, and had fixed a charge of 2s. 6d. per square yard per annum for the use of the shed space, such charge to commence from the date of their occupation. The appellants, in pursuance of this letter, used the berth, quay space and sheds appropriated to them for a number of years, paying the stipulated charges. The sheds, which were constructed on the quay, consisted of a range of quays, covered by one continuous roof, and sub-divided, by partitions reaching to the roof, into a store or shed, a transit shed, and two open sheds. The store shed was provided with doors and locks, and was used by the appellants for holding stores necessary for their ships when in port. The transit shed was situate at about the centre of the range of sheds, having open sheds at each end of it. There were sliding doors communicating at each end with the open sheds, and one on each side communicating with the roadway and the dock respectively. This shed was used for the reception of goods liable to duty, but upon which no duty had at the time been paid. By s. 88 of the Act, goods which have been more than forty-eight hours upon any dock quay are liable to pay a rental to the board of 5s. per hour; goods so lying in the appropriated sheds are liable to this charge, whether they be the goods of those to whom the sheds are appropriated or of any other person. Such charge was sometimes at the instance of the appellants exacted by the board from, and paid to the board, by the owners of goods, not the property of the appellants, but deposited on landing from the appellant's vessels in the sheds appropriated to them. Each door of the transit shed had two locks, the key of one lock was kept at the Custom House, and the key of the other by the appellants, whenever a vessel was discharging, and at all times during the day, the transit shed was open, and the servants of the board went in continually, and at their pleasure, for the purpose of examining the goods therein, or for any other purpose connected with their duties. When the sheds contained goods or ship stores belonging to the appellants they were watched at night by watchmen employed by the appellants:—

Held, *that the board had not parted with the occupation of any part of such sheds so as to render the appellants rateable in respect of such occupation.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 69.]

[IN THE EXCHEQUER CHAMBER.]

1874. Feb. 3. } KELLOCK *v.* ENTHOVEN.

Winding-up of Company—Contributory—Liability of Transferree of Shares on Implied Contract to Indemnify Transferror—Bankruptcy—Inspectorship Deed—Bankrupt Act, 1861 (24 & 25 *Vict. c.* 124. *s.* 153.)

On the 4th of September, 1865, *the plaintiff sold to the defendant twenty shares in a joint-stock company. On the 8th he executed a transfer to the defendant, who paid the purchase money and caused the transfer to be registered by the company on the 4th of December. On the 20th of March,* 1866, *the defendant transferred the shares to M. On the 18th of April,* 1866, *the company stopped payment, and on the 8th of May,* 1866, *was ordered to be wound up. On the 24th of July,* 1866, *M. was placed on the A. list of contributors, being the list of existing members. On the 30th of October,* 1866, *M. executed a deed of inspectorship. An order was made upon M. to pay a call of 40l. a share, but he did not pay, and the liquidators failed to get any payment out of his estate. On the 6th of December,* 1867, *the plaintiff and defendant were placed, in respect of the same shares, on the B. list of contributories, being the list of past members. On the 27th of December,* 1866, *the defendant executed a deed of inspectorship under section* 192 *of the Bankruptcy Act,* 1861, *which was registered on the 29th of December,* 1867. *On the 20th of March,* 1869, *the Court ordered the defendant to pay a call of 40l. a share, which he did not do, and on the 10th of May the plaintiff, in pursuance of an agreement of compromise made between himself and the official liquidator, paid the sum of 15l. per share in respect of the twenty shares sold by him to the defendant. The official liquidator proved under both deeds of inspectorship:* —Held, *affirming the judgment of the Court below, that the plaintiff was entitled to sue the defendant for the amount which he had paid to the official liquidator, and that the deed which the defendant had executed formed no defence to the action.*

This was error upon a judgment of the Queen's Bench on a Special Case stated for the opinion of that Court. The S Case will be found set out in full, 42 L Rep. (N.S.) Q.B. 174. It will be suff to state here that the action was brou recover the sum of 300*l.*, which the tiff, as a past member of a joint stock pany, called Barned's Banking Com had paid to the official liquidator c company in respect of shares of whi had been the proprietor. The con was formed in the summer of the 1865. On the 4th of September, the plaintiff sold twenty shares to tl fendant. On the 8th of Septembe defendant paid the purchase money a transfer was executed and regis by the defendant on the 4th of Dece 1865. His name was entered or register of shareholders. On the 2 March, 1866, he transferred the sha one Mozley, whose name was duly en on the register of shareholders. O 18th of April, 1866, the company st payment, and was ordered to be w up. On the 24th of July, 1866, M was placed on the A. list of contri ries as an "existing member." O 30th of October, 1866, he execut inspectorship deed, under which th cial liquidator proved, but obt nothing either from Mozley or fro estate, although a call of 40*l.* a was made by order of the Court. "existing members" being unab satisfy the contributions which we quired to be made by them, a lis made of persons who had not ceased members for a period of one year o wards prior to the date of the windi of the company. This list was calle list of persons in class B., and up were placed both the plaintiff and tl fendant. On the 27th of Dece 1866, the defendant executed a de inspectorship, under and in accor with the 192nd section of the Ban Act, 1861. The official liquidator p under that deed. The defendant w the 20th of March, 1869, ordered t a call of 40*l.* a share, but he did no nor has any part of the amount realized out of his estate. The pl compromised with the official liqui and paid an amount of 15*l.* per which was allowed by the Court of

cery. At the time of making the compromise, the plaintiff did not know that the defendant had executed the deed, nor that he had transferred the shares to Mozley. He sought to recover from the defendant 1,300*l.*, which was the amount of the payments of 15*l.* per share. The question was whether the plaintiff was entitled to recover that amount.

The Court of Queen's Bench gave judgment for the plaintiff.

The defendant brought error on that judgment.

Herschell (*Beresford* with him), for the defendant.—The question is whether the mere transfer of shares by the plaintiff enables him to call upon the defendant to indemnify him in respect of the sum which he has paid by way of compromise with the official liquidator. It was decided by the Court of Queen's Bench that there was an implied contract of indemnity, but it is difficult to see how that can be so. By section 38 of 25 & 26 Vict. c. 89, "in the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications following, that is to say," and then by sub-section 3—"No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act." The defendant and the plaintiff in the present case are both "past members," and their liability only arises upon the Court being satisfied that Mozley was unable to satisfy the contribution required of him. It is necessary that the Court must see that he is unable to pay, for if he could do so there would be no remedy against the past members. The official liquidator has proved under Mozley's deed of inspectorship, and also under that of the defendant; the company are barred from proceeding against the defendant, and it is impossible to suppose that the defendant ever intended to contract with the plaintiff that he would indemnify him in case the Court was satisfied that Mozley was not of ability to pay, and would pay him the very amount which he had paid.

[BRAMWELL, B.—Why should it be considered unreasonable that he should contract to perform all the duties of a shareholder which devolved upon him in respect of his shareholdership when he was a shareholder?]

It is against the spirit of the bankrupt law that such a contract of indemnity as this is, should be kept up against the defendant. In *Walker* v. *Bartlett* (1) the Court pointed out the distinction between that case and *Humble* v. *Langston* (2), namely, that in the latter the plaintiff claimed to be indemnified against all future calls after the defendant had parted with his interest; the Court of Exchequer decided that he could not support such a claim. In *Walker* v. *Bartlett* (1), the plaintiff claimed to be indemnified against the consequences of his name being allowed to remain on the register as holder of shares which he had sold to the defendant, and this Court decided in his favour, saying, that the principle upon which *Burnett* v. *Lynch* (3) was decided applied. The distinction pointed out above applies here, the plaintiff claiming to be indemnified against the liability which has fallen upon him after the defendant had parted with the shares and ceased to be a member. The Court of Queen's Bench thought that *Roberts* v. *Crowe* (4) governed this case, and no doubt it did so, except for the fact that there the question arose between an existing member and one upon the B. list; there was no re-transfer of the shares as there was here from the plaintiff to Mozley. In *Roberts* v. *Crowe* (4) Willes, J., referred to *Deering* v. *The Earl of Win-*

(1) 18 Com. B. Rep. 845; s. c. 25 Law J. Rep. (N.S.) C.P. 263.

(2) 7 Mee. & W. 517; s. c. 10 Law J. Rep. (N.S.) Exch. 442.

(3) 5 B. & C. 589; s. c. 4 Law J. Rep. K.B. 274.

(4) 41 Law J. Rep. (N.S.) C.P. 198; s. c. Law Rep. 7 C.B. 629.

chilsea (5), which was a case of joint suretyship upon a bond, and to *Mule* v. *Garrett* (6), where a lease had been signed, but it is submitted that neither of such cases is like the present.

[DENMAN, J.—In *Dent* v. *Nichalls* (7) we proceeded upon the assumption that the decision in this case was correct.]

But it may be overruled here. *Nevill's Case* (8) was also referred to by Willes, J., but at most it only amounts to a dictum of James, L.J., and the question which was really to be decided was, whether the compromise which had been entered into between the liquidator and the contributory upon the A. list, prevented the liquidator placing a past member upon the B. list; Mellish, L.J., treated it as a case of principal and surety, which the present case clearly is not. There is also a dictum in *Hudson's Case* (9).

[LORD COLERIDGE, C.J.—Willes, J., dealt with that in *Roberts* v. *Crowe* (4).]

The next question arises under the inspectorship deed of the defendant, executed on the 27th of December, 1866, and it is contended that the plaintiff cannot recover inasmuch as he might have proved under it. The liability of the defendant began when the order for winding-up was made, on the 8th of May, 1866; then by section 153 of 24 & 25 Vict. c. 134 (The Bankrupt Act, 1861), "if any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages, which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in prosecution of such bankruptcy, to direct such damages to be assessed by a jury, either before itself or in a Court of law, and to give all necessary directions for such purpose; and the amount of damage when assessed shall be provable as if due at the time of the bankruptcy." This section must be read together with sections 74, 75 and 76 of 25 and 26 Vict. c. 89, and then it will appear that the plaintiff might have proved this debt under the deed. The Court of Queen's Bench relied much upon *Ex parte Mendel, in re Moor* (10), which no doubt is an authority against the defendant.

Benjamin, for the plaintiff, was not called on to argue.

LORD COLERIDGE, C.J.—This is an appeal from the judgment of the Court of Queen's Bench on a case in which the material facts have been stated by Mr. Herschell with perfect accuracy as follows —It is an action between a former shareholder in a company, which has been wound up, and a transferree of certain shares which were sold to him, which shares the defendant, the transferree, afterwards transferred to a person of the name of Mozley, who became bankrupt, and the only dates which are material are those which Mr. Herschell gave us. The sale from the plaintiff to the defendant was upon the 4th of September, 1865, the transfer was executed upon the 8th, and the defendant became the registered owner upon the 4th of December, 1865. On the 20th of March, 1866, the defendant transferred to Mozley, who became bankrupt. On the 18th of April, 1866, the company stopped payment, and on the 8th of May the company was ordered to be wound up. Mozley became bankrupt in October, 1866, and the defendant became bankrupt on the 27th of December, 1866, and the liquidator proved against the estate of Mozley, and also proved against the estate of the defendant, and then came upon the plaintiff. The plaintiff had to pay 15*l.* a share in respect of these shares, and then the question is, whether he has a right to recover that 15*l.* a share against the defendant who was a mesne transferree in the chain of transfers that have taken place with regard to these shares. Under those circumstances the Court of Queen's Bench held that there was such a right, and they held further that the bankruptcy of the defendant in the action in which it was suggested that this debt might have been proved by the plaintiff, and there-

(5) 2 Bos. & P. 270.

(6) 39 Law J. Rep. (N.S.) Exch. 69; s. c. Law Rep. 5 Exch. 32.

(7) 29 Law Times, N.S. 536.

(8) 40 Law J. Rep. (N.S.) Chanc. 1; s. c. Law Rep. 8 Chanc. Ap. 43.

(9) 40 Law J. Rep. (N.S.) Chanc. 444; s. c. Law Rep. 12 Eq. 1.

(10) 33 Law J. Rep. (N.S.) Bankr. 14.

fore might have been extinguished, and which he was bound to have proved and got rid of in the bankruptcy of the defendant, was no answer to this claim.

Now with regard to the second point, which is a short and easy one, it is enough to say that it turns upon the words of the 24 & 25 Vict. c. 134. s. 153, and it is admitted by Mr. Herschell that unless the case of *Ex parte Mendell* (10), decided by Lord Westbury on appeal, can be distinguished from this case, that the statute has been interpreted in a way fatal to the contention of the defendant.

I am unable to distinguish this case either in its facts, to some extent at all events, or in its principles, from *Ex parte Mendell* (10). The reasons of Lord Westbury's judgment, and the interpretation which he put upon the 153rd section, appear to me, with great respect, to be right, proper and sensible, and I have no difficulty in assenting to it as matter of authority, and also in thoroughly assenting to it as matter of sense and reason. Therefore, upon the short ground that Lord Westbury decided it as a Court of Appeal, we affirm the judgment of the Court of Queen's Bench, concurring entirely in the authority of the case of *Ex parte Mendell* (10).

Then there is the first point made by Mr. Herschell, whether, under these circumstances, there is a liability on the part of the defendant to pay the plaintiff. There have been several cases decided on this matter, and unless those cases can be distinguished from this case, it is admitted that they are in this sense authorities, that they are in point. *Walker* v. *Bartlett* (1) was a case decided in this Court, and if the facts had been exactly the same in *Walker* v. *Bartlett* (1), it would have been difficult for Mr. Herschell to have contended against the authority of that case, because it was a case in the Court of Exchequer Chamber, and would have been binding on us as a matter of authority. The judgment of the Court of Exchequer Chamber was delivered by Wightman, J., and his statement of the case is this—"The plaintiff was the owner of 500 shares in a mine worked by a company on what is called the cost-book principle, according to certain regulations which subjected the person registered as the owner of the shares in the cost-book, to the payment of calls in respect of such shares, as long as he continued registered in the book as the owner. The plaintiff, in pursuance of an agreement between him and the defendant, sold his shares to the latter, and delivered to him a document addressed to the secretary of the mine company, by which the plaintiff requested him to enter a transfer of the shares and all profit arising therefrom, out of his name into that of the transferree, subject to the rules under which the plaintiff held them, but leaving a blank for the name of the transferree to be filled up by the holder of the document, which also contained at the foot an agreement to take and accept the shares subject to the rules, with the name of the party agreeing also left in blank. . . . . The plaintiff, by the delivery of that document to the defendant, had done all that it was incumbent upon him to do or that he could do to pass the property in the shares to the defendant, who, upon the receipt of it, became potentially the owner of the shares, and might have made his title perfect at any time. The defendant, however, did not cause the shares to be registered in his name, and the plaintiff was, in consequence of his name being continued on the register, obliged to pay some subsequent calls; and the question before us was whether the defendant was, under the circumstances of the case, bound to cause the shares to be registered in his own name, or if he did not, whether there was an implied contract of indemnity by him to the plaintiff." Then, on the first point, they say there was no obligation. Then they say on the second point: "The second point then arises, whether, if the defendant does not choose to avail himself of that power, which, for his benefit and convenience, is made optional with him and not with the plaintiff, there is not an implied contract on his part to indemnify the plaintiff against the consequences of his (the defendant) suffering the plaintiff's name to be continued on the register after he has done all that the nature of the contract between him and the defendant and of the property, which

was the subject of it, would require him to do to convey a perfect title to the defendant;" and under those circumstances the Court of Exchequer Chamber held that that implied contract did arise, and that the defendant was bound to indemnify the plaintiff in the action which the plaintiff brought against him, and they distinguished the case of *Humble* v. *Langston* (2), of which I will say nothing in the present case; they adopt the principle which was laid down in *Burnett* v. *Lynch* (3), and they in effect say that where there was an absolute parting with such shares as those, between a transferror and transferree, the transferror gets rid of his shares, and the transferree accepts the shares, and he accepts them *cum onere*, and undertakes to discharge all liability which may arise in respect of them. That was the case of *Walker* v. *Bartlett* (1) which is not exactly in point here, because it did not arise on this winding up Act, and there was no bankruptcy, and there were many circumstances in this case which did not arise in that, but in principle it must be considered to carry the decision which I am about to come to. My brother Denman, in the course of the argument, referred me to the judgment of this Court in the case of *Maxted* v. *Paine* (11), which was a case, no doubt, to determine whether the rules of the Stock Exchange were to be incorporated into contracts; from a paragraph of that judgment it appears to me that the Court of Exchequer Chamber assumed the doctrine which is now disputed, that upon a transfer of this description of shares from a transferror to a transferree there is an implied contract on the part of the transferree to indemnify a transferror against any calls or liability which might arise in respect of those shares during the time the transferree holds them. There are also some cases on which the case in the Court below proceeded—the case of *Roberts* v. *Crowe* (4), in the Court of Common Pleas; *Ex parte Nevill* (8), which was a decision of the two Lords Justices of appeal, adopted expressly, as far as the reasoning of Lord Justice James was concerned, by Willes, J., in giving judg-

(11) 40 Law J. Rep. (N.S.) Exch. 57; s. c. Law Rep. 6 Exch. 132.

ment in *Roberts* v. *Crowe* (4), and so denied by Mr. Herschell to be a thority unless it were distinguisl overruled in favour of the cas before us.

The Court of Queen's Bench, the authority of all these cases, d in favour of the plaintiff, and up broad principle that a person who the advantage must take the disa age, if any there be, with whicl benefit is accompanied. Then thi has been sought to be distinguishe these other cases, which are more authorities in point, upon this gro that in this case the liability wl sought to be enforced upon the trans is a liability which does not result the default of the transferree or fr default of the ultimate holder c shares, I mean Mozley, but it is a li which is fixed by the Act of Parli only in the case of an inability to the part of Mozley. Mr. Hersch far as I could follow his argu seemed to say that the principle might apply in the ordinary ca transferror and transferree, had no cation where the liability was crea such an inability to pay as wa foundation of the liability in thi created by Act of Parliament. T also, further, no doubt, a distinction was hinted at by him and not mu sisted on at the moment, that the dator having failed to get the whole the company was entitled to fro ultimate shareholders, class A., bound to sue the contributories in cl in order of their originality, he bound to begin with the last tran and then go upwards to the o transferror; but that class A. bei set of persons, if any person in cl fails, then recourse may be made t B., not one by one, step by step, class B. as a whole. There is no as matter of fact, that the liquid such a company as this may go to the mesne transferrors of these sha secure payment from them, and may any one in class B. and get, if h the whole that is due to the company any one of the mesne transferrors be the original and the ultimate hol

the shares, but that does not appear to me to vary the responsibility which those transferrors and transferrees respectively have the one to the other, arising out of the relation which is created between them upon the various transfers which are made by the one to the other of these shares, and I apprehend the rule of law to be that if there be twenty transfers in the year, which might happen, should there be twenty mesne transferrors between the first holder and the last holder who would all be liable, because they have all been holders of the shares within the year, and if the company choose to go to ten or nine or anyone they think fit, as between him and his immediate transferree, the transferror would be bound to pay, and has a right to come on his immediate transferree and say, "As between you and me, when I parted with the shares, the contract was that you would discharge in respect of them all liability that might arise upon them during the time of your holding, and this is a liability which in truth has arisen in respect of your shares during the time you held them, and you agreed that, as between you and me at any rate, you should discharge this liability; you may have some further remedy against somebody else, but as between you and me that was the contract. I have had to pay, and you must repay me." That seems to me to be the short and simple ground on which this case may be decided, and that is the ground on which I understand the Court below put it, founding themselves on the judgment to which I have already referred. It seems to me that they were quite right in so doing, and it is upon that, as well as upon the other ground to which I first adverted, that the judgment ought to be affirmed.

BRAMWELL, B., PIGOTT, B., CLEASBY, B., GROVE, J., and DENMAN, J., concurred.

Judgment affirmed.

Attorneys—Gregory & Co., agents for Duncan, Hill & Co., Liverpool, for plaintiff; Elmslie & Co., for defendant.

1874. Jan. 17. } HOARE *v.* THE METROPOLITAN BOARD OF WORKS.

Metropolitan Commons Act, 1866, 29 & 30 *Vict. c.* 122. *s.* 15—*Metropolitan Commons Supplemental Act*, 1871, 34 & 35 *Vict. c. lvii.*—*Beneficial Right—Replacing decayed Sign-post—Easement.*

The right to erect, and to replace from time to time, when decayed, a public-house sign-post is a "right of a profitable or beneficial nature" within the meaning of section 15 *of the Metropolitan Commons Act*, 1866.

By 29 & 30 *Vict. c.* 122. *ss.* 6, 8, *the inclosure commissioners may prepare a scheme for the management of metropolitan commons. By s.* 14, *every scheme is to state what rights are affected thereby. And by s.* 15, "*no estate, interest or right of a profitable or beneficial nature in, over or affecting the common shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme, without compensation,*" *to be ascertained and provided under the Lands Clauses Acts*, 1845 *and* 1860. *By s.* 22, *any scheme under the Act, before it can have operation, must be confirmed by Act of Parliament. A scheme prepared under* 29 & 30 *Vict. c.* 122, *and confirmed by* 34 & 35 *Vict. c. lvii., which entrusted the management of the "metropolitan common" of Blackheath to the respondents, contained the words, "saving always to all persons . . . . all such estates, interests or rights of a profitable or beneficial nature . . . . as they had before the confirmation of this scheme by Act of Parliament, or could or might have enjoyed if this scheme had not been confirmed by Act of Parliament:"*—Held, *that the scheme and the confirmation amounted to a waiver of the power to take away with compensation beneficial rights within the meaning of the scheme, and a conviction for erecting a sign-post in the enjoyment of such a right, but in contravention of a bye-law under the scheme, was quashed.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 65.]

1874. Feb. 16. } EMANUEL *v.* BRIDGER; ROBERTS, *Garnishee.*

Garnishee Order—Common Law Procedure Act, 1854, *s.* 63—*Bankruptcy—Trustee—The Bankruptcy Act,* 1848 (12 & 13 *Vict. c.* 106), *s.* 184—*The Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *s.* 12—*Bill of Sale.*

On the 20*th of April,* 1870, *E. obtained a judgment against B. for* 45*l.* 15*s.* 10*d. On the* 22*nd of the same month he obtained a garnishee order served on the* 23*rd, attaching a debt due from R. to B. of* 55*l. The order was made absolute on the* 2*nd of May, and the usual order made to levy as much as was sufficient to satisfy the judgment debt, and a fi. fa. was delivered to the sheriff. B. was adjudicated bankrupt on the* 3*rd of May. The sheriff seized certain goods as the goods of R. on the* 4*th of May, but they were on the* 11*th claimed by the trustee of B., and, upon an interpleader, the goods were sold and* 31*l. paid into Court. On the* 21*st of May,* 1869, *R. had executed a bill of sale to B. of the same goods to secure the repayment of a loan of* 147*l. The bill of sale was registered and the goods remained in the house of R. By the bill of sale B. had the right in case R. failed in payment of certain instalments to enter and seize the goods and either hold them or sell them, repaying himself and paying the balance, if any, to R. On the* 22*nd of April,* 1870, *the day on which the garnishee order was made, B. instructed an auctioneer to seize the goods and sell them in order to repay the sum then due, that is* 55*l. This was done. On the* 26*th of April, when neither the auctioneer nor B. had any notice of the attachment, the former advanced to the latter* 50*l. and was authorised to retain it out of the proceeds of the intended sale. On the* 30*th the goods were advertised for sale on the* 2*nd of May, as being the goods of R., sold under a bill of sale, and on the same day, the auctioneer received notice of the attachment. The sale did not take place owing to R. obtaining an interim injunction to restrain the sale, and on the* 4*th of May the sheriff seized the goods :—*

Held, *that the garnishee order constituted E. a creditor holding security on the property of the bankrupt within section* 12 *of the Bankruptcy Act,* 1869, *and a charge on a part of the estate of B. within secti sub-section* 5.

Held *also, that the auctioneer w titled to* 9*l.* 4*s.* 2*d., and that E. was e to the rest.*

Held *also, that the Bills of Sale A not apply, inasmuch as the acts of th tioneer were sufficient to take the goo of the possession of R. at the time seizure.*

This was a rule calling upon Em a judgment creditor, to shew caus the proceeds of the sale of certain paid into Court should not be paid Court to Thomas Bowman, the trus bankruptcy of Bridger, the exe debtor, notice of the rule being to one Benjamin James Chigwell.

The material facts were as follow

On the 20th of April, 1870, En obtained a judgment against Bridg 45*l.* 15*s.* 10*d.*

On the 22nd of April, 1870, En obtained a garnishee order *nisi* atta a debt due from Mary Roberts to Br or such part of it as was sufficient the judgment debt, and this orde served on the 23rd of April, 1870.

On the 2nd of May, 1870, this gar order was made absolute, and the order was made under section 63 Common Law Procedure Act, 18 levy as much of the debt due from R to Bridger, as was sufficient to the judgment debt, and on the sam a writ of *fi. fa.* against the goods of Roberts was delivered to the sheriff

The amount at that time due Roberts to Bridger was 55*l.*

On the 3rd of May Bridger wa judicated a bankrupt on an act of ruptcy of the same date, and the l trar of the Court was appointed t until a trustee was appointed at the meeting of creditors.

On the 4th of May the sheriff certain goods as being the goods of Roberts, the garnishee. On the 1 May notices of claims to these goods given to the sheriff by Bridger's t and one Chigwell, an auctioneer, a sheriff having interpleaded, it wa ranged with the consent of all p that the goods should be sold an

proceeds paid into Court, to abide the result of any application by either of the parties to have the amount, or any part of it, paid out to him.

The amount paid into Court under this arrangement was 31*l.* 19*s.*

On the 21st of May, 1869, Mary Roberts executed a bill of sale of the goods in question to Bridger, to secure the repayment of the sum of 147*l.* lent to her by Bridger, and this bill of sale was duly registered and the goods remained in a house occupied by Mary Roberts till the seizure, subject to a question on that point mentioned subsequently.

By the terms of this bill of sale, the goods were assigned to Bridger, subject to a proviso that if Roberts repaid the debt by certain instalments the deed should be void, but that if she failed to pay any of the instalments, Bridger had the right to enter and seize the goods and hold them for his own use absolutely, or at his option to sell the goods, and out of the proceeds to repay himself any part of the loan then due to him, and to pay the balance, if any, to Mary Roberts.

On the 22nd of April, 1870, the same day on which the garnishee order *nisi* was made, there being then 55*l.* of the loan still unpaid, but subsequent to the garnishee order he, Bridger, instructed Chigwell to enter and take possession of the goods and sell them in order to repay the 55*l.* Chigwell accordingly seized the goods and put a man into possession of them on the same day.

On the 26th of April, 1870, Chigwell advanced Bridger 50*l.* on the security of the goods of which by his man he was then in possession, and Bridger authorised him to retain the advance out of the proceeds of the intended sale. At this time neither Bridger nor Chigwell had notice of any attachment.

On the 30th of April Chigwell advertised the goods for sale, in the *Hampshire Independent* newspaper, for the 2nd of May, stating in the advertisement, that they were the goods of Mary Roberts, sold under a bill of sale, and he posted up announcements of the sale in the neighbourhood, and on the same day he received the first notice of the attachment.

On the 2nd of May Roberts obtained an interim injunction to restrain the sale, and in consequence of this, the sale as advertised for the 2nd of May did not take place. This injunction was afterwards dissolved, and Roberts, in consequence of a warrant for perjury, committed in obtaining the injunction, having been issued against her, absconded.

Before another day for the sale could be arranged, the sheriff entered and seized the goods on the 4th of May as already mentioned (1).

Horne Payne shewed cause against the rule (on Jan. 28, 30, 1873).

Bullen supported it.

The following statutes and authorities were referred to in the course of the arguments—

Holmes v. *Tutton* (2), *Slater* v. *Pinder* (3), The Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 184. The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 12; *Ex parte Rocke* (4), *Ex parte Williams* (5). The Bills of Sale Act, 17 & 18 Vict. c. 36; *Gough* v. *Everard* (6), *Ex parte Lewis* (7), *Smith* v. *Wall* (8), *Mitchell* v. *Lee* (9), *Newman* v. *Rook* (10).

Cur. adv. vult.

(1) This statement of the facts is taken from the written judgment of the Court.

(2) 5 E. & B. 67; s. c. 24 Law J. Rep. (N.S.) Q.B. 346.

(3) 40 Law J. Rep. (N.S.) Exch. 146, in error 41 Law J. Rep. (N.S.) Exch. 66; s. c. Law Rep. 6 Exch. 228, in error Law Rep. 7 Exch. 95.

(4) 40 Law J. Rep. (N.S.) Chanc. 70; s. c. Law Rep. 6 Chanc. App. 795.

(5) 41 Law J. Rep. (N.S.) Bankr. 38; s. c. Law Rep. 7 Chanc. App. 314.

(6) 2 Hurl. & C. 1; s. c. 32 Law J. Rep. (N.S.) Exch. 210.

(7) Law Rep. 6 Chanc. App. 626.

(8) 18 Law Times, 182.

(9) 36 Law J. Rep. (N.S.) Q.B. 154; s. c. Law Rep. 2 Q.B. 259.

(10) 4 Com. B. Rep. N.S. 434.

The judgment of the Court (11) was (on Feb. 16, 1874) delivered by

QUAIN, J.—[The learned Judge after stating the terms of the rule, and the facts as above set out, continued as follows]—

On this state of facts two questions arise for consideration.

The first relates to the debt due from Roberts to Bridger, or rather to that part of it attached by the garnishee order, and as to which the garnishee order is in any way affected by the subsequent bankruptcy of Bridger.

The second relates to the property in the goods seized under the *fi. fa.*, and as consequent on that question, the distribution of the money paid into Court. It will be seen from the dates that, in this case, the garnishee order was obtained, served and made absolute, and a *fi. fa.* lodged with the sheriff to enforce it on the goods of Roberts before any act of bankruptcy committed by Bridger. Short, therefore, of execution actually levied on the goods of the garnishee or payment of the debt, everything had been done to perfect the title of the execution creditor to so much of the debt as was sufficient to pay the amount of the judgment before the bankruptcy.

The position of an execution creditor after a garnishee order was obtained and served in relation to the assignees in bankruptcy of the execution debtor, and their claim to the debt attached by the garnishee order, was much considered in *Holmes* v. *Tutton* (2).

It was there held that an execution creditor who had obtained and served a garnishee order before the bankruptcy of the debtor, was in the position of a creditor having security for his debt within section 184 of the Bankruptcy Act, 1849, but that he had no mortgage or lien within the exception in the same section. The judgment of the Court, therefore, was that the debt, not having been realised before the adjudication in bankruptcy, passed to the assignees. That case was followed by *Tilbury* v. *Brown* (12) before Crompton, J. There the garnishee order *nisi* had been served and tl absolute obtained before the bank Both these decisions, however founded on the enactments conte section 184 of the Bankruptcy Ac That Act has since been repealed Bankruptcy Act, 1869, and there no section in the latter Act sin section 184 of the Act of 1849, it that the judgments referred to, s least as they relate to the quee lien, are not applicable to the prese

The section of the Bankrupt 1869, which applies to the case now the Court is section 12. That enacts that where a debtor shall judicated bankrupt, no creditor debt is proveable under the banl shall have any remedy against the or property of the bankrupt, ex manner directed by that Act. further provides that that sectio not affect the power of any c "holding a security on the prop the bankrupt" to realise his secu if that section had not been The question, therefore, is whetl execution creditor in this case security on the property of his before the bankruptcy. It woul to follow from *Holmes* v. *Tutton* (2) execution creditor who had obtain served a garnishee order *nisi*, and *tiori* an order absolute, before the ruptcy, is a creditor holding a secu the property of the bankrupt, section 12 of the last Act, as ther practical difference between the la of section 12 of the present Act, a first part of section 184 of the ol Counsel for the trustee relied m *Ex parte Williams* (5). There decided in accordance with *Slater der* (3) that the mere delivery writ to the sheriff did not make tl cution creditor a creditor holding se and that actual seizure was essent that purpose, and as in *Holmes* ton (2) Lord Campbell, in deliveri judgment of the Court, while holdi the garnishee order did consti security for the debt, still held bound the debt only in the sam and to the same extent as the deli the writ to the sheriff, so that if

(11) Cockburn, C.J.; Mellor, J.; and Quain, J.

(12) 30 Law J. Rep. (N.S.) Q.B. 46.

v. *Tatton* (2) be right on the latter point, *Ex parte Williams* (5) would amount to a decision that the garnishee order does not constitute a security for the debt.

It appears to us, however, that the attachment or seizure by way of execution for a debt due from a specific person named in the order resembles an actual seizure of goods by the sheriff much more than the delivery of the writ to the sheriff which binds no specific goods, but merely the property of the debtor in general. The execution creditor can do no further act as regards the debt attached, than to obtain his garnishee order, serve it, and make it absolute. We think, therefore, that the garnishee order, especially when, as in this case, it was made absolute before the bankruptcy, does constitute the execution creditor a creditor holding security on the property of the bankrupt within section 12 of the Bankruptcy Act, 1869. But apart from this question there is another point which seems to us decisive on this part of the case.

The Bankruptcy Act, 1869, contains a definition of a "secured creditor" as used in that Act; section 16, sub-section 5, enacts that a "secured creditor" shall in this Act mean "any creditor holding any mortgage, charge or lien on the bankrupt's estate or any part thereof as a security for a debt due to him." Now we apprehend that a secured creditor within this section and "a creditor holding a security" mentioned in section 12 mean the same thing. But it will be observed that in the definition in section 16 the word "charge" is introduced, which is not to be found in section 184 of the Act of 1849.

We think that the word "charge" has a wider meaning than the words mortgage or lien, and we cannot doubt but that an execution creditor who has obtained, served and made absolute his garnishee order before the bankruptcy, is a creditor holding a charge on a part of the bankrupt's estate as a security for a debt due to him within section 16, sub-section 5, and is therefore a creditor holding a security on the property of the bankrupt under section 12.

Under these circumstances, the execution creditor was entitled to receive from Roberts 45*l.* 5*s.* 10*d.* out of the debt of 55*l.* then due from Roberts to Bridger. But Roberts having failed to pay the amount, the usual order was made under section 63 to levy the amount due from the garnishee, and her goods were accordingly seized under the execution on the 4th of May as before stated.

At that time, the bankrupt and his trustee were interested in the goods, under the bill of sale, only to the extent of the difference between the balance of the debt then due from Roberts (55*l.*), and the judgment debt (45*l.* 15*s.* 10*d.*), namely, 9*l.* 4*s.* 2*d.*, and Chigwell, who made his advance on the 26th April (the garnishee order having been served on the 23rd of April), could not be in a better position than Bridger, or take any greater interest in the goods than Bridger then had. The value of the goods being greater than Bridger's interest in them at the time of the seizure, an order might have been made to sell them under section 16 of the Common Law Procedure Act, 1860.

Under these circumstances, the rule will be that 9*l.* 4*s.* 2*d.* of the money in Court shall be paid to Chigwell (who had advanced his money, and held possession of the goods before the bankruptcy) and the rest to the execution creditor.

On the part of the execution creditor, the validity of the bill of sale was challenged, on the ground that the occupation of the grantor was not correctly described. But we think that the Bills of Sale Act does not apply to this case, as we consider that the acts of Chigwell, in taking possession of and ordering the goods for sale as above mentioned, were sufficient to take the goods out of the possession or apparent possession of the grantor at the time of the seizure. (See *Ex parte Lewis* (7) and the cases there cited).

Judgment accordingly.

Attorneys—J. Emanuel, for plaintiff; Whyte, Collisson & Prichard, agents for W. Perkins, Southampton, for defendant.

1874. Jan. 21. } HARDING (*appellant*) *v.* HEADINGTON (*respondent*).

Turnpike Road—Evasion of Toll by Occupier of Land adjoining.

H., the occupier of land adjoining a turnpike road, made an opening through the fence which separated his land from the turnpike road, and another opening through the same fence at a few yards' distance. He also made a road over the land in his occupation, connecting the two openings in the fence, between which was a toll gate, at which the trustees of the turnpike road were authorised to take tolls. By means of the two openings in the fence, and the road connecting them, he was able to use the turnpike road without passing through the gate: —Held, *that in doing so with intent to evade the payment of toll, he did not incur any liability to the penalty imposed by section* 41 *of* 3 *Geo.* 4. *c.* 126.

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 59.]

1874. Jan. 21. { THE QUEEN ON THE PROSECUTION OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY (*appellants*) *v.* THE ASSESSMENT COMMITTEE OF THE BEDFORD UNION, AND THE OVERSEERS OF THE PARISH OF GOLDINGTON (*respondents*).

Poor Rate—Railway—Branch Line—Rent—Rateable Value.

A line of railway originally made by an independent company became vested in the appellants, under an agreement by which the appellants guaranteed a certain per centage upon the money expended upon the line. The line communicated with the main line of the appellants, and with three other main lines of railway owned and worked by three other companies respectively. If the line were in the market, either of such three companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants held and worked it:—Held, *that in ascertaining the rateable value of a part of the line which passed through the parish of G., the fact of there being such four companies who would so compete for the line, might be taken into consideration.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 81.]

1874. Feb. 16. { THE VESTRY OF ST. MARY, ISLINGTON (*appellants*), *v.* BARRETT (*respondent*).

Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 105—*The Metropolis Management Amendment Act,* 1862 (25 *&* 26 *Vict. c.* 120), *s.* 112—*New Street.*

The respondent leased some land for building purposes, and formed a road for the purposes of the houses built on each side of the road. Previous to 1863–1864, *the road was occupied by saw pits and building materials. From the year* 1863 *he placed a barrier across it with an open space capable of being also closed by a folding bar. He continued the barrier, and frequently prevented the passage of vehicles along the road. Both he and the freeholders objected to the road being a public thoroughfare. The footways on each side of the road were made at the cost of the owners, and repaired by the vestry:*—Held, *that under these circumstances there had been no dedication of the road to the public, but that nevertheless it was a "new street" within s.* 112 *of* 25 *&* 26 *Vict. c.* 102, *and within s.* 105 *of* 18 *&* 19 *Vict. c.* 120, *so that the vestry had a right, under the last mentioned section, to call upon the respondent to pay the amount of the estimated expenses of paving the road.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 85.]

1874. Jan. 26. } MULLINS (*appellant*) *v.* COLLINS (*respondent*).

Ale and Beer-house—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *sec.* 16, *sub-sec.* 2—*Constable on Duty—Supplying Liquor to—Absence of Licensed Person.*

By sec. 16 *of the Licensing Act*, 1872, "*If any licensed person supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior of such constable, he shall be liable to a penalty, &c.*"

A constable, on duty and in uniform, went to the house of a licensed person. He was there supplied with some brandy by a servant. He did not go there by the authority of a superior officer, nor was the brandy supplied by the authority of any superior officer. The licensed person was not present at the time; he did not know that the brandy was supplied, nor had he given any express authority to the servant to supply it:—Held, *that, under the above section, he was liable to be convicted.*

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 67.]

END OF HILARY TERM, 1874.

CASES ARGUED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

EASTER TERM, 37 VICTORIÆ.

1874. May 1. } WALSH *v.* WALLEY AND ANOTHER.

Contract—Construction—Forfeiture "of all Wages due"—Wages fixed on Thursday, but not payable till Saturday.

In an action to recover 22s. for wages it appeared that the plaintiff was a weaver in the employment of the defendants, who were cotton manufacturers, that he was a weekly servant, and that his wages were regulated by the number of pieces which from time to time he wove and delivered to his masters. The practice at the defendants' mill was that the wages earned by the workmen at the mill were ascertained and fixed at noon on Thursday, but were not paid to the workmen till the following Saturday. The workmen worked under certain rules which were embodied in the contract of hiring. They were as follows—"All persons in our employ are required to give fourteen days' notice before leaving, such notice to be given at the time of booking up. Persons leaving without notice will forfeit all wages due." The term "booking up" is understood to mean the Thursday in each week. Fifteen shillings of the amount sued for was earned in the week of his service, which ended at noon on Thursday, and the amount was then fixed. He worked till the forenoon of Friday, earning the balance claimed, and then left his service without any reasonable excuse:—Held, that the wages earned in the week ending on Thursday were forfeited as the rules were so framed as to protect the master, by making the workman always liable to forfeit something if he left without notice.

Action in the County Court of Lancashire to recover the sum of 22s. for wages alleged to be owing by the defendants to the plaintiff.

At the hearing at Blackburn, on the 13th of October last, the following facts were admitted.

The plaintiff was a weaver, in the em ploy of the defendants, who are cotto manufacturers at Blackburn. He was weekly servant, and his wages were r gulated by the number of pieces whi from time to time he wove and delive to his masters.

The practice at the defendants' was that the wages earned by the w men at the mill were ascertained and at noon on Thursday in each week

that the wages so ascertained and fixed were not paid to the workmen entitled thereto until the succeeding Saturday.

The workmen worked under certain rules which were embodied in the contract of hiring between the masters and workmen. The rules are as follows—

"All persons in our employ are required to give fourteen days' notice before leaving, such notice to be given at the time of booking up.

"Fourteen days' notice will be given previous to discharging any person, except for spoiling or neglecting work, in which case they will be discharged forthwith. Persons leaving without notice will forfeit all wages due, and their return to work may be refused."

The term "booking up" in the above rules is understood by the parties to mean Thursday in each week.

The principal part of the wages sued for, namely, the sum of 15*s.*, was earned by the plaintiff in the week of his service which ended at noon on Thursday, the 25th day of April, 1872, and such sum was ascertained and fixed at that time.

The plaintiff commenced another week of his service on the afternoon of that day. He worked during that afternoon and also during the morning of Friday, the 26th of April, and he earned during that time the residue of the sum of 22*s.* so sued for, namely, the sum of 7*s.*

He left the service on the forenoon of that day without having given any notice of his intention to leave.

The reason for so leaving was an intended alteration in the weaving shed in which the plaintiff worked, but for the purposes of this appeal only it is admitted that the plaintiff left the service without any reasonable or justifiable cause.

The plaintiff applied for payment of his full wages, namely, the sum of 22*s.*, on Saturday, the 27th of April, but his application was refused altogether, on the ground that his wages had been forfeited.

At the hearing the same ground of defence to the action was taken. It was held that as the plaintiff had left the service after the commencement of the week beginning at noon on Thursday, the 25th of April, without proper notice of his intention to leave, the wages earned during that week were forfeited and could not be recovered, but that the wages earned in the previous week and which were ascertained and fixed on Thursday, the 25th of April, were vested in the plaintiff, and were not divested or forfeited either by the general law, or by the special agreement contained in the rules, by the plaintiff leaving the service without notice in a subsequent week of his service. And a verdict for the sum of 15*s.* was given accordingly.

The question for the opinion of the Court is whether the wages earned by the plaintiff in the week ending at noon on Thursday, the 25th of April, were forfeited by the plaintiff having left the service on Friday, the 26th of April, 1872, without having given notice of his intention to leave.

R. G. Williams, for the appellants.—The whole of the plaintiff's unpaid wages were forfeited. The words "all wages due" cannot be confined to wages, the amount of which has not been fixed or ascertained. The object of postponing the payment after the amount was fixed was to give the master a security in the event of misconduct on the part of the workmen. He cited *Button* v. *Thompson* (1).

Edwards, for the respondent.—The plaintiff is entitled to retain the verdict. The intention of the rule was to prevent a break in the service between the two booking up days, by making wages which had been earned in the interval, but the amount of which had not been settled, liable to forfeiture if the workman broke his contract.

[LUSH, J.—What is there to shew that the words "wages due" do not mean "wages which have not been paid?"]

The reasonable construction of the contract is that the punishment for the breach of contract is not to be excessive, and it is enough if the workman forfeits wages which have been earned but not ascertained.

(1) 38 Law J. Rep. (N.S.) C.P. 225; s. c. Law Rep. 4 C.P. 330.

COCKBURN, C.J.—I think that the only construction which we can put upon these rules is adverse to the plaintiff. The rules are obviously intended to protect the master against the contingency of his workmen leaving him without reasonable excuse, and if we were to hold that they did not under such circumstances forfeit their right to wages, the amount of which had been already ascertained, the protection which the master intended to secure would be at an end. It has been argued that the object of the rules was that the workman should not leave in the middle of a fresh week, but the answer is that it was not intended to protect the master against such a breach of contract, but to prevent the workman from working till his wages had been ascertained on the Thursday, and then going away without entering on a fresh week.

BLACKBURN, J.—I am of the same opinion. It appears that under the rules in question the wages were fixed and ascertained on Thursday, and payable on Saturday, and that workmen leaving without notice forfeit all wages due. The plaintiff left without notice, so that the terms of the contract were literally fulfilled and the wages due to him were forfeited. I give no opinion upon what would be the decision if the wages had not been paid on the Saturday, and the plaintiff had not left his employment till the following Monday. It is sufficient to say that in the present case the wages fixed on Thursday were not so vested in the plaintiff as not to be forfeited by his leaving without notice on the following day and before the money was payable.

LUSH, J.—I am of the same opinion. It was the intention of the rules that the workman should always be liable to forfeit something if he left without notice.

Judgment for the appellants.

Attorneys—Doyle & Edwards, agents for T. & R. C. Radcliffe, Blackburn, for appellants; Charles Barnard, agent for Wheeler, Deane & Fletcher, Blackburn, for respondent.

1874. April 25. } PITTS *v.* MILLAR.

Animals—Cruelty—12 & 13 Vict. c. 92. s. 3—Baiting Rabbits—Using a "Place" for the "Baiting" of Animals.

A match took place in a field of between three and four acres as to which of two dogs could kill the greatest number of rabbits. The field was walled and paled round so that a rabbit could not escape therefrom. The two dogs were held in a slip. A rabbit was let loose before the dogs who ran and killed it. The appellant was convicted under 12 & 13 *Vict. c.* 92. *s.* 3, *for using the field for the purpose of baiting a rabbit:*—Held, *that such conviction could not be supported, inasmuch as a rabbit treated in the manner above described could not be said to be baited within the meaning of that section.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 96.]

1874. May 2. } THE QUEEN *v.* THE GUARDIANS OF THE WORCESTER POOR LAW UNION.

Poor—Removal—Irremovability—Break of Residence.

H. lived in the parish of B. for many years up to the 30*th of May,* 1872, *when he went into the workhouse. After remaining there till November, he agreed with R. to go to S., and there work for R. in his trade, on the understanding that if he and R. agreed, he might stay as long as he thought proper. He boarded and lodged with R. in S. for ten weeks, and then returned to Birmingham, because he and R. could not agree:*—Held, *that there was no actual or constructive residence in B. after H. had gone to S., and therefore that he had lost his status of irremovability, and was liable to be removed to the place of his last legal settlement.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 102.]

1874. April 28. } THE QUEEN *v.* CASTRO.

Trial at Bar—Jurisdiction—Venue—Indictment for Perjury — Certiorari — Trial — Adjournment — Conviction — Sentence.

An indictment found by the Grand Jury in the Central Criminal Court for perjury committed within the jurisdiction of that Court contained two counts, in one of which the perjuries assigned were in respect of an oath taken before a Commissioner in Chancery, sitting in the city of London. In the other count the perjuries assigned were in respect of an oath taken by the defendant in the Sessions House at Westminster, on the trial of an ejectment in the Court of Common Pleas. The indictment was removed into this Court by a writ of certiorari, which, as required by 9 & 10 *Vict. c.* 24. *s.* 3, *specified "Middlesex" as the county in which it should be tried. On the application of the Attorney General it was ordered that the trial should be at bar. This Court, in Hilary Term, under Statute* 11 *George* 4. *and* 1 *Will.* 4. *c.* 70. *s.* 7, *appointed for the trial the* 23*rd of April,* 1873 *(being a day in Easter Term), and every day up to and inclusive of the* 1*st of November,* 1873, *being the day before the first day of Michaelmas Term; and further ordered that, in case the trial should not terminate on or before the* 1*st of November, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the Court should then direct. The jury was taken from the county of Middlesex and the trial at bar commenced. The Court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. In particular, there was an adjournment from the* 31*st of October,* 1873, *to the* 17*th of November,* 1873, *which was a day in Michaelmas Term. The defendant's counsel objected to this last adjournment, and the Court adjourned without consent. The trial having been protracted, this Court in Michaelmas Term,* 1873, *made a second order, appointing every day up to Michaelmas Term,* 1874, *for the trial. The trial proceeded, and on the* 28*th day of February,* 1874, *a day in the vacation before Easter term, the defendant was found guilty, and the Court then passed upon him sentence of penal servitude upon each count of the indictment:*—Held, *that the proceedings were regular and that the sentence was properly pronounced.*

This was an indictment for perjury removed by a writ of *certiorari* into this Court for the purpose of being tried.

It contained two counts, in one of which the perjuries assigned were in respect of an oath taken in Chancery within the city of London. In the other count the perjuries assigned were in respect of an oath taken by the defendant upon the trial of an action of ejectment in the Court of Common Pleas in Middlesex.

The circumstances under which the trial at bar took place are fully set out in the judgment of the Court. It lasted, with certain adjournments, from the 23rd of April, 1873, to the 28th of February, 1874, when the defendant was found guilty, and was sentenced to penal servitude on each count of the indictment.

Kenealy (*McMahon* and *Cooper Wylde* with him), on April 18th, moved for a rule calling upon the Crown to shew cause why there should not be a new trial, on the ground that the verdict was unsatisfactory on account of the way in which it was obtained, and why the judgment should not be arrested, or a *venire de novo* ordered.

He contended, first, that inasmuch as the perjuries assigned in one Court were in respect of an oath taken in Chancery within the city of London, a Middlesex jury could not try the defendant for the offence alleged to have been committed by him.

Secondly, That a trial at bar cannot be protracted beyond the term in which it commences and the succeeding vacation; and that, therefore, the proceedings were invalid.

Thirdly, That the trial had been adjourned from time to time, whereas the Court ought to have sat continuously; and that the adjournment vitiated the whole proceedings.

Fourthly, That there was no jurisdic-

tion to administer the oath to the defendant upon the trial of the action of ejectment, because the Court was sitting in the Sessions House at Westminster, whereas it had no power to sit except within Westminster Hall, as provided by 18 Eliz. c. 12.

Fifthly, That the sentence of penal servitude passed in respect of the perjury committed in swearing an affidavit before the Commissioner in Chancery was illegal, inasmuch as the oath was taken in a manner not authorised by the law at the time when the 2 Geo. 2. c. 25, which imposed the punishment of transportation, since changed to penal servitude, was passed.

Sixthly, That the Court had no power to pass sentence during the vacation.

In support of these grounds he referred to the following statutes and authorities—

18 Eliz. c. 12;
1 Geo. 4. c. 21;
Vin. Ab. tit. Trial, S. 2;
Vansittart v. *Taylor*, 4 E. & B. 910; s. c. 24 Law J. Rep. (N.S.) Q.B. 198;
Co. Lit. 125 b;
2 Salk. 653;
4 & 5 Will. 4. c. 36;
The Queen v. *Mitchell*, 2 Q.B. Rep. 636; s. c. 11 Law J. Rep. (N.S.) M.C. 55;
9 & 10 Vict. c. 24. s. 3;
11 Geo. 4. & 1 Will. 4. c. 70. s. 7.
O'Connell's Case, 11 Cl. & Fin. 250;
16 & 17 Vict. c. 78.

PER CURIAM (COCKBURN, C.J., BLACKBURN, J., LUSH, J., and QUAIN, J.)—There is no ground whatever for a new trial. We do not entertain any doubt upon the other questions, but we will postpone giving judgment, in order that our judgment may be drawn up in precise language.

Judgment postponed.

The judgment of the Court (1) was (on April 29) delivered by—

BLACKBURN, J.—In this case an indict-

(1) Cockburn, C.J.; Blackburn, J.; Lush, J.; and Quain, J.

ment was found by the grand jury i
Central Criminal Court for perjury
mitted within the jurisdiction of the
tral Criminal Court. It was removec
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as required by statute 9 & 10 Vict. c
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ordered that the trial should be at
This Court in Hilary Term, under
tute 11 Geo. 4. & 1 Will. 4. c. 70.
appointed for the trial 23rd of A
1873 (being a day in Easter Term)
every day up to and inclusive of the
November, 1873, being the day befor
first day of Michaelmas Term, and fu
ordered that in case the trial should no
minate on or before the 1st day of No
ber, the further trial should be adjou
till Michaelmas Term next, and be t
after continued at such times as the C
should then direct. The jury was t
from the county of Middlesex, and
trial at bar commenced. The Cou
not sit continuously, but adjourne
only over Sundays and holidays, bu
over days included in this period on w
it might have sat. And in partic
there was an adjournment from the
day of October, 1873, to the 17th d
November, 1873, which was a da
Michaelmas Term. To this last adj
ment the defendant's counsel obje
and the Court adjourned without
consent. The trial having been
tracted, this Court, in Michaelmas T
1873, made a second order, appoi
every day in Michaelmas Term, 187
every day up to Michaelmas Term of
for the trial. The trial proceeded, a
the 28th day of February, 1874—
in the vacation before this term—th
fendant was found guilty, and the
then passed sentence on him of
servitude on each count. Withi
first four days of this term, the co
for the defendant moved for a rul
for a new trial, or to arrest the judg
or for a *venire de novo*, on grounds
will be presently noticed, most of th
jections having been taken and dis
of during the trial at bar. It mus
be supposed that by entertaining th
tion for a new trial we express any o

as to the competency of the Court to rehear and reconsider points of law already decided by the same Court when sitting at bar. It will be time to decide this point when it becomes necessary to do so, but we are desirous of guarding ourselves against any inference in favour of such a proposition from the fact of our having heard the application. We are all of opinion that no ground whatever has been shewn for doubting that the proceedings from first to last have been perfectly regular, that the verdict was properly obtained, and is quite satisfactory, and that the sentence was properly passed by the Court sitting in banco, on a day which, by 7 Geo. 4. & 1 Will. 4. c. 70. s. 7, was, for the purposes of this trial at bar, to be taken to be part of the preceding term, viz., Hilary Term, 1874. We pronounced at once our reasons for saying that there was no colour for the motion for a new trial on the ground that the verdict was unsatisfactory on account of the way in which it was obtained. On the other grounds of motion we postponed giving our reasons, not from any doubt entertained by any member of the Court, but because this being in some respects a new case, we were desirous of expressing our reasons precisely, so as to be an assistance to our successors, if a similar case should occur again. We now proceed to deal with the different objections made, as they arose in order of date, without regard to the order in which the counsel brought them forward.

The indictment, as already stated, was originally preferred in the Central Criminal Court, a new Court, created by statute 4 & 5 Will. 4. c. 36, with jurisdiction including the city of London, the county of Middlesex, and parts of the counties of Essex, Kent and Surrey. The grand jury in that Court had jurisdiction to find a bill for offences committed within any part of this jurisdiction, and trials in the Central Criminal Court are by the 4th section to be by juries taken wholly from the said city or the said counties, or taken indiscriminately from the said city and the said counties." The *certiorari* is not taken away, and, therefore, an indictment found in the Central Criminal Court may be removed into the Court of Queen's Bench, and may be there tried, but the original Act does not contain any express provision as to the manner in which the jury are to be summoned in the Queen's Bench. As the issue to be tried is whether the offence charged by the indictment was committed within the jurisdiction of the Central Criminal Court, it may, on the trial of any indictment, appear that the offence was committed in any one of the five counties out of which that district is formed, and it did in fact appear in the trial of the case now before us that the perjuries assigned in one count were in respect of an oath taken in Chancery within the city of London, and that the perjuries assigned in the other count were in respect of an oath taken in the Court of Common Pleas, in Middlesex. On this it was contended that the venue summoning a jury from Middlesex was originally wrong, or, at least, that when it appeared that one of the offences charged took place in London, the Court should have ruled that the Middlesex jurors could not try that offence. But the legislature has, by another enactment, foreseen and provided for this difficulty. Statute 9 & 10 Vict. c. 24. s. 3, is as follows—"And whereas doubts have been raised as to the proper place of trial where indictments have been removed by writ of *certiorari* from the Central Criminal Court into the Court of Queen's Bench, be it enacted that every writ of *certiorari* for removing an indictment from the said Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and the jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." We cannot doubt that the true construction of the statute is that the Court of Queen's Bench shall have discretion to name in the *certiorari* the county or jurisdiction in which the trial is to take place, and that by the jurors summoned from that jurisdiction the same issues shall be tried that would have been tried in the Central Criminal Court had the indictment not been removed. These objections, therefore, fail.

The next objection relates to the order

of the Court made in Hilary Term, 1873, directing that a number of days should be appointed for the trial, extending beyond the then next term, and the long period then appointed having proved too short, a second order was made in Michaelmas Term, 1873, appointing further days. It was contended that a trial at bar if it could be protracted beyond the first vacation after it began was necessarily to fail. It is a sufficient answer to cite the words of the statute 11 Geo. 4. & 1 Will. 4. c. 70. s. 7—"If a trial at bar shall be directed by any of the said Courts it shall be competent to the Judges of such Courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall for the purposes of such trial be deemed and taken to be a part of the preceding term." It is impossible to use words more clearly declaring that the Court should have the most absolute discretion to appoint such days as they should think fit for the trial; and there is nothing either in the object of the enactment or the language used to require either that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the term in which the order was made.

It was then contended that the adjournment of the Court vitiated the whole proceedings. It is scarcely possible to suppose that this objection was seriously made. The Court was sitting on a day which, for the purpose of the trial, was to be taken as part of the then preceding term. It is incident to a trial that the Court may, for sufficient reason, adjourn it, and there is nothing whatever, either in the words of the enactment or the object of the legislature, to take away this power from the Queen's Bench sitting on a trial at bar in what is by legislative enactment to be taken as part of the term.

Two objections were then made arising on the evidence at the trial. It appeared that the trial at Nisi Prius, before the Chief Justice of the Common Pleas, was in fact holden in the Sessions House at Westminster, and not in any sense of the words "within Westminster Hall." It was argued that the sittings of Court of Common Pleas at Nisi : in Middlesex were held only unde authority of the 18 Eliz. c. 12, v authorises sittings within the said called Westminster Hall, in Westmi And therefore it was said that a ness on a trial at Nisi Prius hel this in fact was held, near to, bu in Westminster Hall, could not be guilty of perjury. We should be reluctant to give any countenan the notion that on a trial before of the Judges of the superior C who has general jurisdiction ove subject, a witness might commit pe with impunity on account of any c or irregularity in the proceedings, cially when, as in this case, the irre rity, if it were one, was waived b parties, who, though they cannot by sent give jurisdiction, can waive regularity. But it is quite unnece to consider that, for by the statu Vict. c. 6. s. 5, "any number of Judg one and the same time may hold a si or sittings at Nisi Prius either in Lo or Westminster, as may be deemed dient by the Court." The rooms in v the ordinary sittings of the superior C of Nisi Prius are held in Middlese limited in number, and when more Ju sit at Nisi Prius than usual, some sit elsewhere. It was for that reason the ejectment was tried in the Ses House in Westminster, and we thi quite clear that the statute 33 Vict. made such a course quite regular. by no means say that the law previ was that the sittings at Nisi Prius we be holden only in the usual courts, w if they are "within the hall called W minster Hall" are only so constructi but only that if it was so it is s longer.

A further objection was made tha oath on which the perjuries in one c were assigned was taken in the Cou Chancery before a commissioner a rised to take the oath by the 15 & 16 c. 78. It was said that the senten penal servitude on this count could n justified, because the oath was taken manner not authorised by the law at time the 2 of Geo. 2. c. 25, which imp

the sentence of transportation (now penal servitude) on perjury was passed. This is quite unfounded. The offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a Court at common law or acting under an earlier or later statute, it is equally an oath taken in a judicial proceeding, and equally perjury, and equally punishable by penal servitude.

One more objection was taken. Sentence in this case was passed by this Court when the verdict was delivered, not in term, but on one of those days which by virtue of the statute 11 Geo. 4. & 1 Will. 4. c. 70. sec. 7. already cited, are "for the purposes of the trial to be deemed and taken as part of the preceding term." It was argued that the Court could do nothing during those days but take the verdict, and that consequently sentence could not be then passed, but must of necessity be delayed until the next or some ensuing term. If this were so, it would follow that we should treat the sentence actually passed as a nullity, and on the application of the prosecution, grant a rule to bring up the defendant during term, and then pass the sentence that appeared to the Court as then constituted to be the proper one. Great inconvenience would arise from pursuing this course, and no benefit to any one is likely to result, but still if such was the course prescribed by the law we must follow it, however troublesome and useless it might be. We are, however, clearly and undoubtingly of opinion that it was competent for the Court to pronounce sentence at the time. As on this point an authority was cited, it is necessary to examine the question fully, as we dissent from that authority. All Courts of oyer and terminer sit for the trial of the causes brought before them. If the issue raised during the trial of one of these causes be on matter of fact, it is to be tried by the jury, under the supervision of the Court. If it is matter of law, it is to be tried by the Judges; if matter of record, by the record itself. See *Termes de la Ley*, Trial. The question what the sentence in a criminal cause should be is a question of mixed law and judicial discretion, to be guided by the facts proved on the taking of the verdict, and, therefore, is to be determined by the Judges, and so it is properly and necessarily included in the word trial. The trial by the Court of the cause before it, includes all those, and the word trial is not confined to taking the verdict. The superior Courts sat at common law only during term time and at Westminster. When an issue of fact arose which required to be tried by the verdict of a jury, process issued to bring up the jurors from the proper venue to Westminster, and the verdict was found there under the superintendence of the Court sitting during term, and if for any sufficient reason the whole trial was not completed during the term in which it began, the cause was adjourned, and the trial completed at a future sitting or sittings of the Court, which were necessarily holden in term time. As early as the Statute of Westminster the second, Edward 1, A.D. 1285, a remedy was provided for part of the inconvenience, expense and delay arising from this state of the law. By that statute power was given to the courts at Westminster to award a writ of Nisi Prius commanding the sheriff to bring the jury to Westminster in the next term, unless the justices of assize should first come to his county. And in case such a writ was awarded the justices of assize were to take the inquisition, and return the same to the Court at Westminster, where judgment should be given. In practice it became a matter of course to award a writ of Nisi Prius in every case, unless either the Crown was a party concerned, and refused its assent, or the Court, in its discretion, thought fit to direct that the trial should be at bar on account of the importance of the case. In either case the trial proceeded in this Court in term time at Westminster, as at common law. It was not usual to issue a commission of assize in Middlesex, and consequently in causes in which the venue was in Middlesex all trials remained as at common law till a much later period, when by various statutes, which it is unnecessary to cite, the Chief Justices and Chief Baron were directed to hold sittings at Nisi Prius in London and at Westminster, and the award of Nisi Prius

in town causes is therefore "unless first the Chief Justice comes," &c. In all respects material to the question before us, the law and practice is the same in town and in country causes. The direction of the Court would more properly have been called a direction that there should be no award at Nisi Prius, than a direction that the trial should take place at bar; but the latter phrase has been in use so long that it would be pedantry to try to alter it now. Substantially, the law remained the same down to the passing of the 11 Geo. 4. & 1 Will. 4. Two inconveniences were found to result in practice, which the statute was designed to remedy. The first was that in the comparatively rare cases in which there was a trial at bar, it must necessarily be in term time, to the great delay of all the ordinary business of the Court, and if the trial was not completed within the term in which it began, it must of necessity be adjourned till the next term, and then completed. The other inconvenience was that when there was a criminal trial in the Queen's Bench, and there was an award of Nisi Prius, the authority of the Judge on circuit or Chief Justice at Nisi Prius, being not to try the cause, but simply to take the inquisition, sentence was of necessity postponed till the next term. Whenever that sentence was discretionary, the Court in Banco was very much guided by the report of the Judge who presided. When the criminal was found guilty, but it was necessary to bring that report before the Court, there was much delay and expense occasioned both to the prosecution and the defendant. Both these inconveniences were, amongst others, remedied by the Act for the more effectual administration of justice in England and Wales, 11 Geo. 4. & 1 Will. 4. c. 70. By the 9th section it was provided that the judgment might be pronounced by the Judge at the sittings or assizes, subject to a power in the Court of King's Bench, within the first six days of the next ensuing term, to grant a rule to amend the judgment. In *The King* v. *Lloyd* (2), a motion was refused for such a rule. The judgment of Parke, J., very clearly indicates what the mischief was which it was meant to remedy—"To ground a motion of this kind the party ought to point out some essential defects in the sentence, otherwise we should lose and not gain by the enactment of the late statute, for after sentence had been passed at the assizes we should still be called upon in a number of cases to hear the report of the trial, affidavits, and speeches of counsel in this Court, as the practice was before the Act." It is obvious that those who framed the Act could not wish to introduce for the first time in a trial at bar a necessity to postpone sentence till next term, producing an inconvenience similar to that which was by the same statute taken away in the case of trials at Nisi Prius, still it is possible from want of skill they might use words which would compel us to say that such was the enactment. And if they had enacted that the days appointed, if in the vacation, should "for the purposes *of taking the verdict*, and those only," be deemed to be a part of the preceding term, we should have had great difficulty in avoiding that conclusion. The objection taken is grounded on the assumption that the word "trial" in this Act is to be construed as meaning "taking the verdict." But in construing all writings it is a general rule that we are to understand the words used in their technical sense, if they have acquired one, or if not, in their ordinary sense, unless there be something to shew that they are used in some secondary sense; and in *Haydon's case* (3) Lord Coke says it was resolved, "That for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discussed and considered—1. What was the common law before the making of the Act? 2. What was the mischief and defect for which the common law did not provide? 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? and 4. The true reason of the remedy. And then the office of all

(2) 4 B. & Ad. 135.

(3) 3 Rep. 76.

Judges is always to make such construction as shall suppress the mischief and advance the remedy." We cannot doubt that the defect which the Legislature intended to amend was that trials in the Superior Courts could not be holden except in term time, which was inconvenient when the verdict had to be taken before that Court, and the remedy was that when a trial at bar was directed in any cause, the Court might appoint days for the trial, which, if in vacation, should, for the purposes of the trial of that particular cause, be deemed to be in term, and on which the Court might therefore dispose of that cause just as they might at common law have done had those days been days in term time. To substitute for the word "trial" the words "taking of the verdict," or any similar words, or to construe the word "trial" as limited to the "taking of the verdict," would be an alteration and straining of the words of the Legislature for the purpose of defeating their obvious intention. We have no doubt that we cannot do so, and we should not have thought it necessary to render our reasons so much at length were it not for the expressions used by Tindal, C.J., in the opinion delivered by him in the case of *O'Connell* v. *The Queen* (4), which certainly are an authority to the contrary. It is to be remembered how that opinion came to be delivered. The Court of Queen's Bench in Ireland had, under the Irish Act, which is identical in its terms with the English Act, appointed days in the vacation after Hilary Term for the trial of that cause. On one of those days the jury delivered in a long special finding on the issues, and on this finding many troublesome questions arose. Had the verdict been delivered on a day which actually as well as constructively fell in Hilary Term, the Court of Queen's Bench might, and on such proceedings probably would, have postponed sentence until those points were argued, and for that purpose have adjourned the cause until next term. Nor can any reasonable doubt be entertained that in point of fact the Court of Queen's Bench in Ireland did, on receiving these findings, declare that they would do so, for on the first day of the next term, Easter Term, the parties did appear, motions were made on their behalf in arrest of judgment and otherwise, and after long arguments, sentence was pronounced in Trinity Term. But when the record was made up and returned in obedience to the writ of error, all that appeared on the record was, that these special findings were taken on the 12th of February, being one of the days which, by virtue of the statute, were for the purposes of the trial to be deemed part of Hilary Term, and that on the 15th of April, being the first day of the ensuing Easter Term, the parties appeared, and that having done so, and taken various steps in the cause, it was continued into Trinity Term, in which the sentence was passed. The counsel for the defendants assigned thirty-three grounds of error, some of which were very serious, and on one of which the judgment was reversed. But many were frivolous, and amongst those was the twentieth objection, "that there was not any proper continuance from the time when the verdict was given to the following term, when the judgment was pronounced." The House of Lords had to determine for the first time whether this objection was good, and whatever might have been the judgment if there had been a long series of precedents determining that the absence of a formal entry was fatal, it is obvious that there could be but one decision when it was a case of the first impression. The House thought fit to ask the Judges amongst other questions, whether this was a good ground for reversing the judgment. The unanimous answer of the Judges, delivered by Tindal, C.J., was that it was not, and the judgment of the House was that it was not. But in delivering the reasons for that judgment, Tindal, C.J., does undoubtedly, at page 250 of the report, state as the ground of his opinion that the day appointed was a day in term for the purpose of the trial, which no one doubts; but he assumes that the trial means in this statute the taking of the verdict and nothing more. He gives no reasons for this assumption; it had not been argued

(4) 11 Cl. & F. 250.

at the bar of the House, and it evidently was not much considered. If this was part of the *ratio decidendi* of the Lords in that case, we should be obliged to submit to it. But the opinions of the Judges rendered to the House are but advice to assist the House, as was strongly shewn in that very case, where the Lords by a majority of one gave judgment contrary to the opinions of a great majority of the Judges. But though not binding on us, the opinion of such an eminent lawyer as Tindal, C.J., is to be treated with great respect, and the more so as all the other Judges subscribed to his opinion, giving this as a reason. We should not, therefore, presume to dissent from that opinion if it were not that we find this point was not argued, and the opinion seems to have been hastily adopted without considering the reasons, which we think would have brought those learned persons to an opposite opinion, and which certainly lead us, without any doubt, to hold that the sentence was in this case properly pronounced.

These are all the objections that were made, and we think that none of them are tenable.

Rule refused.

Attorneys—The Solicitor to the Treasury, for the Crown; C. Harcourt, for defendant.

1874. May 4. } FLETCHER *v.* BAKER.

County Court—9 & 10 Vict. c. 95. ss. 70, 71—Notice to try by Jury—"Day of Hearing"—Adjournment—County Court Rules 104, 105.

By the County Court rule 104, *notice to try a case by a jury (under* 9 *&* 10 *Vict. c.* 95. *ss.* 70, 71) *is to be given "three clear days before the day of hearing;" and by rule* 105, *where the notice has not been given in due time, or if at the hearing both parties desire to try by jury, the Judge may, on such terms as he shall think fit, adjourn the cause, &c. In the present case the cause was ordered to be tried in a County Court under* 19 *&* 20 *Vict. c.* 108. *s.* 26, *and the* 18*th of February was appointed for the hearing. The defendant posted a demand for a jury which did not arrive three days before the* 18*th, and on the* 16*th made a fresh demand. On the* 18*th, the case, on account of the non-attendance of the defendant's counsel, was adjourned by consent till the* 19*th of March, and on that day, no jury having been summoned, the case was tried without a jury in spite of the defendant's protest, and the plaintiff obtained a verdict:*—Held, *that the defendant was not entitled to a new trial, for "the day of hearing" meant the day originally fixed for hearing, so that the demand for a jury was too late, and that the adjournment did not aid the defendant, as it was not an adjournment ordered by the Judge in the exercise of his discretion, for the purpose of allowing a jury to be summoned.*

Rule for the plaintiff to shew cause why there should not be a new trial in this action, on the ground that the plaintiff was entitled to have it tried by a jury.

It appeared from the affidavits that a Judge's order was made for the trial of the cause in a County Court, and the Court appointed the 18th of February for the hearing of the cause, notice of which was sent by the registrar to both parties. On the 14th of February the defendant posted to the registrar notice of his demand for a jury under 9 & 10 Vict. c. 95. s. 70 (1), but the notice did

(1) By 9 & 10 Vict. c. 95. s. 70, in all actions where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed shall not exceed five pounds, it shall be lawful for the Judge, in his discretion, on the application of either of the parties, to order that such action be tried by a jury, and in every case such jury shall be summoned according to the provisions hereinafter contained. Provided always that the party requiring a jury to be summoned shall give to the clerk of the Court, or leave at his office, such notice thereof as shall be directed by the rules made for regulating the practice of the Court as hereinafter provided, and the said clerk shall cause notice of such demand of a jury, made either by the plaintiff or defendant, to be communicated to the other party to the

not reach the registrar till the 16th. The defendant also neglected to pay to the clerk of the Court the five shillings for payment of the jury. On the 16th the defendant received a communication from the registrar, calling his attention to the irregularity in his proceedings, and he then forwarded a fresh demand in writing for a jury, and paid the five shillings. On the 18th the cause came on for hearing, when it appeared that no jury had been summoned. A proposal was however made for the adjournment of the trial on account of the non-attendance of the defendant's counsel, and the trial was adjourned by consent till the 19th of March, the defendant paying the costs of the day. When that day arrived the cause again came on for hearing, and the parties appeared, but no jury had been summoned. The Judge, notwithstanding the defendant's protest, insisted on trying the case without a jury, and there was a verdict for the plaintiff.

Francis shewed cause.—The defendant not having complied with the conditions prescribed by the County Court Act and rules, had no right to require that the cause should be tried by a jury. His demand for a jury was not made in due time, and he neglected to avail himself of the only means of curing the omission by applying to the County Court for an adjournment, in order that the necessary steps might be taken.

W. Lewis in support of the rule.—If the Court are of opinion that the notice posted on the 14th was not in time, which is doubtful, still there was a good three days' notice before the 19th of March, on which day the case actually came on for hearing. It cannot be suggested that any inconvenience arose from the original delay, as there was in fact more time for summoning the jury than there would have been if the first demand had been made early enough, and the case had been tried on the 18th of February. It is true that the adjournment was not made for the purpose of summoning a jury, but this really makes no difference.

COCKBURN, C.J.—I am of opinion that this rule must be discharged. By the County Court Rules 104 and 105, notice of demand of a jury is to be made in writing to the registrar three clear days before the day of hearing; and where the notice has not been given the Judge may adjourn the cause in order that the necessary steps for such trial may be taken, I think that the words "day of hearing" must be taken to mean the day appointed for the hearing, and not a day introduced by and depending upon accidental circumstances. Here the notice was not given three clear days before the hearing; and though the Judge has

said action either by post or by causing the same to be delivered at his usual place of abode or business, but it shall not be necessary for either party to prove on the trial that such notice was communicated to the other party by the clerk.

By section 71, every party requiring any jury to be summoned, shall at the time of giving the said notice, and before he shall be entitled to have such jury summoned, pay to the clerk of the Court the sum of five shillings for payment of the jury, and such sum shall be considered as costs on the cause unless otherwise ordered by the Judge.

By 19 & 20 Vict. c. 108. s. 26, where in any action of contract brought in a Superior Court the claim indorsed on the writ does not exceed fifty pounds, &c. . . . a Judge of a Superior Court on the application of either party, after issue joined, may in his discretion and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name, and thereupon the plaintiff shall lodge with the registrar of such Court such order and the issue, and the Judge of such Court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys, &c.

By rule 104 of the Rules for Regulating the Practice of the County Courts, 1867, "Notice of demand of a jury shall be made in writing to the registrar of the Court three clear days before the day of hearing, and the summonses to the intended jurors shall be delivered to the bailiff forthwith."

By rule 105, where notice of demand of a jury has not been given in due time, or if at the hearing both parties desire to try by a jury, the Judge may, on such terms as he shall think fit, adjourn the cause in order that the necessary steps for such trial may be taken, and the trial shall take place accordingly.

power to adjourn the hearing for the purpose of enabling the necessary steps to be taken, yet I think that this is not a case in which he can be said to have granted such an adjournment, for the application is one which he may comply with or not according to his discretion, and it appears that no application was made for him to exercise his discretion, but that the adjournment took place by consent.

BLACKBURN, J.—I am of the same opinion. The words of 9 & 10 Vict. c. 95. s. 70, "Provided always that the party requiring a jury shall give to the clerk of the Court such notice as shall be directed by the rules for regulating the practice of the Court," shew that the giving of such notice is a condition precedent to the right to demand a jury. And by section 71, it is further provided that before either party shall be entitled to have a jury summoned he shall pay to the clerk of the Court five shillings for the jury. Under rule 104, the notice demanding a jury is to be made three clear days before the day of hearing; and by rule 105, where the notice has not been given in due time, the Judge *may*, on such terms as he shall think fit, adjourn the cause. It appears, therefore, that the Judge has a discretionary power to adjourn for this purpose. Now what occurred? The defendant did not give his notice in time for the 18th of May. He gave a second notice on the 16th. On the 18th, when the case came on for hearing, an application might have been made to the discretion of the Judge for adjournment. But no such application was made. I think that, upon the true construction of the rules, the defendant never complied with the conditions upon which he was entitled to require a jury. It is very possible that the Judge might not have granted the indulgence if it had been asked for; and at all events the application was not made.

QUAIN, J., and ARCHIBALD, J., concurred.

Rule discharged.

Attorneys—Monckton, Long & Co., agents for J. F. Crump, Walsall, for plaintiff; Lewis, Munns & Longden, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Queen's Bench.*)

1874. May 9. { FISHER AND OTHERS *v.* THE LIVERPOOL MARINE INSURANCE COMPANY.

Marine Insurance—Policy—Unstamped Slip — Action — 30 *Vict. c.* 23. *ss.* 7 *and* 9.

The defendants, an insurance company at Liverpool, employed E. & Co. as their agents in London, to accept risks and receive premiums there for policies of marine insurance. The plaintiffs instructed P. & Co., insurance brokers in London, to effect an insurance upon a cargo. P. & Co., on the 16*th of November,* 1871, *prepared a slip, which was initialed by E. & Co., and a copy was made out by P. & Co. who sent it to E. & Co. On the same night E. & Co. sent the copy to the defendants at Liverpool. A policy ought to have been executed and sent soon after, but this was not done. An account, including* 2*s.* 6*d. policy duty, was sent by E. & Co. to P. & Co., who paid it on the* 13*th of March,* 1872. *No stamped policy was ever prepared or executed, and the ship and cargo having been lost, the defendants refused to execute the policy or to pay the insurance money. The jury found that the defendants authorised E. & Co. to issue slips, accept risks and receive premiums; that they had given plaintiffs reasonable ground to believe, and that the plaintiffs did believe, that if the plaintiffs paid the premium and stamp, on a slip initialed by E. & Co., they, the defendants, would issue a policy in accordance with the slip. They also found that the plaintiffs were prevented by the conduct of the defendants from insuring elsewhere:*—Held, *affirming the judgment of the Court of Queen's Bench, that no action would lie against the defendants, inasmuch as by ss.* 7 *and* 9 *of* 30 *Vict. c.* 23, *no contract for sea insurance is valid unless the same is expressed in a policy, and no policy is available unless duly stamped.*

This was an appeal against a judgment of the majority of the Court of Queen's Bench, making a rule absolute to enter a verdict for the defendants.

The case when in the Court below is reported 42 Law J. Rep. (N.S.) Q.B. 224.

The following case on appeal was stated.

CASE.

The first count of the declaration was upon a contract that the defendants had warranted that one Eames was their agent in London authorised to accept risks, and to receive premiums on their behalf, and that the plaintiffs were thereby induced to insure, and to pay premiums on the cargo of the ship *Lizzie*, and not to insure elsewhere, and setting out as a breach that Eames was not so authorised, and averring loss and damage.

The second count charged a fraudulent misrepresentation by the defendants, that Eames was their agent, and authorised as in the first count mentioned, whereby the plaintiffs were induced to insure the said cargo, and to pay to the defendants a sum of money for premiums and stamp duty on such insurance, and alleging as breach that Eames was not so authorised, and that no such policy was granted, and averring a total loss by perils of the sea.

The declaration also contained a count for money payable by the defendants to the plaintiffs for money had and received to the plaintiffs' use.

To the first count the defendants pleaded a traverse of the warranty.

To the second count they pleaded not guilty; and that they did not induce the plaintiffs to insure as alleged.

To the money count of the declaration the defendants pleaded never indebted, and payment into Court of 25*l.* 15*s.* 6*d.*, the amount of premium and stamp duty.

The cause was tried before the Honourable Mr. Justice Brett and a special jury at the Liverpool Summer Assizes, 1872.

The following are the facts as proved—

1. The plaintiffs carry on business as merchants and shipowners at Barrow-in-Furness, and were, at the time of the orders to insure hereinafter referred to, the owners of the ship *Lizzie*, and continued to be such owners up to and at the time of the loss of the ship, as hereinafter mentioned. The defendants are a marine insurance company carrying on business at Liverpool under the name and style of the Liverpool Marine Insurance Company (Limited), and in December, 1871, they entered into a voluntary liquidation.

2. The defendants appointed and employed the firm of Eames & Co. to act as their agents in London to accept risks and receive premiums in London on their behalf, and a circular was issued by the defendants informing the public of the said appointment.

3. Eames was called as a witness by the plaintiffs, and proved the course of business to be as follows: His firm accepted risks for the defendants by his himself initialing the slips. Copies of such were then sent to him by the brokers, and he invariably forwarded copies of the same to the defendants at Liverpool on the same day.

4. The plaintiffs employed their brokers in London, Messrs. John Patton, jun., & Co., to insure for them a cargo of steel rails per the said ship *Lizzie*.

5. The said cargo was the property of the Barrow Hematite Company, as agents for whom the plaintiffs were shipping the said cargo, and the *Lizzie* being the plaintiffs' own vessel, they were carrying the cargo upon a charter-party, and took upon themselves the risk of the cargo and to pay the Hematite Company any loss thereon. After the loss, the plaintiffs paid the Hematite Company the amount thereof.

6. On the 16th of November, 1871, the said brokers submitted a slip, of which the following is a copy, to Eames, who initialed the same—

"4,923*l.* 4*s.* 5*d.* 16th Nov., 1871.

Cash.

John Patton, jun., & Co.

'Lizzie.'

Barrow.	New York.
Steel rails.	f.p.a.
f.g.a. 880	60/ %
f.c. & s. 6,000*l.*	

1,000*l.* T. R. E. 16/11."

The words printed in italics appear in print in the above slip.

7. The initials T. R. E. appearing opposite the sum of 1,000*l.* on the slip are

the initials of Eames, and the said slip was put in and proved at the trial, and was not objected to.

8. A copy of the said slip or request note was made by the brokers and sent to Eames, and he the same day forwarded to the defendants a document, of which the following is a copy.

Liverpool Marine Insurance Company (Limited), London Agency, London, 16/11/1871. No.

Policy in the name of	On	Voyage, including all risk of craft, free of captures and seizures and the consequences of any attempt thereat.	Sum insured.	Premium per cent.	£	s	d.
John Patton, jun., & Co.	Steel rails. f.p.a. f.g.a. f.c. & s.	At and from Barrow to New York.	£1,000.	60/ Brokerage Discount Duty £			
To the debit of. do.	Ship *Lizzie.* Date of Sailing.						

9. On the 1st or 2nd of February a debit note was forwarded from Eames to Patton & Co., of which the following is a copy.

"*The Liverpool Marine Insurance Company (Limited).*

London Agency.

Eames & Co., St. Michael's House, Cornhill, E.C.

To premiums for the month of January, 1872, less brokerage and 10 % discount for cash	£25 13 0
Policy duty	0 2 6
	£25 15 6

Messrs. J. Patton, jun., & Co.

"Note.—The discount will be forfeited in default of prompt payment on the 8th of February.

"Please bring this account when payment is made."

10. On the 29th of January, 1872, the defendants' liquidators in Liverpool wrote a letter to Eames & Co., of which the following is a copy—

"T. R. Eames, Esq., London.

29th January, 1872.

Dear Sir,—We have open slips as at foot, and shall be glad to receive instructions regarding them.

Yours faithfully,
for Self & Co., liquidators,
J. S. McGhie.

Nov. 16th, *Lizzie*, Barrow, to New York, 1,000*l.* on steel rails.

J. Patton, jun., & Co."

11. To this letter Eames & Co. sent no reply, but upon receipt of it communicated with Patton & Co., and received their instructions to put the slip forward. The slip was put forward, but on what date did not appear except by the correspondence hereinafter set out.

12. On the 13th of March, 1872, Patton & Co. paid to Eames & Co. by cheque to the defendants' order the sum of 25*l.* 15*s.* 6*d.*, being 25*l.* 13*s.* for premium, and 2*s.* 6*d.* for stamp duty on the policy; and Eames & Co., acting on their authority, indorsed the said cheque for the defendants and paid it into their own banking account, and it was duly paid.

13. The brokers on that occasion, and

on several occasions afterwards, applied to Eames for the policy, and were told it had not been sent up from Liverpool, and that he would write a sharp letter about it.

14. The *Lizzie* and cargo were on the 21st of March, 1872, posted as, and were, in fact, totally lost, and the defendants refused to execute any stamped policy or to pay the insurance.

15. The following correspondence took place between Eames and the defendants—

"London, 13th March, 1872.

Gentlemen,—Messrs. Patton & Co. have applied to us for policy per *Lizzie*, the slip of which was sent to you some time since. Please send us the policy at your earliest convenience.

Yours faithfully,
Eames & Co.,
p. E. O.

To Liverpool Marine Insce. Co."

"Liverpool, 16th March, 1872.

Messrs. Eames & Co., London.

Dear Sir,—Please send me a copy of your reply to mine of the 29th of January. It appears to have been mislaid.

Yours faithfully,
T. S. McGhie,
for Self & Co., liquidators."

"To T. S. McGhie, from
Eames & Co., London.

18th March, 1872.

In reply to yours of the 16th, we cannot find any favour from you dated 29th of January. Please hand us a copy of same."

"20th March, 1872.

Eames & Co., London,
To liquidators of Liverpool Marine Insurance Company.

Copy of yours of 29th of January duly to hand. We have never received the original. The *Lizzie* was sent down to you to put forward some ten days ago, and we have since written asking for policy. Messrs. Leech Harrison will let us know to-morrow about ship or ship's policy."

Defendants to Eames & Co.

"21st March, 1872.

As so long a time has elapsed since the insurance per the *Lizzie* was opened, we cannot now issue a policy.

Yours faithfully,
T. S. McGhie,
for Self & Co., liquidators."

Eames & Co. to defendants.

"London, 25th March, 1872.

Referring to your note in reference to the *Lizzie*, we are surprised at your refusing to issue a policy. This slip was sent to you some time since, and we have written more than once for the policy, and, moreover, Messrs. Patton & Co. have paid the premium."

Defendants to Eames & Co.

"Liverpool, 26th March, 1872.
Lizzie.

Dear Sirs,—Will you please say when you received the premium per this vessel, as we have no account of it? The earliest request we had for a policy was contained in your letter of the 13th March.

Yours faithfully,
T. S. McGhie,
for Self & Co., liquidators."

Eames & Co. to defendants.

"27th March, 1872.

In reply to yours of yesterday respecting the *Lizzie*, the copy of the slip was sent to you some time since; we have no record of the date, because it was sent down without any letter being written (as customary). The cheque was paid 13th of March. Messrs. Patton & Co. inform us that they wish to know by wire to-morrow without fail if you intend to issue a policy or not."

Defendants to Eames & Co.

"28th March, 1872.

I have yours of yesterday, and repeat a policy cannot now be issued. The liquidators do not recognise the payment to you by Messrs. Patton, as you had no authority to receive it on behalf of this company. Permit me to ask you why advice of the payment was not made to the liquidators before?

Yours faithfully,
T. S. McGhie.
for Self & Co., liquidators."

Eames & Co. to defendants.

"28th March, 1872.

Yours of the 28th duly to hand. Never having had our authority to receive money

on behalf of the Liverpool Marine, cancelled, we of course considered we were justified in applying for and receiving premiums overdue; and referring to your other question, it has not been our custom, as you well know, to make daily advice of payments made to us on behalf of the company. Messrs. Patton & Co. inform us that they consider you are bound to issue a policy."

16. The company did not at any time return the said slip, nor did they in any way intimate that they would not grant a policy until the 21st of March, 1872.

17. The learned Judge put the following questions to the jury—First, did the defendants authorise Eames to initial slips, to accept risks, and to receive premiums on their behalf?

Secondly, did the defendants by approving the circular issued stating that Eames had authority to accept risks, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe, that if they (the plaintiffs) paid the premium and stamp duty on a slip initialed by Eames, the defendants would issue a policy in accordance with the slip?

Thirdly, were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere?

And the jury having answered all these questions in the affirmative, a verdict was thereupon entered for the plaintiffs with damages 1,000*l.*, the declaration to be taken as amended to meet the facts and findings, his Lordship ruling that there was no evidence on the record as it stood, and reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, on the grounds that there was no evidence to go to the jury of liability on the part of the defendants, and that his Lordship ought not to have allowed the declaration to be amended.

18. The defendants afterwards moved for and obtained a rule, of which the following is a copy—

"In the Queen's Bench.

Thursday, the 7th day of November, 1872, in the 36th year of Queen Victoria.

Fisher and others *v.* The Liverpool Marine Insurance Company (Limited). } It is ordered that the plaintiffs upon notice of this rule to be given to their attorney shall upon Saturday, the 16th day of November instant, shew cause why the verdict obtained in this cause should not be set aside and a nonsuit or verdict for the defendants entered instead thereof, pursuant to leave reserved by the learned Judge, on the grounds—first, that there was no evidence to go to the jury; secondly, that no action will lie on the slip alone without a policy; thirdly, that no interest was shewn in the plaintiffs; fourthly, that the learned Judge should not have allowed the declaration to be amended; and it is further ordered that in the meantime proceedings be stayed."

19. This rule was made absolute on July 5, 1873.

20. Due notice of appeal has been given pursuant to the said Act. And the question for the opinion of the Court of Appeal is whether the said last mentioned rule ought to have been made, or whether the said rule of the 7th day of November ought not to have been discharged.

Benjamin (*Aspland* with him), for the plaintiffs.—The judgment of Blackburn, J., in the Court below was correct. The pleadings may be considered as being out of the case. The defendants were bound either to execute a policy within a reasonable time or to inform the plaintiffs that they would not do so, in time for them to insure the cargo elsewhere. The questions of duty and breach of duty are raised by the last question which Brett, J., asked the jury at the trial, that is to say, "Were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere?" The course of business, and the practice of sending a copy of the slip which has been initialed, which prevails in the case of companies for sea insurance, is described in *Xenos* v. *Wickham* (1), and is admitted to be correct. There is evidence of an independent contract here by the defendants which the

(1) 14 Com. B. Rep. N.S. 435; s. c. 33 Law J. Rep. (N.S.) C.P. 13; in error 36 Law J. Rep. (N.S.) C.P. 313; s. c. Law Rep. 2 E. & I. App. 296.

majority of the Court failed to see, although they agreed with the facts as stated by Blackburn, J. The question is this: are not the defendants responsible for keeping the plaintiffs uninsured, as a broker would be in the case of an ordinary policy? In the Court below Blackburn, J., said, "If the broker has been negligent, and in consequence the final conclusion of the matter has been unreasonably delayed, the broker is responsible to his principal for the damage sustained through that delay." The defendants have taken this duty upon themselves. They undertake to prepare the policy and execute it. The action is not brought upon a policy, but upon the undertaking to grant a policy. They must have known that the position of the plaintiffs would be altered by their neglect to carry out their undertaking. They have been guilty of this neglect, although the plaintiffs through Patton & Co. have paid the premium and the stamp duty, and although they have done all they could to insure that the revenue should be protected.

[CLEASBY, B.—There was no payment until the 13th of March.]

That was because the defendants gave a month's credit; it was the same as if the money had been paid in February, and the plaintiffs are not to be injured by the fact of the defendants giving time to the broker. There was ample evidence of a second agreement that they would send a policy to the defendants.

[BRETT, J.—You will have to consider the case as if the same question arose upon a Lloyd's policy, whether the underwriter would be liable, under such circumstances, if he merely signed the slip.]

No; in such a case, there would be no duty beyond initialing the slip, while here the company undertake to get the stamp and prepare the policy. If they do not, they are bound to let the defendants know, so that they may insure elsewhere. The binding contract is on the policy, but beyond that there is a bargain between the company and the assured as to the premium and the risk; the Legislature steps in by the 30 Vict. c. 23, and says, "You shall not enforce the contract unless the duty is paid." The 5th, 7th and 14th sections shew that the Legislature contemplated a prior agreement being made, and being afterwards put into a policy. If the judgment of the Court below is affirmed, the defendants will succeed by reason of defrauding the revenue, while the plaintiffs, who have done all they can to protect it, will be defeated. The plaintiffs are not seeking indirectly to enforce the contract.

G. R. Williams (*Aspinall* with him), for the defendants.—It is contended on behalf of the plaintiffs that there are two contracts, one which is within the statute, and which cannot be enforced, and the other beyond the statute upon which the plaintiffs can maintain an action. But there is only one contract, and that contract is evidenced by the slip. This is a contract of sea insurance, which by the 7th section is not valid unless expressed in a policy, and by section 9, no policy can be given in evidence unless it is stamped. It was decided by *Ionides* v. *The Pacific Fire and Marine and Insurance Company* (2) that a slip may be looked at for other purposes, but not with the view of enforcing it as a contract for sea insurance.

(He was then stopped.)

LORD COLERIDGE, C.J.—We all think that the judgment of the Court below must be affirmed. The ground upon which I come to that conclusion is a short and simple one, and the same as that upon which the majority of the Court below proceeded, that all that was done with respect to initialing the slip, the sending the copy to the defendants, the receipt by them and what was done or ought to have be done afterwards was one entire and indivisible contract between the plaintiffs and the defendants, the defendants being represented by Eames & Co. as their agents. If that be so, it is admitted that the contract cannot be enforced, because it would be a contract made by a slip, which has been held again and again to be a contract for sea insurance, and which by the express words of the statute, 30 Vict.

(2) 41 Law J. Rep. (N.S.) Q.B. 33; in error, 190; s.c. Law Rep. 6 Q.B. 674; in error, 517.

c. 23, is absolutely invalid and cannot be enforced.

Of course it is true that though that be so, and it cannot be enforced, it is, in one sense, a contract and binding in honour. One is astonished to find that it is ever repudiated, but it cannot be enforced in a Court of Law. In the Court below one of the learned Judges differed, and it was natural enough under the circumstances of the case to endeavour to maintain, if possible, that a contract entered into, as a matter of fact, and repudiated under circumstances which the Judge who tried the case has fittingly expressed his opinion upon, and which contract he was very desirous of enforcing if it could be done consistently with the law. Now that could be done only by separating the portions of it, and saying that that portion which was constituted by what would be the slip, is one part, but that apart from the contract contained in the slip, and of which the slip was the only evidence, there was a contract which casts upon the defendants the obligation to prepare the policy, and tender that policy to themselves for the purpose of being executed, and that inasmuch as that was a separate contract which arises impliedly from the state of the facts between the plaintiffs and the defendants, and as the defendants had not carried it out, and as it was separable from the unenforceable contract, the portion of the contract which was enforceable could be recovered on and the damage assessed accordingly. It would certainly seem necessary to resort to extreme refinement, and some violence to the common understanding of the facts of these transactions, to maintain such a proposition. No one supposes in fact, that when a broker of an insurance company signs a slip of that kind, he does anything more than contract to prepare and execute a policy, as a part of one and the same transaction, a policy that is in accordance with the terms entered into in the slip. It is admitted that if in this case that was the contract which was entered into it cannot be enforced; the only suggestion is that that was not the contract, but that it was something separable and distinct, of which, I confess, I cannot see the slightest evidence.

Something has been said of som sequent contract, but I think th whole of the transaction must be re as a performance or non-performa the original contract entered into the slip was signed, that it is imp to distinguish this day or that day as the date of any fresh or second co It all constitutes one entire and indi contract which cannot be enforced, think that the judgment of the below should be affirmed upon the gr stated in the judgment of the majo that Court.

Bramwell, B.—I am of the opinion. It is said that there ar contracts, one of which is uninfor by the terms of the statute, and a which is inforceable, but I think w argue that in this transaction the not two contracts. Bearing in mi practice of these insurance comp the defendants through Eames & C itialed the slip, which was nothing than this—that the plaintiffs were to pay the premium, and the defer were bound to receive it, to prepare a properly stamped, and to pay the a of insurance if there was a loss. was no necessity for further arrang or bargain; there was nothing happened afterwards which was contemplation between the parties the initialing took place. The prepar made for the policy were a part bargain which the defendants e into. The defendants are not pa preparing policies, nor is there any in reference to the preparation policy except that which they unde by originally initialing the slip. I had been a lawful inforceable contr one would say that there was mor one contract. Again, it is said th supposed second contract was not tract by the defendants that they execute the policy, but only that would prepare it. Then this prepos consequence would follow, that ha duty to prepare the policy, but n execute it, they would have co with their undertaking if they had pared it, though they had not cuted it.

Another argument addressed to us assumes somewhat like this shape: that the plaintiffs have a right to complain that the defendants did not inform them that they had not prepared the policy, and would not execute it if they had prepared it; the consequence being that the plaintiffs had a right to suppose that they had executed it, which misled them, and consequently that they did not insure elsewhere. When this argument is sifted, it comes to this, "You, the defendants, were bound to prepare, execute and hand to us a policy, and from your not performing your duty, we had a right to infer that you had performed it; *i.e.* because you did not hand us a policy duly executed, and thus broke your agreement, we have a right to infer that you had prepared it." It seems to me that that would be an erroneous subtlety, and that the judgment of the majority of the Court below was right.

BRETT, J.—If I had not tried this cause I should not have ventured to say anything in addition to those judgments which have already been delivered, but I was convinced upon the evidence that the repudiation upon the part of the defendants of that which was an agreement, though not binding, and which was in every business sense an honourable undertaking on their part, was a shameful proceeding. And I confess I sought means by which, if it were possible, that repudiation should be a failure; and I should, if I could without to my mind breaking rules of law, be glad if I could support Mr. Benjamin's argument, and the opinion of my brother Blackburn. I am only afraid that in attempting to answer those which may appear to be fallacious arguments, I may be supposed to be countenancing in any way that conduct of the defendants which in my opinion was disgraceful. At the trial it seemed to me that Eames, who was their agent, had bound them by initialing the slip. Now it must be admitted that if it had been an ordinary Lloyd's slip, the only undertaking that could be inferred from the signature would be an undertaking by the defendants to sign a policy of insurance when tendered to them. No undertaking to prepare or tender a policy could be inferred. It is also admitted that that would be a contract having reference to an insurance, and that therefore it would be within the Act and would be void, because not put into the form of a policy, and not stamped. It seems to me that the slip was the only evidence at the trial of any contract by the defendants. Even if it could be gathered from the evidence given at the trial that there was evidence of any other contract, I must say, that neither at the trial nor in the case stated, do I see that that evidence was relied upon as evidence of a contract made at any other time than when the slip was initialed. But in argument it has been alleged that at the time of the signing the slip, by reason of the course of business which is carried on by insurance companies, and which is different from the course of business carried on by Lloyd's underwriters, that there was at that time and by reason of signing the slip another independent contract, namely, that the defendants beside executing a policy would prepare that policy, and would procure a stamp for that policy. But if that be a contract made at the same time by reason of that course of business, it can only be a contract because the defendants have signed the slip, and it is therefore to my mind a part of the same contract, and if so, it cannot be enforced any more than the contract to execute the policy. If by signing the slip, and by the course of business, there is not only a contract on the part of the company to execute the policy, but also to prepare such policy and to procure the stamp, it cannot be said that there are two contracts evidenced by the same act, it would be one contract made at the time, and as much within the Act as a contract on a Lloyd's policy would be.

But then it is said that there is at the same time an independent contract that the company shall be an agent to procure the execution of a policy by itself. It seems to me that to say that a man is an agent to procure the execution of a policy by himself is an ingenious play of words. A man cannot be an agent to make himself do things. If I could see that the Act

could be evaded in this way I would evade it, but I do not see how it can be done. It has been suggested, and I refer to the suggestion with much respect, that there is evidence of a contract introduced afterwards, namely, in February, on the part of the defendants by and through Eames, that they would get the policy sent up and executed. It strikes me, in the first place, that there is no evidence that Eames would be the agent of the defendants to enter into the contract. He was merely their agent for the purpose of initialing the slip. But the great defect in the suggestion is this, that it was not put forward at the trial, as it was not then in the mind of any one. I did not leave it to the jury, and in point of fact I did not reserve leave to move on the ground that there was any such evidence upon which the verdict could have been entered. This is a motion to enter the verdict on leave reserved, and I cannot think the point is open to the defendants in the present case. I doubt very much whether the judgment of my brother Blackburn was founded on that suggestion at all. Therefore it seems to me that I cannot support the judgment of my brother Blackburn, because every argument which has been brought forward seems to be equally applicable to the signature of a Lloyd's slip by a Lloyd's underwriter. In such a case if I had left the same question to the jury, they must have answered it in the same way, and then if this judgment could be upheld in favour of the plaintiffs, in such a case it could be upheld, and that in point of fact would be nothing else than making the slip a binding contract to enter into an assurance, and that is the very thing which the Act says shall not be.

Cleasby, B.—I am of the same opinion. It seemed to me that possibly the plaintiffs' case might rest upon the answer to the third question, that the plaintiffs were prevented by the conduct of the defendants from insuring elsewhere. That question must, as I understand, have been put with respect to the amount of damages; and though possibly the answer to it might involve a right in the plaintiffs to maintain an action, it is obvious generally that they could not do so on the ground that they were prevented from insuring elsewhere by reason of the slip being initialed. The only way in which they could succeed would be by the particular facts of the case being brought before the jury, and their opinion being taken upon the effect of those facts. I should have been glad to make use of it, if I could, but the question must be left to the jury. As to the breach of contract or duty, there is an inseparable difficulty in finding that at the time of initialing the slip there was any contract except that which was contained in the slip itself. If an arrangement could be shewn on the part of the defendants to bring the policy forward at the proper time, there might be a foundation for a claim against them, but as far as I can see, nothing of the sort appears to have existed.

Denman, J.—I am of the same opinion. With every desire to support the judgment of my brother Blackburn, after hearing Mr. Benjamin exert all his ingenuity in support of it, I can come to no other conclusion than this: that no declaration could have been framed so as to support the plaintiff's case, without setting up a contract which would have been a contract or agreement for a sea insurance not expressed in a policy and not stamped. That being so, I think that we are bound to give our judgment for the defendants.

Pollock, B.—I also think that the judgment of the Court of Queen's Bench ought to be affirmed. Whatever view we may take of the conduct of persons with reference to the fulfilment of contracts, which are to make them bound in honour, the sound rule of law in all such cases is that we should look to what is the substance of the thing. In this case the substance clearly is that this is a contract, the consideration of which is the payment of the premium, and the contract, apart from the statute, is that the interest which is put forward by the proposer should be accepted, and when accepted should be insured. In the case

of a company that proposition includes this—that a policy should be prepared as well as executed. In my mind those two things may be said to exhaust the consideration. Now then comes the statute, and that statute appears to me to be like one which follows upon a series of statutes of the same kind, where there has been a sort of struggle between the habits of mercantile men on one side, and revenue legislation on the other. It says that no contract for sea insurance shall be binding unless it bears a stamp. To my mind this is to put an intended contract exactly in the same position as a verbal contract under the statute of frauds, in which case it is impossible to suppose that you could superadd to the contract itself any duty to do that which is part of the duty under the contract. That being so, the difficulty is acknowledged in the Court of Queen's Bench, and is put in this way by my brother Blackburn: that as a broker in the case of a Lloyd's policy has a duty to prepare the policy, such a duty is, in the case of a company, shifted by usage to the company, and the liability which attached to the broker would also attach to the company. It strikes me that that is not so; for, in truth, the separate duty which exists in the case of the broker who is an agent of the proposed insurers, would, in the case of a company, be merged in the contract itself which is created by the slip.

AMPHLETT, B.—I am of the same opinion. The matter is entirely exhausted by the judgments which have been delivered, and I need not add anything.

Judgment affirmed.

Attorneys—J. McDiarmid, for plaintiffs; F. Venn & Son, agents for Anderson, Collins & Robinson, Liverpool, for defendants.

1874. April 28. May 1. } COX *v.* LEIGH.

Landlord and Tenant—Sheriff—Execution—8 Ann, c. 14. ss. 1, 6, 7—Distress—Year's Rent.

Statute 8 Ann, c. 14, by section 1, provides that no goods or chattels being in or upon any messuage, lands or tenements which are or shall be leased for life, &c., shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall before the removal of such goods from off the premises pay to the landlord, &c., all such sum or sums of money as shall be due for rent, &c., provided the said arrears of rent do not amount to more than one year's rent, and in case they do, the judgment may be executed after paying one year's rent:—Held, *that the provision in the above section applies only to a case where there is a subsisting tenancy; and therefore where the sheriff seized goods after the tenancy had been determined he was held not liable to an action for selling the goods upon the land without paying over a year's arrears of rent to the landlord.*

This was a Special Case stated in an action against the sheriff for the removal of goods taken in execution without paying rent to the landlord.

CASE.

1. The plaintiffs are the trustees for and on behalf of the Derby and Derbyshire Banking Company, and the defendant is the Sheriff of Cheshire.

2. George Underwood being possessed of or well entitled to the messuage and premises called Raby Hall, in the county of Cheshire, by virtue of an assignment dated the 21st of March, 1868, for the residue of a term of ninety-nine years, to be computed from the 2nd day of August, 1846, subject to the yearly rent of 79*l.* 6*s.*, payable to the Earl of Shrewsbury, the owner in fee, by an indenture dated the 21st of March, 1868, between him, the said George Underwood, of the first part, and Charles Spencer and Thomas Levi Harris of the other part, Underwood assigned to Spencer and Harris the said messuage and premises, subject to the

said yearly rent, for the residue of the said term of ninety-nine years, by way of mortgage, for securing the repayment of 5,000*l.*, and interest at 5*l.* per cent. per annum, advanced by the said Charles Spencer and Thomas Levi Harris to the said George Underwood. And by this indenture Underwood attorned and became tenant from year to year to the said Charles Spencer and Thomas Levi Harris or the survivor of them, or his executors or administrators, their and his assigns, for and in respect of the said messuage and premises, with the appurtenances, at the yearly rent of 250*l.*, clear of all deductions, to be paid by two equal half-yearly payments, on the 21st day of March and the 21st day of September in each year; the first half-yearly payment thereof to be paid on the 21st day of September then next, with power to the said Spencer and Harris or the survivor of them, or the executors or administrators of such survivor of them, their or his assigns, to enter upon and to take possession of the said hereditaments and premises, in case of non-payment of the said rent within twenty-one days after the same had become due, or to determine the tenancy created by the aforesaid attornment. And by an indenture of the 2nd of February, 1869, the said Spencer and Harris assigned to Josiah Lewis (since deceased) and one of the plaintiffs, the said William Thomas Cox, Esq. (the then trustees of the said Derby and Derbyshire Banking Company), the said messuage and premises, and the said debt security, and all their rights and title in regard to the same, and to the messuage and premises subject to the equity of redemption under the last mentioned indenture, and George Underwood having been and remaining in the occupation of the said messuage and premises, signed the following attornment: "I do hereby agree to pay to the said Josiah Lewis and William Thomas Cox for the same hereditaments and premises, meaning the messuage and premises called Raby Hall, the same rent as is reserved to the said Charles Spencer and Thomas Levi Harris by a certain indenture of mortgage bearing date the 21st day of March, 1868, and made between me, the undersigned, of the one part and the said Charles Spencer and Thomas Levi Harris of the other part, and from such several periods or times as are in the said indenture expressed, and I have given unto the said Josiah Lewis and William Thomas Cox the sum of one shilling in the name of attornment and in part of the said rent. As witness my hand this 19th day of February, 1869.

"Geo. Underwood.

"John Moody, Solicitor, Derby."

The 250*l.* above referred to represented the five per cent. interest due on the said advance of 5,000*l.* for which the said messuage and premises were held by the parties as security. And the said Josiah Lewis having died, and the said plaintiff, Samuel Walter Cox, having become one of the trustees of the said banking company with the said plaintiff, William Thomas Cox, he, the said W. T. Cox, by deed dated the 8th day of October, 1869 (amongst other things), assigned the said messuage and premises and the said debt security, and all the right, title and interest of the said Josiah Lewis at the time of his death, and the said plaintiff, William Thomas Cox, jointly or of the said plaintiff, W. T. Cox, as the survivor of the said Josiah Lewis in regard thereto, and to the said messuage and premises subject to the said equity of redemption, to the use of the plaintiffs.

The said George Underwood paid the said yearly sum of 250*l.* to the said Charles Spencer and Thomas Levi Harris, which was due to them up to the 2nd of February, 1869, and to the said Josiah Lewis and William Thomas Cox, which was due to them up to the time of the death of the former, and to the plaintiffs from that time up to the 21st day of September, 1871, and on the 21st of March, 1872, by a due notice to quit before then given by the plaintiffs to the said George Underwood, his tenancy to the plaintiffs, if any existed in such messuage and premises, expired.

3. On the 21st of March, 1872, there became and was due from the said George Underwood to the plaintiffs, under the circumstances aforesaid, in respect of the said yearly sum of 250*l.* mentioned in the second paragraph of this case, the sum of 125*l.* for the half-year ending on that day; and on the 26th day of March,

1872, the plaintiffs issued a writ in an action of ejectment against the said George Underwood, brought to recover the possession of the said messuage and premises, and on the 9th of May, 1872, judgment was obtained, and the sheriff delivered possession to the plaintiffs on the 22nd of June, 1872.

4. An action was brought by John Cash and another against the said George Underwood in the Court of Exchequer, and judgment was signed for the plaintiffs therein, and upon such judgment a writ of *fieri facias* was issued, and on the 27th of March, 1872, it was lodged with the defendant as the Sheriff of Cheshire to be executed. By such writ of *fieri facias* the said Sheriff of Cheshire was commanded to levy of the goods and chattels of the said George Underwood, in his bailiwick, 34*l.* 15*s.* 11*d.* besides, &c.; and the defendant as such sheriff, by his officer, on the same day, took goods and chattels of the said George Underwood then being in and upon the said messuage and premises in the bailiwick of the said sheriff, to answer the said writ, and left a man in possession thereof under the said writ of *fieri facias;* and another action was brought by Edward Gilbert against the said George Underwood in the Court of Exchequer of Pleas, and judgment was signed for the plaintiff therein, and upon such judgment a writ of *fieri facias* was issued, and it was lodged with the said defendant as such sheriff on the 11th day of April, 1872, to be executed in like manner to levy 61*l.* 15*s.* 2*d.* besides, &c. And the defendant as such sheriff, by his officer, took on the same day the said goods and chattels of the said George Underwood then being in and upon the said messuage and premises to answer such last mentioned writ, and left the same man in possession thereof under the said two writs of *fieri facias.*

5. Before these executions were put in, and before the 21st of March, 1872, viz., on or about the 13th of March, 1872, the Earl of Shrewsbury had seized a large part of the goods on the said messuage and premises for arrears of rent due in respect of the said premises amounting to 220*l.* 10*s.* 4*d.*, being two and a half years of rent in arrear, which goods were sold by the Earl of Shrewsbury in June, 1872. The sheriff seized for the purpose of satisfying the said writs so lodged with him the residue of the goods on the said premises not seized by the Earl of Shrewsbury.

6. On the 12th day of April, 1872, the plaintiffs caused a distress to be put in upon the said goods and chattels of the said George Underwood then being in and upon the said messuage and premises, and which had been so seized and taken, and were then held possession thereof under the said writs of *fieri facias* for the said arrears of alleged rent due on the 21st of March preceding, and put and left a man in possession of the said goods and chattels under the said distress, and so continued such last mentioned man in possession of the said goods and chattels with the said man so put in possession thereof by the said sheriff until the 16th day of April then following. The defendant as such sheriff continued also to hold the said goods and chattels under and by virtue of the writs of *fieri facias* before mentioned, and the said goods and chattels so taken in execution and under the said distress then were and continued to be in and upon the said messuage and premises; and on the 16th day of April the plaintiff caused a written notice to be given to the said defendant as such sheriff that the said alleged rent was so in arrear as aforesaid, and requested him not to remove the said goods of the said George Underwood so then being taken by him in execution as aforesaid till the said rent so in arrear was paid, and thereupon the plaintiffs withdrew the said man so sent by them to take possession under the said distress.

7. On the 16th of April, 1872, a certain other writ of *fieri facias* on a judgment for the plaintiff, in a suit wherein Walter William Wynne was plaintiff and the said George Underwood was the defendant, was lodged with the now defendant as such sheriff to levy of the goods and chattels of the said George Underwood then being in and upon the said messuage and premises the sum of 104*l.* 11*s.* 3*d.*, being the amount of such judgment, with interest thereupon; and the now defendant, by his officer, on the same day, took

and held the said goods and chattels henceforth under and by virtue of such writ, and on the 30th of April then following a certain other writ of *fieri facias* on a judgment for the plaintiff, in an action wherein William Ryalls was the plaintiff and the said George Underwood was the defendant, was lodged with the now defendant for execution on the said goods and chattels of the said George Underwood then being in and upon the said messuage and premises, and the now defendant, on the same day, took and held the same to satisfy the said writ.

8. On the 9th day of May, 1872, the plaintiffs obtained judgment in the said action of ejectment referred to in paragraph 3, and possession of the said messuage was awarded to be given in execution to them on the 1st day of June then ensuing.

9. On the 4th day of June, 1872, the defendant caused to be sold the said goods and chattels of the said George Underwood so as aforesaid seized by him, and the said goods and chattels were removed from the said messuage and premises and delivered to the respective purchasers thereof, and realized sufficient to pay the plaintiffs, if they are entitled to priority as against the execution creditors.

10. After the said sale of the said goods and chattels of the said George Underwood by the defendant there remained no further or other goods and chattels of the said George Underwood on the said messuage and premises to answer any distress by the said plaintiffs or to meet the said rent so in arrear as aforesaid.

11. The question for the opinion of the Court is, whether, under the circumstances above stated, the defendant could legally cause to be sold and removed in pursuance of such sale the said goods and chattels in order to satisfy all the said writs of execution until the arrears of rent had been paid to the plaintiffs.

If the Court should be of opinion in the negative, then judgment was to be entered up for the plaintiff for 125*l.* and costs of suit.

If the Court should be of opinion in the affirmative, then judgment was to be entered up for the defendant with costs of suit.

Field (*J. O. Griffits* with him), for the plaintiff (on April 28).—The question is, whether the 1st section of 8 Ann, c. 14, applies in a case where the tenancy has been determined as well as to a subsisting tenancy (1). It is contended that it does so apply. The 1st and 6th sections should be read together, and then, inasmuch as by the latter section the landlord has a right to distrain for arrears of rent after

(1) Statute 8 Ann, c. 14. s. 1—"For the more easy and effectual recovery of rents reserved on leases for life or lives, term of years, at will or otherwise, be it enacted, that from and after the 1st day of May, which shall be in the year of our Lord 1710, no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this Act; and the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

Section 6—"And whereas tenants *pur auter vie* and lessees for years or at will frequently hold over the tenements to them demised after the determination of such leases, and whereas after the determination of such or any other leases no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof;" it is hereby further enacted—"That from and after the said 1st day of May, 1710, it shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will ended or determined, to distrain for such arrears after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined."

Section 7—"Provided that such distress be made within the space of six calendar months after the determination of such lease and during the continuance of such landlord's title or interest and during the possession of the tenant from whom such arrears became due."

the determination of the lease, so long as he does so within the time limited by section 7, that is to say, within six months after the determination of the lease, so it was intended by the Legislature that the party at whose suit the execution was sued out should, before the removal of the goods off the premises, pay the landlord his rent, so long as six months had not expired after the determination of the lease. The tenancy, in the present case, of Underwood, was determined by a notice which expired on the 21st of March, 1872; a half-year's rent, namely, 125*l.*, was then due. In the action by John Cash against Underwood a *fi. fa.* was issued, and being lodged in the hands of the defendant on the 27th of March, 1872, he took possession of the goods of Underwood on the same day. On the 12th of April, 1872, the plaintiffs, the landlords of Underwood, put in a distress upon the goods which were in the hands of the defendant. They were justified in doing so, the period of six months after the determination of the tenancy not having expired. If that be so, the defendant is liable in this action for removing the goods without paying the half-year's rent. It is true that in *Woodfall's Landlord and Tenant*, 10th ed., p. 443, an opinion is expressed that the statute "does not apply to rent due under a lease which has expired, or which has been legally determined by a notice to quit, or by entry or ejectment for a forfeiture." But the case of *Cook* v. *Cook* (2), which is referred to, does not bear out the proposition. In *Risely* v. *Ryle* (3), which is referred to as an authority that a mere agreement for lease is not sufficient, the judgment of the Court was simply that the plaintiff had better amend his declaration.

[BLACKBURN, J.—The same case is mentioned in the note 2 Chit. Stat. 773, and *Hodgson* v. *Gascoigne* (4) is also referred to, but it is difficult to see the ground upon which the judgment in the latter case proceeded.]

Although the tenancy of Underwood was determined, his possession of the goods continued, so as to be within section 7, and then the plaintiffs had a right to distrain. The word "possession" means possession *de facto*, not *de jure*. It means where the tenant holds over by wrong after the tenancy is determined. There is no necessity to dispute the correctness of *Jones* v. *Carter* (5), where it was held that after service of a declaration in ejectment for a forfeiture the lessor cannot sue for rent due, or covenants broken, after the service.

H. Matthews, for the defendant.—There is no sound reason for saying that sections 1 and 6 must be read together; they are distinct and point to two different states of things. Section 1 applies to the case of an execution put in upon the goods of a tenant whose tenancy is still subsisting, while section 6 contemplates the case of a distress put in upon the goods of a tenant, which goods could not at common law be distrained because the tenancy had been determined. The 7th section is a proviso upon section 6, but it cannot be imported into section 1. In *Cook* v. *Cook* (2) there was a tenancy for one year, which must be supposed to be within the 1st section, and which had come to an end. The Court refused to order the sheriff to pay the year's rent. In *Hodgson* v. *Gascoigne* (4) there was no decision, because *Littledale*, for the defendant, admitted that he could not claim to have the year's rent allowed. The head-note states that the statute contemplates an existing tenancy.

[BLACKBURN, J.—It is not a decision against the present defendant.]

Wharton v. *Naylor* (6) shews that the landlord cannot distrain goods which have been seized by the sheriff. The landlord has his remedy under section 6; but if he chooses to claim under section 1 he must make out that there is a subsisting tenancy. See, also, *Coote's Landlord and Tenant*, 464, and *Comyn's Landlord and Tenant*, 397. Statute 3 & 4 Will. 4. c. 42. s. 37, gives to executors of a lessor power

(2) Andrews, 218.
(3) 10 Mee. & W. 101; s. c. 12 Law J. Rep. (N.S.) Exch. 322.
(4) 5 B. & Ald. 88.
(5) 15 Mee. & W. 718.
(6) 12 Q.B. Rep. 673; s. c. 17 Law J. Rep. (N.S.) Q.B. 278.

to distrain for arrearages of rent due to him in his lifetime, and by section 38 such distress must be made within the space of six calendar months after the determination of the term or lease, and *during the continuance of the possession of the tenant* from whom the arrearages became due.

Field did not reply.

Cur. adv. vult.

The judgment of the Court (7) was (on May 1) delivered by—

BLACKBURN, J.—From the facts brought before us we infer that there was a tenancy of the premises in question from year to year at a fixed rent. Before six months had expired from the termination of the tenancy by notice to quit, the tenant being still in possession, the defendant as sheriff levied an execution on the goods of the tenant. The plaintiffs as landlords of the premises claimed to be entitled to a year's rent and brought an action against the defendant under 8 Ann, c. 14, for removing the goods taken in execution without satisfying such rent. The question is, whether the statute of Ann applies to cases like the present, where there is no existing tenancy at the time of the execution. Section 6 is as follows. (The learned Judge read the section.) In this section nothing is, in express terms, said confining the landlord's right to the year's rent to a case where he has a common law right of distress. Section 2 gives a right to seize goods taken off the premises. (The learned Judge read the section.) But here also there is nothing in express terms to confine the right to cases where there is a right to distrain at common law. The question is, are we to extend the enactment in section 1 to cases where there is only a statutory right of distress under sections 6 and 7, or whether that enactment is confined to cases where there is a subsisting tenancy? In *Woodfall's Landlord and Tenant* it is stated that the enactment is so confined, though no case is there cited which really supports that proposition. Having regard to the fact that this appears to be the opinion of the profession, and that there is not the slightest authority to the contrary, although one hundred and sixty-five years have passed since the enactment became law, we think that in a case of doubt we ought to give effect to that general impression. We hold, therefore, that the sheriff was not bound to pay the year's rent, and that there must be judgment for the defendant.

Judgment for the defendant.

(7) Cockburn, C.J.; Blackburn, J.; and Lush, J.

Attorneys—J. A. Redhead, for plaintiffs; G. F. Hudson, Matthews & Co., for defendant.

1874. April 29. } REDGRAVE (*appellant*) *v.* LEE AND OTHERS (*respondents*).

Factory — Cement Works — Premises without Roof or Enclosure—Factory Acts Extension Act, 1867 (30 & 31 *Vict. c.* 103), *s.* 3.

Premises consisting of about ten acres of land and connected by railroad with chalk pits were used by the respondents for the manufacture of cement. The premises were open to the surrounding country, and contained mills, kilns, sheds, &c., for the preparation of the cement from chalk and mud, but no large roofed building. About two hundred men were employed in the work: —Held, *that the process of manufacturing the cement being practically carried on in the open air, the works were not "premises" within the meaning of the Factory Acts Extension Act*, 1867, 30 & 31 *Vict. c.* 103, *sec.* 3. *sub-section* 7.

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 105.]

1874. April 27. } DENNIS v. WHETHAM AND ANOTHER.

Sheriff—Action for not levying—Prior Writs fraudulent—Return of nulla bona—Special Damage.

In an action against the sheriff for not levying and for making a false return of nulla bona, it appeared that there were goods of the execution debtor to the value of 50l. which were never seized by the defendant, but that two writs of fi. fa. for a greater amount had been lodged with him before the plaintiff's writ was issued. The jury found that these writs were fraudulent, but it did not appear that the defendant had notice of the fraud:—Held, *notwithstanding, that he was liable for the value of the goods; inasmuch as if he had executed the writs according to their priority, the plaintiff might have contested the writs prior to his own, and established his right to the proceeds of the sale.*

Declaration against the defendants as sheriffs of Middlesex for not levying, and for making a false return of *nulla bona* to a writ of *fi. fa.* to levy 125*l.*

Pleas, first, not guilty, secondly, that there were not, after the delivery of the writ to the defendants, any goods of the debtor within the defendants' bailiwick, whereof the defendants could and ought to have levied the money indorsed on the writ. Joinder of issue.

At the trial before Quain, J., at the sittings in Middlesex in Easter term, 1874, it appeared that judgment had been recovered by the plaintiff for 125*l.* against two persons named Barlow and Beesley; that a writ of *fi. fa.* had been delivered to the defendants as sheriffs of Middlesex, commanding them to levy that sum, and a warrant issued on the same day, notice being given by the plaintiff's attorney, to levy on the goods of Beesley only; that a writ against the debtors for 63*l.* and another to levy 44*l.* against Beesley had been previously lodged, which had not been executed; that there were, notwithstanding, goods of the execution debtor's on which the sheriffs ought to have levied, valued at 50*l.* The jury found that the two writs delivered to the defendants before the plaintiff's writ were fraudulent. A verdict was directed for the plaintiff for 50*l.*, with leave to move to reduce it by the amount of one of the prior writs, on the ground that the evidence of this writ being fraudulent was insufficient.

Montagu Chambers (*Petheram* with him) now moved to reduce the damages according to the leave reserved, and also for a new trial, on the ground of misdirection on the part of the learned Judge in ordering the verdict to be entered for the plaintiff.—It has no doubt been held that where prior writs are fraudulent the sheriff is bound to seize and sell the goods under the subsequent process (at all events if he have notice of the fraud); and that if he do not an action lies against him—*Imray* v. *Magnay* (1), *Christopherson* v. *Burton* (2). But in *Remmett* v. *Lawrence* (3) Lord Campbell expressed a wish to have this case reconsidered, and here the defendant had no notice of the fraud. (He also contended that there was not sufficient evidence that one of the previous writs was fraudulent.)

COCKBURN, C.J.—With regard to the point reserved, we think you ought to have a rule to reduce the damages. But on the main question involved in this case our view is against you, and we think there should be no rule. The ground on which I base my opinion is simply this: A sheriff who has several writs of execution placed in his hands is bound to execute them, giving priority according to the time in which they come into his hands. Every person who places a writ of *fi. fa.* in the hands of a sheriff is entitled to have that writ executed, so far as possible, for his interest; and the sheriff commits a wrong against the person entitled to have such writ executed when, instead of executing it, he entirely holds his hand. It is quite true that a person whose writ is entitled to priority cannot maintain an action against the sheriff

(1) 11 Mee. & W. 267; s. c. 12 Law J. Rep. (N.S.) Exch. 188.
(2) 3 Exch. Rep. 160; s. c. 18 Law J. Rep. (N.S.) Exch. 60.
(3) 15 Q.B. Rep. 1010; s. c. 20 Law J. Rep. (N.S.) Q.B. 25.

for not executing it, unless he shews that he has thereby sustained damage; but when the wrong done by the sheriff is accompanied by damage to the execution creditor an action will lie. A wrong accompanied by damage forms the foundation of the action. Here the plaintiff, an execution creditor, placed a writ in the hands of the sheriff, which *primâ facie* was entitled to no priority, but which the sheriff was bound to execute, giving effect, of course, to the prior writs if they were valid. The sheriff does not execute any writ at all. The plaintiff says: "If you, the sheriff, had executed the writs, I should have made good my right to the proceeds of the sale because the prior writs were fraudulent." It seems to me that the sheriff, when he fails to perform his duty, cannot be heard to say: "The prior writs may have been fraudulent, but I did not know it." He failed in his duty in not executing the writs at all, and when, owing to that, a creditor sustained damage because the prior writs could have been made ineffectual, the creditor may maintain an action. It does not lie in the sheriff's mouth here to say that he did not know that the prior writs were fraudulent, as he no more executed the prior writs than he did that which was subsequent. The posterior creditor sustains a wrong, and when to this is superadded damage by reason of the fact that there was no valid writ prior to his, a cause of action arises. On the ground of misdirection we refuse the rule.

BLACKBURN, J.—I am of the same opinion. When more writs than one are placed in the hands of the sheriff each execution creditor is entitled to have all the goods available for his execution seized and sold, or sold if already seized by the sheriff. When sold the proceeds of the sale are to be applied by the sheriff to the writs in his hands according to their priority in order of time. When the proceeds are not sufficient to satisfy the prior writs, a return of *nulla bona* to the subsequent writs is practically true. But if the sheriff does not seize at all, then a return of *nulla bona* is not a good return, because the goods to be seized have not yet become goods applicable under the prior writs. But no action lies against the sheriff for a false return unle execution creditor has thereby sus damage; and if the sheriff were position to shew that as soon as he the goods of the execution debto proceeds would be applicable to the f writs which would wholly swallow up, he would thereby shew that the been in fact no damage sustained. execution creditor in the present ca known of the former writs being fr lent, he would have given notice o fact to the sheriff, and the sheriff have a right to say, let the plainti the other creditors fight the matt between them, and they could then interpleaded. But here the sheri not give the plaintiff an opportun trying the matter at all. If I under Mr. Chambers, his argument is, th cause the sheriff, when he refrained seizing, had not notice that the first were fraudulent, the plaintiff is the not entitled to shew that those prior were fraudulent and void as against I think the matter does not depend whether the sheriff had notice wh declined to seize, but whether the pl could have proved that the prior were fraudulent, and this he has here to the satisfaction of the jury. ever, as the evidence as to the s writ being fraudulent appears to be what doubtful, I agree that a rul should be granted to reduce damage

ARCHIBALD, J.—I am of the opinion. It seems to me that the of our acceding to Mr. Chambers's tention would be to enable the sher postpone almost indefinitely the le of execution wherever any prior had already been placed in his h In cases where rent to the amount writ is due the sheriff is relieved fro duty of making a levy, and is jus in returning *nulla bona*. The same be the case where the expenses of le would absorb the whole of the pro of the sale. He would also be jus in making such a return if there prior valid writs of execution to the whole of the proceeds seized them, would be applicable. Here, ever, he makes no levy at all. H therefore, not discharged his duty.

question then arises, what is the result to the plaintiff of his not having levied? If the defendant had levied under all the writs, the probable result would have been that the plaintiff would have discovered that those earlier were fraudulent, and given notice accordingly. The plaintiff has proved that he was damnified, and he is entitled to maintain an action against the sheriff. On this point, therefore, I am of opinion that there should be no rule. On the other point, as to the damages, I agree that a rule *nisi* should be granted.

Rule refused on the first point; rule nisi on the second point.

Attorneys—Singleton & Tattershall, for plaintiffs; W. Maynard, for defendants.

1874. April 20. { MACDONALD *v.* THE LAW UNION FIRE AND LIFE INSURANCE COMPANY.

Life Insurance—Declaration Untrue but not Fraudulent—Proviso avoiding Policy if declaration untrue.

A policy of insurance was granted by the defendants to the plaintiff on the life of T., containing a proviso that "if the declaration under the hand of the plaintiff delivered at the defendants' office as the basis of the insurance is not in every respect true, and if there has been any misrepresentation, &c. . . . . then the insurance shall be void:"—Held, *that an inaccurate statement of a material fact contained in the declaration avoided the policy, though the statement was made bona fide, and was not untrue to the knowledge of the plaintiff.*

Declaration on a policy of insurance for 1,000*l.*, dated the 9th of April, 1872, effected by the plaintiff with the defendants on the life of Katherine M. Taylor. The policy contained the following proviso—"Provided nevertheless that if the declaration in writing under the hand of J. P. Macdonald, delivered at the office, as the basis of the said insurance, is not in every respect true, and if there has been any misrepresentation, concealment or untrue averment in treating for the insurance, or if the conditions herein indorsed shall not be in all respects observed and performed on the part of J. P. Macdonald and K. M. Taylor, then the insurance shall be void, and the premium or premiums received in respect thereof shall be forfeited to the company."

Fifth plea, that a material fact stated in the declaration in the policy mentioned and thereby agreed to be the basis of the insurance, was untrue, that is to say, that the life of Katherine M. Taylor had not before then been proposed for an insurance in any office or offices, whereas Katherine M. Taylor had been before then proposed for insurance to the Scottish Equitable Life Assurance Society, and to the Scottish Union Assurance Society, and had been declined by both these offices.

Joinder of Issue.

At the trial before Blackburn, J., at the Middlesex sittings after Hilary Term, it appeared that the plaintiff had proposed to effect with the defendants an insurance on the life of Katharine M. Taylor, and signed a list of questions to be answered by the persons proposing the insurance. One of the questions was, 'Has the life been proposed for insurance at this or any other office or offices? If so, at what offices? Was she accepted or declined?" The plaintiff answered "No." The plaintiff, at the foot of the questions, signed the following declaration: "I declare that the above particulars are truly set forth." A policy on the life of K. M. Taylor for the sum of 1,000*l.* was granted by the company. The jury found that the answer given by the plaintiff to the above mentioned question was untrue in fact, and untrue to the knowledge of Mrs. K. M. Taylor, but not to the knowledge of the plaintiff. The learned Judge directed a verdict to be returned for the defendants on the 5th plea, with leave to move to enter the verdict for the plaintiff. (1)

Powell (with him *Barnard*), for the plaintiff, moved for a rule *nisi* to enter a verdict for the plaintiff on the fifth plea. —To avoid the policy, it must be shewn

(1) A verdict was entered for the plaintiff on other issues, subject to leave reserved, but it is considered unnecessary to refer to them.

that the answer was untrue to the knowledge of the plaintiff. His declaration of the truth of the particulars was not a warranty of their truth, but only a representation, and the jury have found that the statement was *bona fide*—*Wheelton* v. *Hardisty* (2), *Benham* v. *The United Assurance Company* (3).

COCKBURN, C.J.—We refuse this rule on the ground that it appears to us, upon the true construction of the contract, that it was a condition that the declaration which the plaintiff signed, should be true in fact, and not merely true in the sense of there being an absence of fraud, that is, true as far as the plaintiff's knowledge went. It is the same thing to the insurance company, whether the representations contained in the declaration are fraudulent or whether they are not. And it is equally important to them to be protected in such a case as this, where the insurance is effected by a third person. The proviso would *prima facie* and naturally import, in the ordinary sense of the language, that the policy is vitiated if the representation made as preliminary to the contract, is not in point of fact true; whether untrue to the knowledge of the party proposing the life is to the company a matter of very little importance. There can be no doubt that, in the ordinary sense of the term, that is the true construction of it. This case is clearly distinguishable from *Wheelton* v. *Hardisty* (2), because in that case there was no condition that any untrue statement should vitiate the policy. I cannot help thinking that the form of expression contained in the present policy has been substituted for a condition that the policy shall be vacated by fraud, in order to avoid any difficulty.

BLACKBURN, J.—I also think that upon the terms of this policy the verdict was rightly entered for the defendants, the policy containing this agreement. [The learned Judge read the proviso.] That is the language put into the contract, and though it is under a deed poll, I think it must be taken as part of the contract, and that the plaintiff cannot sue upon a tract containing those terms withou ing taken to adopt them and to be l by them. If the proviso is such as avoid the contract it can make no ence. Moreover I think that the me of the proviso is, that if the statem untrue, that is, not a lie, or morally dulent, but inaccurate, the policy is The questions are put with the obj securing the company, and that the have a full knowledge of the risk they undertake. Whether the prem are forfeited is a matter dependi other considerations. In *Wheelt Hardisty* (2) the judgment proc upon the ground that there was no ex stipulation making the accuracy statement the basis of the contract. in the present case the proviso pressly worded so as to make the racy of the statement material as di from wilful falsehood. I think, the that there should be no rule.

LUSH, J., concurred.

Rule refu

Attorneys—J. W. Macdonald, for the pl G. Burgess, for defendant.

(2) 8 E. & B. 232; s. c. 26 Law J. Rep. (N.S.) Q.B. 265; s. c. 27 Law J. Rep. (N.S.) Q.B. 241.

(3) 7 Exch. Rep. 744; s. c. 21 Law J. Rep. (N.S.) Exch. 317.

(*In the Second Division of the Cou*

1874. May 8. } THE QUEEN *v.* THE JUST OF LANCASHIRE.

Poor Rate—Appeal—Ground of A Non-Rateability—Notice of Object Assessment Committee—25 & 26 V 103. *s.* 18—27 & 28 *Vict. c.* 39.

By the 27 & 28 *Vict. c.* 39. *s.* 1, *any appeal shall be heard by Quarte sions against a poor-rate made for a in a union to which the Union A ment Committee Act*, 1862, *applies, in writing must be given to the ment committee. Provided that no shall be empowered to appeal to sessions against a poor-rate made i formity with the valuation list app of by such committee, unless he shall given to such committee notice of obj against the said list, and shall have to obtain such relief in the matter deems just. By* 25 & 26 *Vict. c.* 1

18, *a notice of objection by any person aggrieved by the valuation list of any parish, on the ground of unfairness or incorrectness in the valuation of any hereditaments, is to be given to the assessment committee.*

Certain persons rated in a poor-rate made in conformity with such a valuation list, alleged that they were rated in respect of property in which they had no rateable interest, inasmuch as they had the use of it only as bare licensees, and were not occupiers, and they gave due notice of appeal to the sessions to the assessment committee as well as the overseers of the parish, but did not give any notice of objection to the assessment committee, or go before them, or endeavour to obtain relief in the matter from them. The respondents did not appear at the sessions, and the appellants, upon proof of such notice of appeal as above mentioned, obtained an order of the sessions quashing so much of the rate as was appealed against with costs:—

Held, *that the sessions had no jurisdiction to hear the appeal, and that the notice of objection to the assessment committee and the failure to obtain relief from them, were conditions precedent, although the objection was not to the valuation of the property but to its rateability.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 116.]

1874. May 4. } BLADES AND ANOTHER *v.* LAWRENCE.

City of London Court—Judge's Order to try Action in Inferior Court—Order stamped with Judge's Signature—19 & 20 *Vict. c.* 108. *s.* 43—30 & 31 *Vict. c.* 142. *ss.* 7, 34, 35.

A document purporting to be the order of a Judge at chambers for the removal of a cause for trial in a County Court, and stamped with the Judge's signature according to the usual practice, is binding upon the County Court Judge, and he cannot enquire into the circumstances under which it was made.

Upon hearing a rule under 19 & 20 *Vict. c.* 108. *s.* 43, *calling upon the Judge of the City of London Court to shew cause why he should not hear and determine a case which had been ordered to be tried in that Court under the County Courts Act,* 1867, 30 & 31 *Vict. c.* 142. *s.* 7, *it appeared that on the day fixed for the hearing of the cause, the Judge of the City of London Court asked to see the order transferring the cause, and, finding that the order had been made by the master and afterwards stamped by the Judge's clerk at chambers with the signature of the Judge, he declined to hear the case, stating that he had made a rule of practice by which, before such a case could be heard, proof must be given that the order had in fact been made by the Judge of the Superior Court:*—Held, *first, that the Judge of the City of London Court was wholly unjustified in the course which he took, as he had no right to enquire into the validity of the order of the Judge of a Superior Court, such order being on the face of it properly authenticated; secondly, that the proceeding by rule as provided by* 19 & 20 *Vict. c.* 108. *s.* 43, *applied to the Judge of the City of London Court.*

Rule calling on R. M. Kerr, Esq., the Judge of the City of London Court, and upon the defendant, to shew cause why the Judge should not proceed to hear and determine the cause, and why the Judge should not pay the costs of the application.

It appeared from an affidavit of a clerk to the plaintiff's attorney, that the action was commenced by writ of summons issued on the 29th of September, 1873; that a summons was issued to shew cause why the action should not be tried in the City of London Court, pursuant to the 30 & 31 Vict. c. 142. s. 7 (1), and that

(1) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 17, power is given to the superior Court to send down to a County Court actions of contract commenced in a Superior Court where the amount sought to be recovered is within a specified limit.

By section 35 of the same Act the words "County Court" are to include the "City of London Court."

By 19 & 20 Vict. c. 108. s. 43, "no writ of *mandamus* shall henceforth issue to a Judge or an officer of the County Court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any Superior Court, upon an affidavit of the facts, for a rule or summons calling upon such Judge or officer of a County Court, and also the party to be

the master by consent proceeded to hear the same, and made an order that the cause should be tried in the City of London Court pursuant to 30 & 31 Vict. c. 142. s. 7; that the order was drawn up by the clerk of Honyman, J., who appended that Judge's stamped signature thereto, according to the practice of Judges' clerks when such summonses are by consent of the parties heard and decided by a master; that the original writ in the action and the aforesaid order were duly lodged with the registrar of the City of London Court; that the cause was set down for hearing and the cause was called on in its order, and the Judge of the City of London Court was asked by the plaintiff's counsel to let it stand over by arrangement; that the Judge said he must see whether he had power to hear the case at all; that he then inspected the order drawn up by the Judge's clerk, stamped with the signature of Honyman, J.; that having done so, he said that the Act of Parliament directed him to recognise the Judge's signature but said nothing about a stamp, and he required proof of the making of the order; that the clerk to plaintiff's attorney was then sworn, and deposed to the making of the order by the master as above stated, and to the practice at Judge's chambers as to drawing up and stamping the order so made with the Judge's signature; that the Judge then ordered the cause to be struck out.

The affidavit of the Judge of the City of London Court stated that it was, and had been for some time, his practice to be satisfied that the order, when not actually signed by, was, in fact, the order of a Judge, inasmuch as the cause being by such order transferred altogether to the City of London Court, it might become his duty to direct further proceedings therein, and, it might be, to order committal to prison of one or other of the parties to the action, or of a witness called and examined therein.

The Judge further stated that after hearing the evidence as to the order he declined to hear the cause, being of opinion that he had no jurisdiction or authority so to do, inasmuch as the statute under which the order professed to be made, which was passed on the 20th of August, 1867, and came into operation on the 1st of January, 1868, requires that such an order shall be made by a "Judge" at chambers.

Sir J. Karslake shewed cause.—The order transferring the cause was made by one of the masters, but the Act giving power to masters to exercise the powers of a Judge at chambers (30 & 31 Vict. c. 68) gave power only to do what a Judge of one of the Superior Courts could then do, *i.e.*, on the 25th of July, 1867, whereas the power under which this cause was sent down was conferred by an Act which was not passed till the 20th of August, 1867.

[BLACKBURN, J.—Whether the master had jurisdiction to make the order or not a County Court Judge cannot disregard the order when made, and appearing on the face of it to be regular.]

Secondly, the proceeding by rule, under 19 & 20 Vict. c. 108. s. 43, is inapplicable in the case of the City of London Court; and the proper proceeding was by *mandamus*. Section 35 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), which enacts that the words "County Court," when used in that or any future Act, shall "mean and include the Courts held by virtue of the London (City) Small Debts Extension Act, 1852," contains a distinct proviso that "nothing in this Act, or in any of the Acts specified in the schedule (D) to this Act shall take away, lessen, or diminish any of the powers, rights, or privileges of the Judge of the said Court (i. e. the City of London Court) . . . . as such powers or authority existed previously to the passing of this Act."

W. A. Lewis, in support of the rule, was directed to confine himself to the last question. He referred to 28 & 29 Vict. c. 97, ss. 4 and 21. The County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 34.

affected by such act, to shew cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shewn, the Superior Court may, by rule or order, direct the act to be done, and the Judge or officer of the County Court, upon being served with such rule or order, shall obey the same on pain of attachment; and, in any event, the superior Court may make such order with respect to costs as to such Court or Judge shall seem fit."

COCKBURN, C.J.—We are of opinion that this rule must be made absolute. I entertain no doubt whatever that the master who made the order under which this case was sent to the City of London Court for trial had full jurisdiction to make that order; and, in my opinion, if he had signed the order himself, without stamping on it the signature of the Judge, the order would have been perfectly good. Therefore, even supposing that the Judge of the London City Court had any jurisdiction to enquire into the validity of an order bearing on it the stamped signature of a Judge of one of the superior Courts, he ought to have been satisfied on finding that the order before him had been duly made by one of the masters of a superior Court. But I am of opinion that it is not competent to the Judge of the London City Court to enquire into the validity of any such order *proprio motu*. There was before him an order bearing on the face of it what purported to be the valid signature of a Judge of the superior Court. If, without authority, a Judge's clerk had affixed this stamped signature, and that fact came to the knowledge of the County Court Judge, he might apply to the superior Court to have the order set aside as a nullity; but it would not be competent to the County Court Judge of his own mere motion, to determine for himself, without getting the order set aside, on the validity or invalidity of the order. The Judge of the London City Court was therefore clearly wrong as to the practice adopted by him. The only question which seems to me at all open to doubt or difficulty is whether the proceeding by rule is the proper mode of proceeding to be pursued in the case of the Judge of the London City Court. On consideration I am of opinion that the procedure adopted is the proper procedure, and that the contention of the Judge that he can only be reached by *mandamus* is not founded on a correct view of the legislation on the subject. By 19 & 20 Vict. c. 108. s. 43 [The Chief Justice read the section]. The question is whether this section applies to the case of the Judge of the City of London Court; and I think it does, because I think, looking at the whole scope of the legislation on this subject, the intention of the Legislature was to place the City of London Court, in the exercise of its jurisdiction, upon the same footing as County Courts, and this, even if the 34th section of the Act of 1867 did not apply, as I think it does, to this matter. That section provides that "this Act, and the several Acts specified in schedule D to this Act, shall be construed together as one Act." Now in that schedule we find, amongst other Acts, the Act 19 & 20 Vict. c. 108. Whether, then, we look to the scope of the whole legislation on the subject, or to the enactments contained in the Act of 1867, it appears to me that the City Court must be considered, for all intents and purposes, a County Court, and that, with regard to that Court, the writ of *mandamus* is taken away and the procedure by rule is substituted. The only remaining question is whether the reservation contained in section 35 of "the powers, rights or privileges of the Judge of the said Court, or the authority of the mayor, aldermen, and commons, &c. . . . as such powers or authority existed previously to the passing of this Act" preserves what otherwise would be taken away by the 43rd section of 19 & 20 Vict. c. 108. I do not think that was at all the intention of the Legislature in this enactment, and I cannot but think that in giving power to the superior Courts to send down actions for trial in the County Courts, the Legislature intended to assimilate the City of London Court to the other County Courts, and also to take away the proceeding by *mandamus* and substitute the speedy and more convenient proceeding by rule.

BLACKBURN, J.—I have come to the same conclusion on the first point involved in the case. Under the County Courts Act, 1867, a Judge of one of the superior Courts may make an order sending down a cause to be tried in a County Court. In the present case the Judge of the London City Court received such an order. It was not a forgery, but a genuine order, issued in the ordinary way from Judges' Chambers in Serjeants' Inn by a Judge's clerk, stamped with the Judge's signature according to a long-established prac-

tice. If the County Court Judge had reason to think that the order brought to him was a forgery, he would be quite right to apply to the superior Court to set it aside. But what the County Court Judge has done in the present case is to make a rule of practice for himself and to deal with this order of the superior Court, and set it aside himself. It is quite plain that he has been guilty of a contempt of Court in acting as he has done, and that if he wanted to have the order set aside he should have applied to this Court for the purpose. I do not say that he would have any *locus standi* to make such an application, but I am clearly of opinion that he was wrong in taking the course he did. Then, as to the proper remedy. At common law the remedy, where a person did not perform a duty which he should perform, was by *mandamus*. Then section 43 of 19 & 20 Vict. c. 108, enacted that no writ of *mandamus* should thenceforth issue to a Judge or officer of a County Court for refusing to do any act relating to the duties of his office, and substituted a proceeding by application for a rule calling upon the Judge or officer to shew cause why the act should not be done. We must determine in this case whether it does or does not come within this enactment. On this question I have had considerable difficulty. I cannot, however, think that the proviso in section 35 of the Act of 1867, saving the "powers, rights or privileges of the Judge of the said Court," preserves to the Judge the right to be proceeded against by *mandamus*, or that such a thing is a privilege at all. But I have had difficulty in seeing anything in the previous legislation which substitutes the proceeding by rule for that by *mandamus* in the case of the London City Court. The inclination of my opinion is, that the proceeding by *mandamus* would be the proper remedy, though I think it was the intention of the Legislature to take it away. I am very glad that the majority of the Court think that it has been taken away. The Judge of the City of London Court having been contumaciously wrong, the rule must be made absolute with costs.

QUAIN, J.—I am of the same opinion. The order made at chambers was doubtedly a genuine order; it was sta in the regular way in which it is done at Judges' chambers. If the s had been put to it *per incuriam*, or i Judge's signature were a forgery, matter would be different. The question on this part of the case is, ther a County Court Judge can, *motu*, go behind the order, and att to discover how it was obtained, whether the judicial mind of the J was exercised upon it. I am clear opinion that a County Court Judge h authority whatever to act in this ma The only other question is, whethe proper remedy is by rule or by *m mus*. The remedy by rule was i duced by section 43 of 19 & 20 Vi 108, for the very purpose of carryin the object of the legislation as to C Courts, which was to give a sum and inexpensive remedy instead o former expensive remedies, and secti contains a similar enactment as to hibitions. It provides that "whe application shall be made to a su Court or a Judge thereof, for a w prohibition to be addressed to a Jud a County Court, the matter shal finally disposed of by rule or order, no declaration or further proceedin prohibition shall be allowed;" the o of both enactments being to do aw such cases with the old tedious p dure. The only question is, wh these enactments apply to the Ci London Court, and I am of opinion they do. The object of the Act of 1 section 35, was to bring the City of don Court into the same category a other County Courts, leaving it, how and the mayor, aldermen, &c., of the in possession of what might be c their ancient rights and privileges fees, the power of the corporation t point the Judge, &c. Now section 34 tinctly enacts that "this Act and several Acts specified in schedule 1 this Act, shall, except such provisio the same Acts respectively as are he repealed, be construed together as Act;" and 19 & 20 Vict. c. 108, is of the Acts specified in schedule 1 understand this to mean that sectio

of 19 & 20 Vict. c. 108, is to be considered as part of the Act of 1867. Now section 35 of the Act of 1867 enacts that "the words 'County Courts' when used in this Act or in any future Act . . . shall mean and include the Courts held by virtue of the London (City) Small Debts Extension Act, 1852." Reading the two enactments together, I take it that the words of section 43 of 19 & 20 Vict. c. 108, are extended to the City of London Court, unless there is something in the proviso to section 35 of the Act of 1867 reserving the powers, rights or privileges of the Judge of the said Court, &c. Now I take it that the remedy against a Judge by prerogative writ of *mandamus*, in cases where that remedy is applicable, is not a power, right or privilege of the Judge.

ARCHIBALD, J.—I entirely concur in all that has been said on the first point with regard to the Judge's disobeying the order made at chambers. The order was produced in the ordinary way, and I cannot for a moment think that he had a right to enquire into the circumstances under which it was made for the purpose of disregarding it, otherwise it would be open to anyone else to whom an order of a Superior Court was addressed to do the same thing, and shelter himself from the consequences of his disobedience under some trifling irregularity in the order. On this ground the Judge was entirely wrong, and the rule must be made absolute with costs. As to the second point, I agree with what has fallen from my Lord and my brother Quain. I think the proviso at the end of section 35 of the Act of 1867 is sufficiently explained by referring it to certain rights as to fees, and as to the Judges sitting as Commissioners at the Central Criminal Court, &c., which the proviso leaves as they were. When we look at the 34th section we find that it makes the Act of 19 & 20 Vict. c. 108, one with the Act of 1867. I think the effect of that is to incorporate the whole of the provisions of the older Act in the other, and amongst them the provisions contained in section 43 of the former Act, substituting the proceeding by rule for that by *mandamus;* and the convenience of the thing is entirely that way. I am therefore of opinion that the proper remedy has been pursued, and that the rule should be made absolute.

Rule absolute with costs.

Attorneys—Lewis, Munns & Longden, for plaintiff; Torr & Co., for Mr. Kerr.

1874. May 2. } KNIGHT (*appellant*) *v.* HALLIWELL (*respondent*).

Vaccination Acts, 1867 *and* 1871 (30 *&* 31 *Vict. c.* 84. *s.* 31, *and* 34 *&* 35 *Vict. c.* 98. *s.* 11)—*Time for making Complaint.*

By s. 11 *of* 34 *&* 35 *Vict. c.* 98, "*Any complaint may be made . . . . under the Vaccination Acts*, 1867 *and* 1871, *at any time not exceeding twelve months from the time when the matter of such complaint . . . . arose, and not subsequently:*"—Held, *that the period within which a complaint that a child within the age of fourteen years has not been successfully vaccinated, must be made, runs from the time of giving notice to the parent of the child to procure its being vaccinated, and that unless the complaint be made within that period no order directing vaccination can be made under s.* 31 *of* 30 *&* 31 *Vict. c.* 84.

Purkis *v.* Huxtable (28 Law J. Rep. (N.S.) M.C. 221) *considered.*

On a case stated under 20 *&* 21 *Vict. c.* 43, *the Court will decide a point of law arising on the case, though such point was not raised before the justices.*

[For the report of the above case see 43 Law J. Rep. (N.S.) M.C. 113.]

END OF EASTER TERM, 1874.

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

TRINITY TERM, 37 VICTORIÆ.

1874. May 23. } WADDELL *v.* WOOLFE.

Vendor and Purchaser—Sale of Lease—Conditions of Sale—Enquiry—Requisition—Want of Title.

The plaintiff put up for sale by auction a "valuable lease" of a house and premises. By the sixth condition of sale, the abstract of title was to commence with an underlease, dated, &c., and "no requisition or enquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease," &c. By the seventh condition of sale, the purchaser was to bear the expense of verifying the abstract, with the documents of title and all charges incidental thereto, and all enquiries and evidences which might be required by the purchaser of verifying the abstract or otherwise in support of the vendor's title were to be made, sought for and obtained, at his own expense. The lease was knocked down to the defendant, who paid a deposit, which, by the eleventh condition of sale, would be forfeited if the defendant neglected to comply with the conditions of sale. He refused to complete the contract to purchase, because he discovered aliunde that the lessor had parted with the legal estate, and therefore had no power to grant a valid lease:—Held, *That the word "enquiry" in the sixth condition must be taken to mean the same as "requisition;" that the defendant was not precluded by the conditions of sale from taking the objection that he had not got what he had expected to get, viz., a valuable lease, and that he was entitled to have his deposit returned to him.*

An interpleader issue had been ordered for the purpose of enquiring whether the plaintiff or the defendant was entitled to a deposit of 63*l*. The plaintiff was the trustee in bankruptcy of the property of William Benjamin Seymour, to whom a lease had been granted by William Seymour, for the term of fourteen years, of which eleven years were unexpired. The lease had been advertised by the plaintiff for sale by auction. The following were, amongst others, the conditions of sale.

6th. "The abstract of title shall commence with an indenture of under-lease, dated the 1st day of May, 1869, being a lease from Mr. William Seymour to Mr.

William Benjamin Seymour, the bankrupt, for a term of fourteen years, less two days, from Lady Day, 1869, and it shall form no objection to the title that such indenture is an under-lease, and no requisition or enquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such under-lease, and the production of the last receipt for the rent reserved by the said under-lease shall be accepted as conclusive evidence of the due observance and performance of all the covenants contained therein up to the time of the completion of the purchase. A copy of the said indenture of under-lease will be produced at the sale, and may be inspected at the office of the vendor's said solicitor for seven days previous thereto. Intending purchasers shall therefore be deemed to have full notice of all the covenants and conditions in such indenture."

7th. "The purchaser shall bear the expense of verifying the abstract with the documents of title, and all charges incidental thereto, including travelling expenses (if any), and all official or other copies or extracts of proceedings in bankruptcy, and all enquiries and evidences (if any) which may be required by the purchaser for the purpose of verifying the abstract or otherwise, in support of the vendor's title, shall be made, sought for and obtained, at his or her own expense."

11th. "If the purchaser shall neglect or fail to comply with the above conditions, his or her deposit-money shall be forfeited to the vendor, who shall be at liberty, at any time thereafter, to sell the premises in any manner he may think fit; and all loss (if any) occasioned by any subsequent sale, together with all costs and expenses attending or incident to the same, shall immediately thereafter be made good to the vendor by the defaulter at this sale, and in case of non-payment thereof shall be recoverable by the vendor as liquidated damages in an action at law, and it shall not be necessary to tender an assignment to the purchaser; and if there be a surplus on a re-sale, the vendor shall be entitled to such surplus, but this condition shall be without prejudice to the right of the vendor to compel specific performance of the contract if he shall think fit."

The conditions were headed as follows—

"Particulars and conditions of sale.

"The valuable lease," &c.

At the sale the defendant purchased the lease for 315*l.*, and paid 63*l.* as a deposit. In due course the abstract of title was sent, and in the abstract a deed was referred to. In the margin there was this statement—"and the vendor has not this deed in his possession." Upon being asked to produce it, however, the plaintiff did so, and it was then discovered by the defendant that after the lease of fourteen years had been granted, and before the sale by auction, William Seymour had mortgaged all his interest in the property to the Standard Benefit Building Society. The defendant thus finding that William Seymour had, at the time he granted the lease, no legal estate, objected to go on with the purchase, and claimed the return of his deposit. No question was left to the jury at the trial, but the above facts were entered on the Judge's notes, and a verdict was taken for the plaintiff.

Subsequently, a rule *nisi* was obtained, calling upon the plaintiff to shew cause why the verdict so obtained should not be set aside, and a verdict entered for the defendant instead thereof pursuant to leave reserved, on the ground that the defendant was not bound to accept the title to the lease, he having discovered a fatal defect therein from the documents produced to him by the plaintiff.

Edwyn Jones shewed cause against the rule.—Under the eleventh condition of sale the deposit was forfeited, and the vendor has a right to it. The purchaser contends that he has a right to insist upon its being returned to him because the lessor had no title to the premises, so that he could not make a valid lease. But the sixth condition of sale precludes the purchaser from making any such objection. It must be borne in mind that the lease, simply, and not the premises, was put up for sale, and further, that the sale was by order of the trustee in bankruptcy, who would be ignorant of the defect. No fraud is suggested. Under the 6th condition, the purchaser was precluded from making

enquiry or requisition—See *Spratt* v. *Jeffery* (1). It is true that *Shepherd* v. *Keagtley* (2) is somewhat against this contention, but that case has not been followed in more recent decisions.

[QUAIN, J.—It is much like the case now before us, and though it does not overrule *Spratt* v. *Jeffery* (1), Lord Abinger and Alderson, B., do not seem altogether to have approved of that case.]

The Court will construe these conditions of sale as was done by Parker, V.C., in *Hume* v. *Bentley* (3), where it was held that the title could not be looked into. That decision is strongly in point. See also *Hume* v. *Pocock* (4).

[QUAIN, J.—In order to support the plaintiff's contention, the conditions ought to be plain beyond all possibility of doubt. I do not think that they mean more than this, that no requisition shall be sent in the usual way in which requisitions are sent by the solicitor of the purchaser, but they leave it open to the purchaser to make any objection to the want of title if he discovers it *aliunde*. This case is very like *Sellick* v. *Trevor* (5), which seems to be an authority for the defendant.]

The conditions in the present case were intended to preclude the purchaser from making any objection whatever to the title. The plaintiff in advertising the sale of the lease was acting as trustee of the bankrupt's estate.

Gibbons, in support of the rule.—The conditions of sale must be read altogether; if that be done, it will be clear that the purchaser is entitled to a return of the deposit. The heading of the conditions of sale shews that the lease to be sold was a "valuable lease," and the purchaser would reasonably suppose that the lease which he purchased was a real lease and not a worthless one made by a man who had no title. He discovers the defect in the title, and although it must be admitted that the parties may, if they please, use such language as will preclude any objections whatever being raised, it seems clear that such language has not been used in the sixth condition, at any rate when that condition is construed with the seventh. The language of the sixth condition is not the same as that which was used in the fourth condition in *Hume* v. *Bentley* (3), viz., "the lessor's title will not be shewn and shall not be enquired into." But further, *Sellick* v. *Trevor* (5), which has been referred to by Quain, J., is strongly in favour of the contention of the defendant. Lord Abinger, C.B., said.—"The decision in *Shepherd* v. *Keagtley* (2) is applicable to this case. By the conditions of sale the defendants are not bound to produce any earlier title-deed than the last copy of Court-roll; that protects them from any other title anterior to that Court-roll; but still the plaintiff is at liberty to shew *aliunde* that the title is void." So the defendant, in the present case, claims to be at liberty to shew that the lease is worthless. The conditions ought to be drawn with the utmost possible plainness to preclude him from doing so.—See *Dick* v. *Donald* (6), *Southy* v. *Hutt* (7). In *Darlington* v. *Hamilton* (8), one of the conditions of sale provided that the purchaser should not require proof or production of the lessor's title, or any title prior to such lease, and if he insisted on any evidence in proof of the identity of the premises, or that the covenants in the lease or any of them have been duly performed, the same must be had at his own expense. Wood, V.C., said—"It is quite clear, according to the doctrine referred to and the terms of the conditions of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection." *Hume* v. *Bentley* (3) was distinguished.

BLACKBURN, J.—I think that the result of what we have heard is that the rule must be made absolute, because the pur-

(1) 10 B &. C. 249.
(2) 1 Cr. M. & R. 117.
(3) 5 De Gex & S. 520; s. c. 21 Law J. Rep. (N.S.) Chanc. 760.
(4) 35 Law J. Rep. (N.S.) Chanc. 731; s. c. Law Rep. 1 Eq. 423; s. c. Law Rep. 1 Chanc. App. 379.
(5) 11 Mee. & W. 722; s. c. 12 Law J. Rep. (N.S.) Exch. 401.
(6) 1 Bligh N.R. 655.
(7) 2 Myl. & Cr. 207.
(8) Kay 550.

chaser is right in his contention that he is entitled to the sum which he deposited. The whole question turns upon the proper construction to be put upon these conditions of sale. There is no doubt that Parker, V.C., stated the law accurately in *Hume* v. *Bentley* (3), as follows—"According to the ordinary rule, a vendor of leasehold property was under an obligation to shew the lessor's title, but there was no doubt that the vendor might stipulate that he should be relieved from that obligation; and in the case of *Shepherd* v. *Keagtley* (2) a stipulation of that kind was held not to amount to a stipulation that the purchaser should be obliged to accept the title without objection or enquiry. If the purchaser could shew by any means in his power that the vendor had a defective title, he might do so." The document in each case must be construed. The words in *Hume* v. *Bentley* (3) were, as has been observed in the argument, very strong. [His Lordship read them.] Parker, V.C., construed them as intending that the purchaser should be estopped from objecting to the title, and I think that he construed them correctly. But the conditions of sale in the present case are worded differently. [His Lordship read them.] They must be read according to the ordinary rule of contention—"*verba chartarum fortius accipiuntur contra profererentem*," and I cannot but think that a distinction was intended between objections which might arise *aliunde* to the title, and those which might be elicited by requisition or enquiry in the nature of requisition. It strikes me, that what was pointed out by Lord Lyndhurst, C.B., in *Shepherd* v. *Keagtley* (2) was correct, when he said—"it seems to me that the words 'shall not be obliged to produce the lessor's title,' mean nothing more than that there shall be no obligation upon the vendor to produce, for the satisfaction of the purchaser, any evidence of the lessor's title, but that they do not preclude the purchaser from taking any objection, derived from another source, to the validity of that title. It is frequently a matter of great inconvenience to the lessor to produce evidence of the landlord's title, and from this inconvenience the clause in question protects him." Construing the conditions in that way, and bearing in mind that the defect in the title appeared *aliunde*, I am of opinion that the purchaser was justified in claiming the return of his deposit.

QUAIN, J.—The question is, what is the construction which ought to be put upon the sixth condition. It is clearly established that conditions of sale which are intended to preclude all enquiry must be construed with great strictness, and the question is, whether the defendant, who purchased under these conditions of sale, is precluded from making all enquiries into the title, and availing himself of the discovery, which he has made *aliunde* that the lease was worthless. I think that he is not so precluded. [His Lordship read the conditions of sale.] I think the sixth condition points at the usual requisitions and enquiries made in the nature of requisitions by a purchaser and his solicitor, and it was not intended to go beyond the enquiries and other matters which are referred to in the seventh condition. The words are nothing like so strong as those which were used in *Hume* v. *Bentley* (3). Those which were used in *Darlington* v. *Hamilton* (8) are more like the present, and there they were held not to preclude objections obtained *aliunde*. The cases are collected and the rules laid down in *Dart's Vendors and Purchasers*, p. 133, 4th ed.

ARCHIBALD, J.—I am of the same opinion. The principle applicable to questions of this kind is very clear and distinct. Parties may so contract with one another by conditions of sale as to bind the purchaser to accept the property and pay for the same, although the vendor is not able to shew a good title; but in order to make this out, the conditions must be very clear and distinct. *Hume* v. *Bentley* (3) has much bearing upon the point, and at first sight it seemed difficult to see any precise distinction between that case and the present, but having had time to consider the case a little more fully, I think that there is a decided difference between them. The conditions in question in that case seem to have precluded all enquiry into the title. Parker, V.C., said.—"Here the contract was that the title would not be shewn, and should not be enquired into. . . . .

In addition to the terms of the contract, that the title would not be shewn, other words were to be found to which this effect must be given, that the title should not be enquired into. The only reasonable meaning of that stipulation was that enquiry was altogether precluded for every purpose." Those conditions might well mean that no enquiry should be made from the vendor, or from any other person, and that no defect of the lessor's title should prevail. In this case the words of the condition stand in a different way. [His Lordship read the words of the sixth condition.] I think that it means that no enquiry in the nature of a requisition shall be allowed, but that it does not preclude the operation of the other rule which has been laid down, that if a defect in the title has been discovered *aliunde*, as in *Shepherd* v. *Keagtley* (2) the purchaser may avail himself of it. In this case the purchaser did discover the defect by information which he received *aliunde*, and he is entitled to make the objection that the lessor had no title, and so to recover the deposit which he had made.

Rule absolute.

Attorneys—F. Kearsey, for plaintiffs; Webster & Graham, for defendant.

1874. May 27. { THE KIRKSTALL BREWERY COMPANY (LIMITED) *v.* THE FURNESS RAILWAY COMPANY.

Carriers by Railway—Loss of Goods—Value exceeding 10*l.*—*Felony of Servant—Evidence—Railway Company—Authority of Station Master.*

In an action against a railway company for the loss of a parcel of money above the value of 10*l.*, *the issue being whether the loss was occasioned by the felonious act of one of the company's servants, who had absconded at the time of the parcel being missed, it is allowable to call a police officer to prove instructions which he received from the station master tending to shew that he, the station master, had suspicions that the servant had stolen the parcel.*

The first count of the declarat leged that the plaintiffs caused delivered to the defendants as c carriers a parcel containing a 10*l.* 5*l.* note and 20*l.* in gold of the pla to be carried from Whitehaven to stone, and there to be delivered defendants to the plaintiffs for ı Breach—that the defendants 'd safely or securely carry the said or deliver the same, &c.

Second count—Trover for the goods.

Third plea—Under the Carrier that the value of the goods was ı clared, and that the increased made by the defendants in such was not paid by the plaintiffs or a by the defendants.

Replication, that the loss aros the felonious act of a porter o servant of the defendants in the of the defendants.

Issue joined.

At the trial, which took place Sittings in Middlesex after Trinity 1873, before Denman, J., it appear on the 17th of July, 1872, the pl at Whitehaven, delivered a parc taining the money mentioned in claration at the defendants' statio carried to Ulverstone. The pa peared to have been carried to Ulv but was never delivered to the pl agent there, to whom it was add The guard of the train handed the at Ulverstone to a porter of the ants, and the next day, the 18 parcel porter, John Haslam, abs leaving a fortnight's wages du never applied for those wages, a dence was given that he had America. The parcel having been Mr. Padmore, the station master, on the 20th of July to the police s tendent Holden, and had a commu with him.

It was proposed on behalf of th tiffs, in support of their replicat prove the terms of this conversatio defendants objected that this coul given in evidence, but the learne admitted it. Holden then swore lows—" I know Padmore, the stati ter at Ulverstone; he is in the o

position of a station master. I received information from him. He told me that a man of the name of John Haslam had absconded from the service, and a money parcel was missing, and he suspected that he had taken it. He said that Haslam was the parcel porter, and that he had absconded on Saturday morning. He told me of no other person who had absconded. I could not find him."

The jury returned a verdict for the plaintiffs.

A rule *nisi* was obtained calling upon them to shew cause why there should not be a new trial, on the ground of the improper reception of the above evidence.

Sir H. James and *R. T. Reid* shewed cause against the rule.—The issue before the jury was whether the porter Haslam had stolen the parcel. Padmore, the station master, was acting within the scope of his authority in giving instructions to Holden to make enquiries about Haslam. *Moore* v. *The Metropolitan Railway Company* (1), and *Goff* v. *The Great Northern Railway Company* (2) shew that he would thus be acting within the scope of his duty, and that the company must have some one at the station with authority to act for them at once. It will be said that, even if that be so, the statement made by Padmore to Holden is not admissible. But it is submitted that it is clearly admissible. Padmore would have been justified in giving Haslam into custody, and the statement which he made to Holden is evidence to support the contention of the plaintiffs that the parcel was stolen by Haslam.

[ARCHIBALD, J.—Suppose the action had been against an individual carrier instead of against a company?]

Yes, in such a case the statement made to the police by the individual would be clearly admissible, and there is no material difference between such a case and the present.

Price and *Charles Crompton*, in support of the rule.—The statements made by Padmore to Holden prove no more than this; that Padmore entertained suspicions in consequence of the absence of Haslam that he, Haslam, had stolen the money. This was no evidence to shew that Haslam had done so. He may have been absent from illness or any other cause. It was a confidential communication from Padmore to Holden.

[COCKBURN, C.J.—No; I do not think it was so at all.]

No case can be found in which such evidence has been admitted.

[COCKBURN, C.J.—Each case must be determined upon its own circumstances; it appears to me that there was abundant proof of reasonable and probable cause for suspecting that Haslam had stolen the parcel, and that Padmore was acting within the scope of his authority in giving instructions to the inspector.]

The Great Western Railway Company v. *Willis* (3), shews that an admission made by a night inspector of a railway station about cattle having been left at the station could not be given in evidence. In that case Erle, C.J., said, "I am of opinion that the night inspector is not to be presumed to have been authorised by the company to make admissions on their behalf of things gone by." That case seems to have been a stronger case than the present, for what was said may well have been looked upon as part of the *res gestæ*, and therefore admissible. No such evidence as has been admitted in this case could be admitted in a prosecution to prove that Haslam stole the money.

[*Sir H. James* suggested that in *The Great Western Railway Company* v. *Willis* (3), the night inspector was not acting within the scope of his authority, and that the conversation did not take place till a week after the transaction.]

COCKBURN, C.J.—I think that this rule must be discharged, and that the evidence was, under the circumstances of the case, admissible. The money was sent to the station from which Haslam was believed, on what I think was abundantly reasonable and probable cause, to have absconded

(1) 42 Law J. Rep. (N.S.) Q.B. 23; s. c. Law Rep. 8 Q.B. 36.

(2) 3 E. & E. 672; s. c. 30 Law J. Rep. (N.S.) Q.B. 148.

(3) 18 Com. B. Rep. N.S. 748; s. c. 34 Law J. Rep. (N.S.) C.P. 195.

with the money, which must be taken to have been the money of the company having been in their possession at their station. The money and Haslam both disappear from the station. Padmore was the agent of the company. Suppose in such a case, a principal goes to the police officer and tells him "a parcel has been lost and a person has gone away under such circumstances as that I cannot doubt that he has taken it *animo furandi;* he has gone away contemporaneously with the parcel being lost. I have a suspicion that he has taken it, and I will be obliged if you will make enquiries about it, and apprehend him if you can." I cannot see, upon what principle that evidence could be excluded in an action against the principal. If that be so, I think that such a statement, if made by an agent within the scope of his authority, would also be admissible. I think it impossible to say that a man who has the sole management of a railway station, and had authority to cause a person to be apprehended if he had reasonable and probable cause to suppose that a felony had been committed, could not have authority to give instructions to the police, and could not make such communications as would be admissible in evidence just as if they were made by his principals.

QUAIN, J.—I quite agree with my Lord. Padmore had authority to act on behalf of the defendants, and to put Holden in motion to make the enquiry as to what had become of the parcel of money. What he necessarily said to Holden cannot be excluded in this action. In putting the police in motion, he was acting within his duty, and within the scope of the authority given to him. *Moore* v. *The Metropolitan Railway Company* (1) and *Goff* v. *The Great Northern Railway Company* (2) shew that it is necessary that a railway company should have a person on the spot with authority to act at once.

ARCHIBALD, J.—I am of the same opinion. The question is, was Padmore an agent of the company to bind them by what he said to Holden? We must go by steps. If the statement had been made to Holden by an individual carrier it would be admissible. Then is it admissible if made by an agent? That depends upon whether the agent was acting the scope of his authority. Be charge of the station at the time a was committed, it was his duty to p police in motion. That being so, I that he was acting within the scop duty, that he had power to bind th pany, and therefore that the eviden admissible.

Rule discha

Attorneys—Nash, Field & Layton, for pl
Sharp & Ullathorne, for defendant

1874. May 30. } THE QUEEN *v.* GOOD

Appeal—Power to order Justices Costs — Summary Jurisdiction — 3 Vict. c. 32. s. 3.

By the Criminal Law Amendme (34 & 35 Vict. c. 32. s. 3) an ap sessions is given against any co under the Act. By sub-section 2 the lant shall, within seven days after th of appeal has arisen, give notice to th party and to the Court of summar diction of his intention to appeal, and ground thereof. By sub-section 5 the of Appeal may make such order as to be paid by either party as the thinks just.

The defendants, having been co under the Act, gave notice of appeal prosecutor and the justices at petty se and made the justices and prosecu spondents. The justices did not a and the conviction was quashed. In ing up the order of sessions ordering spondents, or some of them, to pay the lant's costs, the justices were nan respondents:—

Held, *that a rule to strike out so of the order as directed the justices costs, must be made absolute, as quite clear that under the circum there was no power to order them costs.*

[For the report of the above ca 43 Law J. Rep. (N.S.) M.C. 119.]

1874. May 23. } HEYWOOD *v.* PICKERING.

Action—Goods Sold and Delivered—Payment by Foreign Cheque—Presentment.

The defendant, on the 27th of January, gave to the plaintiff, in payment of a debt, a cheque drawn upon a Jersey bank. On the 28th the plaintiff paid it in to his bankers in London, who, as is customary with English bankers, sent it to Jersey, where it was received by the bankers on the 29th, on which day the defendant had funds in their hands. No notice was taken by them of a request for payment sent with the cheque. The plaintiff's bankers had not any agent in Jersey. They applied again for the cheque or the amount thereof on the 6th of February. In answer to this application the cheque was sent back to them with the words "refer to drawer" written upon it. The Jersey bank had stopped payment on the 1st of February:—Held, *that there had been a good presentment of the cheque, that there had been no laches on the part of the plaintiff or his bankers, and that the receipt of the cheque by the plaintiff did not amount to payment of the amount due.*

Action for goods sold and delivered.

Plea, among others, payment.

It appeared at the trial, which took place in Middlesex, before Pigott, B., that the defendant, who was indebted to the plaintiff, handed to him a cheque for the amount, which was drawn upon a bank in the island of Jersey. The plaintiff received it at three p.m. on the 27th of January. The next day he paid it to his bankers, the Bank of England. They have no agent in the island of Jersey, and accordingly they sent the cheque by post to the Jersey Bank, where it arrived on the 29th, with a letter asking payment of the amount. At that time the defendant had ample funds in the hands of the Jersey Bank. No notice was taken of the letter by the Jersey Bank, and on the 1st of February they stopped payment. On the 6th of February the Bank of England applied again to the Jersey Bank, whereupon the cheque was sent back to them with the words upon it, "refer to drawer." Evidence was given at the trial that in the case of foreign cheques it was customary with English bankers to act in the manner in which the Bank of England had acted in sending the cheque on to the bank in Jersey. It was contended, on behalf of the defendant, that the plea of payment was supported. The learned Judge directed a nonsuit, but gave leave to move to enter a verdict for the plaintiff for 75*l*. A rule was obtained accordingly.

M'Intyre shewed cause against the rule.—The cheque operated as payment, as the plaintiff had made it his own by sending it to the Jersey Bank in the manner proved at the trial. It is true that evidence was given to shew what was the custom of bankers with regard to foreign cheques, but no such custom was shewn to apply to the case of a cheque drawn upon a Jersey bank.

[QUAIN, J.—Surely this can properly be called a "foreign" cheque.]

Even if that be so, the plaintiff was guilty of laches in not paying the cheque into the Bank of England on the 27th of January. If he did not pay it in on that day he should have sent it direct to the Jersey Bank. If it be held that he was not guilty of laches, his bankers either made the Jersey Bank their agents, or they themselves have been guilty of laches in not sending the cheque to some person who would act as their agent in presenting the cheque. If this had been done, the cheque would have been paid in due course, for the defendant had ample funds in the hands of the bank.

[BLACKBURN, J.—The defendant must shew that the cheque has been dishonoured through the misconduct of the plaintiff. If there is any doubt, it seems to be upon the question whether there ought not to have been some more prompt demand made by the Bank of England when it was aware that the Jersey Bank neither returned the money nor sent back the cheque. We will hear the other side before going into any of the other questions.]

A. W. Clarke, in support of the rule.—The act of the defendant in handing the cheque to the plaintiff does not amount to payment. The plaintiff was not bound

this was the customary way with respect to foreign cheques, which would include cheques drawn upon the Jersey Bank. It was to be expected that that bank would have given an answer whether the amount would be paid or the cheque dishonoured. Was not this a good presentment? The bank stopped on the 1st of February. The judgments of the Judges in *Hare* v. *Henty* (1), referring to *Rickford* v. *Ridge* (7), and Lush, J., in *Prideaux* v. *Criddle* (2), indicate that this would be a good presentment. We must take it that the cheque was presented in the proper and usual mode, and that being so, it appears to me that there was no laches, that there was a sufficient presentment in due time, and that the cheque was dishonoured. That is the only point which is before us, and I think that on principle and also upon authority, the rule should be made absolute.

ARCHIBALD, J.—I am of the same opinion. I only wish to say that the question is simply whether the plaintiff has adopted the usual and proper course, so that the cheque was presented in due time, or whether there has been such laches as will prevent him from so contending. Now I think that strong evidence must be given to shew that a cheque has been accepted as an absolute payment. If it has been dishonoured it ceases to be of any value, but if there has been such laches in the person accepting it that he can be said to have made it his own, it may be treated as payment. Here it was clear that the cheque was presented in the proper course. It must have been taken to have been presented on the 29th, and to have been dishonoured on that day.

Rule absolute.

Attorneys—Johnson & Weatheralls, for plaintiff; Courtenay & Croome, for defendant.

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(7) 2 Campb. 537.

1874. June 8. } DE WOLF *v.* THE ARCHANGEL MARITIME BANK.

Marine Insurance—Voyage—"At and from"—Delay in arriving at Port—Underwriter—Action.

On the 13th of July a voyage policy was effected upon a ship "at and from Montreal to Monte Video" at a premium of two per cent. The ship was at sea on a voyage intended to end at Montreal, and did not arrive there until the 30th of August, so that the voyage to Monte Video was changed from a summer voyage to a winter voyage, whereby the risk and the rate of premium were materially affected. The delay between the making of the policy and the commencement of the risk intended to be insured against was unreasonable, but it was occasioned by matters beyond the control of the assured. At the time of effecting the policy, no question was asked by the underwriter as to where the ship was, nor was any information offered by the assured:—Held, *that the risk being materially varied, the underwriters were not liable to an action upon the policy.*

This was an action upon a voyage policy on a ship at and from Montreal to Monte Video, to recover the loss of freight on a part of the cargo washed overboard, and also the contribution of the freight to the general average loss in respect of the part sacrificed.

The defendants pleaded, fourthly, That the ship was not at Montreal within a reasonable time, being a delay materially varying the risk.

At the trial, which took place in the Mayor's Court, it appeared that the policy was effected on the 13th of July, when the ship was on a voyage, which was intended to end at Montreal. The defendants were not told where she was nor did they enquire of the plaintiff's broker. She did not arrive at Montreal until the 30th of August. Her voyage from that place would therefore be a winter voyage instead of a summer voyage, and the rate of premium would have been a higher one. Evidence was offered on behalf of the plaintiffs to prove that the delay in arriving at Montreal was not voluntary on their part, but was oc-

casioned by perils of the seas on the voyage out to Montreal. This evidence was rejected by the Common Serjeant, who tried the cause, and the jury returned a verdict for the defendants, finding that the delay was unreasonable, and that the risk was thereby materially changed. The Common Serjeant gave leave to move in this Court for a new trial on the ground of the rejection of evidence.

A rule was subsequently obtained.

C. Bowen shewed cause against the rule (on April 30).—He referred to *Hull* v. *Cooper* (1), *Mount* v. *Larkins* (2), *Small* v. *Gibson* (3), *Maude and Pollock on Merchant Shipping*, 3rd edit. 355, *Park on Marine Insurance*, 63, *Phillips' Law of Insurance*, 5th edit. vol. i. p. 690.

Benjamin and *Aspland* supported the rule, referring to the authorities mentioned above, and in addition to *Beckwith* v. *Sydebotham* (4), *Vallance* v. *Dewar* (5), and, in a note to that case, *Ougier* v. *Jennings* (6), *Grant* v. *King* (7), *Phillips* v. *Irving* (8), *Marshall on Marine Insurance*, p. 366, *Philips' Law of Insurance*, s. 924, *Driscoll* v. *Passmore* (9), *Jones* v. *The Neptune Marine Insurance Company* (10), *Brine* v. *Featherstone* (11).

Cur. adv. vult.

The judgment of the Court (12) was (on June 8) read by

(1) 14 East, 479.

(2) 8 Bing. 108.; s. c. 1 Law J. Rep. (N.S.) C.P. 20.

(3) 16 Q.B. Rep. 128, 158; s. c. 19 Law J. Rep. (N.S.) Q.B. 147.

(4) 1 Campb. 116.

(5) 1 Campb. 504.

(6) 1 Campb. 505 (a).

(7) 4 Esp. 175.

(8) 7 M. & G. 325; s. c. 13 Law J. Rep. (N.S.) C.P. 145.

(9) 1 Bos. & P. 200.

(10) 41 Law J. Rep. (N.S.) Q.B. 370; s. c. Law Rep. 7 Q.B. 702.

(11) 4 Taunt. 869.

(12) Cockburn, C.J.; Blackburn, J.; and Lush, J.

BLACKBURN, J.—This was an a tried in the Mayor's Court befor Common Serjeant.

The action was on a voyage poli ship "at and from Montreal to I Video."

The fourth plea on which alon question arises, was that the shi not at Montreal within a reasonable being a delay materially varying risk.

The facts as to this were that the was effected on the 13th of July premium of two per cent. No qu was asked by the underwriter as to the ship then was, and no inform was offered by the assured, but i she was then at sea on a voyage int to end at Montreal.

She did not arrive at Montreal t 30th of August.

Evidence was given that the de the arrival at Montreal change voyage from a summer voyage winter one, which materially affect risk and the rate of premium.

Evidence was offered on the part plaintiffs that the delay in arrivi Montreal was not voluntary on part, but was occasioned by perils seas on the voyage out to Montreal.

The Common Serjeant rejecte evidence, giving leave to the plain move in this Court for a new tr this ground.

The case was then left to the jur found that the delay was unreasc and that the risk was thereby mat changed.

A rule *nisi* was obtained for trial, which was argued in last before my Lord and my brother and myself, when the Court took t consider.

As the evidence was rejected, we consider the case as if it had been re and had established what it was to prove, and as if the jury had not only as they have done that was unreasonable delay betwee making of the policy and the comm ment of the risk intended to be i against, materially altering that ris also that the delay was occasion matters beyond the control of the as

And then we have to determine whether that would be a defence or not.

Nothing would seem easier than for the parties making a policy to insert a few words preventing all possibility of dispute on such a point.

If the insurance had been in this case at five per cent., to return three per cent. if the ship was at Montreal on or before some named day, there would have been no question but that the underwriters would in this case have been liable, and the assured would not have had to pay the winter premium unless the underwriter ran the winter risk.

If the underwriters had inserted "warranted to be at Montreal on or before" some named day, there can be no doubt that the risk would not have attached, and in either case by naming a fixed day the controversy as to when the risk became varied would be avoided. But we are informed that in practice there are great if not insuperable difficulties in the way of introducing unusual clauses into policies, and that brokers prefer the risk of causing litigation at the expense of their customers to the risk of frightening away custom by proposing something unusual. We must anticipate that policies will continue to be made as this has been, and the question before us is therefore one of considerable importance.

It is quite clear that the words "at and from" a particular place do not import either a warranty or a representation that the result at the time of making the policy is already at the place. In *Hull v. Cooper* (1), decided in 1811, the case was one of an insurance on goods, "at and from Heligoland to a port in the Baltic." At the time when the policy was effected, the 13th of August, the ship was in the Thames, which fact was known to the assured, and not communicated. She did not sail from the Thames till the 27th of August, a fortnight later, which latter fact could not have been known to the assured at the time of making the policy, as it had not then happened.

The plaintiff having obtained a verdict, a motion for a new trial was refused. It appears from the report as if the counsel who moved treated the case entirely as one of concealment, and not as one of a change of risk; but Lord Ellenborough in his judgment separates the two questions. He says, "when a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there; for if she is only to be there at a distant period that might materially increase the risk. But it has never been understood tha the terms of such a policy necessarily imported that the ship was at the place at the very time, so as to make the assured guilty of deception if she were not." So far he is dealing with the non-disclosure of the fact that the ship was in the Thames on the 13th of August. He then proceeds: "It was a question for the jury whether the intervening period materially varied the risk in this instance, the interval being from the 13th to the 27th of August, with the additional days which elapsed from her sailing till she reached Heligoland, and the jury were not persuaded that the risk was thereby varied and found for the plaintiffs." And Bayley, J., says, "It was a question for the jury to say whether the delay in reaching Heligoland for so many days after the policy was effected materially varied the risk."

The affirmative decision here is, that a delay not varying the risk does not discharge the underwriter; but the opinion is expressed that a delay materially varying the risk does discharge the underwriter, though that was not the very point decided.

In *Driscoll* v. *Passmore* (9), in 1798, where an analogous question arose and the plaintiff recovered, it was stated in the report "that it was in evidence that the difference of season arising from this delay did not vary the risk." *Brine* v. *Featherstone* (11) came before the Court on a rule to enter the verdict on a point reserved at the trial, and the Court in Banc had not to consider whether the delay was such as to discharge the underwriters. The facts, as stated in the report, appear to be such as would have afforded evidence that the delay was such as to vary the risk, but if that defence was raised at Nisi Prius, which does not appear to have been the case, there may

have been some other evidence not stated in the report which justified the finding of the jury.

Neither of those cases can, as we think, be considered in conflict with *Hull* v. *Cooper* (1).

The case, however, that comes nearest to the present is that of *Mount* v. *Larkins* (2). In that case the facts were found in a special verdict, a part of which only is set forth in the report. The policy was on the ship *Aquila*, at and from Singapore and Batavia, both or either, to the ship's port of discharge in Europe.

In the report it is said that it was found that the policy was entered into on the 28th of February, 1824, that the ship sailed from England in the beginning of September, 1823, on a voyage to the Cape of Good Hope, Van Diemen's Land and Sydney, and thence to Singapore.

It is not stated in the report that it was known to the underwriters that she was bound on this preliminary voyage, but it is scarcely possible that it should be otherwise, and in the judgment of the Court it is assumed throughout that it was known to them. The jury found that there was "unreasonable and unjustifiable delay between the making of the said policy of assurance and the commencement of the risk intended to be insured against." On this the Court of Common Pleas decided in favour of the defendants, saying, "We must intend that the risk was in fact varied, and consequently the underwriters discharged."

This would be precisely in point were it not that it was there expressly found that the delay was unjustifiable, and that in the present case the plaintiffs have not been allowed to give evidence to shew that the delay was not from any fault of theirs.

The ground on which the judgment delivered by Tindal, C.J., in *Mount* v. *Larkins* (2), is based is, that "The underwriter has as much right to calculate the outward voyage on which the ship is then engaged being performed in a reasonable time and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underw who has another risk substituted ir of that which he has insured agains in both cases the alteration is occa by the *wrongful act of the insured hin* This may be relied on as an express opinion that the delay, *if necessary*, not discharge the underwriters. It be so where the fact that the vessel a preliminary voyage is known and municated to the underwriter, so make that the basis of the contract it seems to have been understoc Tindal, C.J., that the principle on the cases of *Vallance* v. *Dewar* (5 *Ougier* v. *Jennings* (6) were decide on the ground of notice. He says, same principle is admitted in the ca *Vallance* v. *Dewar* (5) and *Ougi Jennings* (6) in a note to that ca both of which it is admitted that a in the commencement of the risk, k interposition of an intermediate v *not communicated to the underw* would discharge the policy, unless intermediate voyage was one whicl made usually and according to the of the trade in which the ship wa engaged, which would be *equivale notice* to the underwriters."

We need not in the present case how that is, for there was no comm tion made to the underwriters where the ship was at the time the policy was made. And we thi under such circumstances, not ma whether the delay which varies th was occasioned by the fault or the fortune of the assured. In either the risk is equally varied.

Where the alteration in the cou the voyage after the risk has att is justified by necessity, it does no the risk. The underwriter has u taken to insure the vessel durin usual and proper course of the a ture. Now, though under ordinar cumstances the usual proper cours voyage is to proceed direct, or, if c by a hostile cruiser, or forced tc before a storm, to go out of the course, the underwriter takes his c of the vessel being forced to do so. the underwriter does not take upon self any part of the risk of the

being delayed so long as to vary the risk, by perils of the sea or otherwise, on its passage to the port where the risk is to attach. This seems involved in the decision of *Hull* v. *Cooper* (1), that the assured is not bound to communicate to the underwriter the place where the vessel is at the time of insurance. For, if the time when the risk is to attach might be indefinitely delayed by perils affecting the passage from the place where the vessel was, it must be material to the underwriter to know what that place is. If, on the other hand, at whatever place the ship then is, the risk is not to attach unless the vessel in fact arrives at the port within a proper time, it is not material to the underwriter at what place the ship then is.

The position is laid down in 1 *Phillips on Insurance*, p. 379, sect. 690, "That it is an implied understanding that the risk is to commence within a reasonable time, unless the policy contains some express provision on the subject."

He elsewhere, 1 vol. 332, sect. 602, expresses a hesitating opinion that a representation, though not embodied in the policy, may have the effect of qualifying or rebutting an understanding that is only implied. As already said, we are not now called upon to decide how this may be, as in the present case there was neither representation nor express provision in the policy. We think, at all events, in the absence of a representation, that in a policy "at and from a port," it is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach. The rule therefore must be discharged.

Rule discharged.

Attorneys—W. Flux, for plaintiffs; G. Ashley & Tee, for defendants.

[IN THE HOUSE OF LORDS.]

1873. July 4. 1874. May 15; June 22. } BRIDGES *v.* THE NORTH LONDON RAILWAY COMPANY.

Railway Company — Negligence — Evidence—Invitation to Alight—Calling out Name of Station—9 & 10 Vict. c. 93.

In an action brought under Lord Campbell's Act, 9 & 10 Vict. c. 93, against a railway company, for negligently causing the death of one of their passengers, it appeared that the deceased, who was short-sighted, was in the habit of travelling daily from Highbury station to Broad Street station, and back. One evening after dark the deceased arrived at Highbury station in one of the company's trains. The train was stopped when part of it was brought up to the platform and part of it was in a tunnel, through which the station is approached from Broad Street station. Part of the platform runs a short distance into the tunnel, and from the end of the platform a slope leads down to the level of the line. On the night in question there was a quantity of hard rubbish from one to two feet high lying along beyond the slope. The carriage in which the deceased was riding was pulled up opposite this rubbish, at the distance of twenty-seven feet from the mouth of the tunnel. After the train had stopped, a passenger in the next carriage gave evidence that he heard the company's servant call out "Highbury;" that he got out; that he then heard called out, "keep your seats;" that he then heard a groan, and going to the sound found the deceased, lying partly on the rubbish, and partly with his legs on the rails between the wheels, and having sustained such internal injuries in attempting to alight from the carriage that he died soon afterwards. The wheels of the carriage had not gone over the deceased, the train must therefore have been at a stand-still long enough for the passenger who gave evidence to alight, and then to proceed in the darkness, and to find the deceased in the situation described. The tunnel was dark, being filled with steam, but there was a lamp at the end of the tunnel. The Judge at Nisi Prius having on this evidence directed a nonsuit, — Held (*reversing the*

judgments of the Exchequer Chamber and Queen's Bench) that, without laying down any rule as to the effect in all cases of the company's servant calling out the name of the station, the evidence of the calling out the name in this case, coupled with the stoppage of the train, and the interval of time which elapsed before it was again moved on, was evidence which ought to have gone to the jury, as it was, in the absence of rebutting evidence on the part of the company, sufficient to authorise their finding a verdict for the plaintiff.

This was an appeal, on a case stated, from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Queen's Bench, upon an application by the appellant in an action against the respondent company, to recover compensation for the death of her husband through the alleged negligence of the company, for a rule to enter the verdict in the appellant's favour for 1,200*l.*, the amount at which the jury had assessed her damages.

The declaration stated that the appellant was the executrix of her late husband, Robert Hill Bridges; that the respondent company had for reward received the said Robert Hill Bridges as a passenger, to be carried by them as carriers from Broad Street station to Highbury station on their line; that the respondents did not use due and proper diligence in and about the carrying him as such passenger, and so negligently conducted themselves that he, whilst getting out and descending from a carriage, was cast down upon the ground, and was thereby so greatly injured that he died within twelve months next before the suit was brought.

The defendants pleaded not guilty, and issue was joined.

The facts were stated in a case which was settled by Blackburn, J., the learned Judge who tried the action, and were as follows.—

The respondents, the North London Railway Company, were the owners, and had the management of a line of railway from Broad Street to Highbury.

The action was brought under Lord Campbell's Act by the appellant, to recover compensation for the death of her husband, Robert Hill Bridges, whi curred under the following circumst

The deceased was a man of about two years old, and very short-sig and had been resident in the West for the greater portion of his life. time of the accident he was livi Arundel Square, close by the respon station at Highbury.

The deceased was a season ticket-h upon the line, and was in the daily of going in the morning to and retu in the evening from his place of bu by the railway from and to Higl station, to and from Broad Street st

On the night of the 20th of Jan 1869, the deceased left Broad S station at 6.40 p.m., in a train cons of five or six carriages, the last ca being a second class, and the dec was seated in about the centre of carriage. The train arrived at Higl at a few minutes to seven o'clock.

Approaching the station at Higl from Broad Street, you enter a tun about 150 feet in length, and ther slope from the platform, which for a distance runs under the tunnel, a same level as the station proper, dov the level of the line, and at the end c slope a quantity of hard rubbish o night in question lay within the tu The station is lighted, a lamp is p at the mouth of the tunnel, but under it. The train on this occ entered the tunnel and stopped, w two of the carriages were inside the tu

A passenger who was in the last riage but one was called as a witness gave evidence that he heard "Highb called at the far end of the platform; he got out, and after he got out he warning, "keep your seats," after w the train moved on to the station. witness hearing a groan, proceeded fa back into the tunnel, and found th ceased lying, with his legs across the between the wheels of the carriage his body on the rubbish. The wheel not touched his legs or body. He lying about ten feet from the end o slope, and further within the tunnel. was found to have broken his leg i tempting to alight, and to have rec mortal internal injuries by his fall.

tunnel was filled with steam, the night being damp.

It was admitted at the trial that death ensued from the injuries sustained through the accident.

Blackburn, J., before whom the cause was tried, being of opinion that there was no evidence of negligence for the jury, nonsuited the appellant; but, owing to a strong expression of opinion by the jury in her favour, the Judge reserved leave to the appellant to enter a verdict, if the Court should consider that there was any evidence of negligence on the part of the respondents which could be properly left to the jury, and took the opinion of the jury as to the amount of damages, which they assessed at 1,200*l.*

The appellant, in pursuance of the above leave, applied for a rule to shew cause why the verdict should not be entered in her favour for the said sum of 1,200*l.*

Liberty was given to the Court to draw any inferences or find any facts from the facts stated in the case, and the pleadings and pleas thereto subjoined, which formed part of the case.

The Court of Queen's Bench having refused the rule, the plaintiff appealed to the Court of Exchequer Chamber, which Court by a majority, consisting of Bramwell, B., Channell, B., Pigott, B., and Cleasby, B. (Kelly, C.B., Willes, J. and Keating, J., dissenting), affirmed the judgment of the Court of Queen's Bench.

From that decision the appellant now appealed to this House.

Henry James and *Kempe*, for the appellant, cited *Foy* v. *The London, Brighton and South Coast Railway Company* (1), *Siner* v. *The Great Western Railway Company* (2), *Cockle* v. *The London and South Eastern Railway Company* (3), *Praeger* v. *The Bristol and Exeter Railway Company* (4), and *Gill* v. *The Manchester and Sheffield Railway Company* (5).

Sir John Karslake, Aspinall, and *Shield*, for the defendants, cited *Toomey* v. *The London, Brighton and South Coast Railway Company* (6), *Gee* v. *The Metropolitan Railway Company* (7), *Crafter* v. *The Metropolitan Railway Company* (8), and *Adams* v. *The Lancashire and Yorkshire Railway Company* (9).

The Judges were summoned, and Kelly, C.B.; Martin, B.; Keating, J.; Brett, J.; Denman, J.; and Pollock, B., attended.

The following question was last session submitted to the Judges: Whether on the facts stated in the Special Case, and having regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury?

The Judges answered as follows—

POLLOCK, B.—My answer to the question which has been submitted by your Lordships in this case to the Judges is in the affirmative.

The general rule which prescribes the duty of the Judge presiding at Nisi Prius when the question is raised whether at the close of the plaintiff's case there is evidence which ought to be left to a jury, is laid down in the judgment of the Court of Exchequer Chamber in *Ryder* v. *Wombwell* (10), where the question being whether articles supplied by the plaintiff to the defendant who was an infant, were "necessaries," the Court say, "The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact. In so far as it is a question of fact it must be determined by a jury, subject no doubt to the control

(1) 18 Com. B. Rep. N.S. 225.
(2) 33 Law J. Rep. (N.S.) Exch. 67; s. c. Law Rep. 4 Exch. 117.
(3) 39 Law J. Rep. (N.S.) C.P. 226; s. c. Law Rep. 5 C.P. 457.
(4) Law Rep. 5 C.P. 460, n. 1.
(5) 42 Law J. Rep. (N.S.) Q.B. 89; s. c. Law Rep. 8 Q.B. 186.
(6) 3 Com. B. Rep. N.S. 146; s. c. 27 Law J. Rep. (N.S.) C.P. 39.
(7) 42 Law J. Rep. (N.S.) Q.B. 105; s. c. Law Rep. 8 Q.B. 161.
(8) 35 Law J. Rep. (N.S.) C.P. 132; s. c. Law Rep. 1 C.P. 300.
(9) 38 Law J. Rep. (N.S.) C.P. 277; s. c. Law Rep. 4 C.P. 739.
(10) 38 Law J. Rep. (N.S.) Exch. 8; s. c. Law Rep. 4 Exch. 32.

of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit, if the *onus* is on the plaintiff, or direct a verdict for the plaintiff, if the *onus* is on the defendant."

This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence or no negligence is usually one of pure fact, and, therefore, for the jury, it is the duty of the Judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them or inference drawn from them by the jury, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration.

I commence, therefore, by considering what was the duty of the defendants towards their passengers upon the occasion in question, the non-observance of which would constitute negligence? It appears to me that their duty may be stated generally by saying that they were bound to provide a proper place and proper means for alighting at the Highbury Station, and this involves not merely the actual formation of the platform and the length and position of the train, but also the time at which the passengers could, with reference to the usual course of the journey and the conduct of the company's servants, reasonably suppose that the proper time for alighting had arrived.

In the present case the facts given in evidence by the plaintiff fall short of those which actually occurred, and this seems to be, as in many similar cases it is, essential to the character of the event. Because, although the evidence which relates to the stopping of the train, whilst the last two of the passenger carriages were within the tunnel, and to th ing out by the porters first of " bury" and then "Keep your seats," being uncontradicted, be accepted a the precise time when, and the m in which the deceased attempted to is left to be inferred.

The jury, had the facts been them, might have inferred that the proper time for the deceased to had arrived, the warning "Keep seats" had been given, and the trai moved on towards the station; this were so the place for alighting vided by the company was a prope having reference to the time at whi deceased had a right to claim such vision, or inverting the propositi had no right to alight at an earlier p and therefore when he did so, he own imprudence contributed to the ries he received. But it must be re bered that a passenger who was cal a witness was in the last carriage bu and he heard "Highbury" called got out before the warning "Keep seats" was given, and alighted a because although within the tunn carriage was opposite to the narrow form.

Now taking this fact, together wi other evidence given by the plaintif stood, without contradiction or exp tion by the defendants, the jury fairly have found that, looking to the nary requirements of the passenger t the length of the platform was in cient, or if it were sufficient in itself there was negligence on the part of in charge of the train in stopping fore it was wholly alongside the plat or on the part of the porters in c out "Highbury" before the train wholly alongside. The defendant have shewn that there were except circumstances which rebutted thi ference, as that the break power diminished by some accident over they had no control, that the rails by some unforeseen event unusually pery, or that a dense fog prevente porters from seeing the exact positi the train, but all this is beside the sent question.

Then it is said that, assuming

was some evidence of negligence on the part of the defendants, the plaintiff must have acted so rashly or carelessly as to disentitle him to recover. I say *must*, because that he may have done so would not be sufficient to support the defendants' contention. It appears to me that the jury were entitled to assume that *prima facie* the deceased would conduct himself with ordinary prudence and discretion, and that there was evidence from which they might fairly have found that the deceased having heard "Highbury" called out, and finding the train had stopped, got out of the carriage before it moved out of the tunnel, and whilst it was opposite the hard rubbish, supposing that he would alight on the platform. Had he known the rubbish was there instead of the platform, to jump out on to it with such a fall as would break his leg and occasion mortal internal injuries, would indeed have been negligent and rash in the extreme. But it was two hours after sunset, there was no light in the tunnel, and the deceased was near-sighted, and he might well have supposed he would step on to the platform, as did the passenger in the next carriage, with impunity.

The plaintiff no doubt is bound to make out her case, and cannot by a bare suggestion challenge its rebuttal, and if what I have stated were all mere speculation, it ought not to have gone to the jury, but if it was an inference which they could fairly draw from the facts, proved in the same manner as things unseen or unproved—which in the eye of the law are the same—are constantly inferred and found as facts by a jury, then the evidence should have been submitted to them, together with any facts which the defendants chose to adduce, and which might have exculpated or further inculpated them, according as their witnesses knew more of the occurrence, and confirmed or displaced the evidence for the plaintiff.

This is not merely the view which presents itself to my mind upon the consideration of the facts themselves, but the more I have studied the judgments of those learned Judges from whose opinion I have the misfortune to differ, the more I have been led to the conclusion that it cannot correctly be affirmed that under no circumstances could the jury have reasonably drawn the two inferences that there was negligence of the company's servants and no contributory negligence on the part of the deceased.

In this view of the case it is unnecessary for me to consider piecemeal the conduct of the defendants' servants, or the proper effect to be attributed to the calling out by the porter of the name of the station. Its intention as an invitation to alight must obviously be often conditional, and I concur in the view that is taken of it by the late Mr. Justice Willes in his judgment in this case in the Court of Exchequer Chamber, where he says, "It is an announcement by the railway officers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company in which the man reasonably supposes he is getting out at the place where the company intended him to alight."

In the course of the argument at the bar several cases were cited in which actions had been brought by railway passengers against the companies by which they were carried to recover compensation for injuries received in consequence of alleged omission to supply proper and safe means for alighting, but as these cases varied in their circumstances, and were none of them identical with the present, I do not feel that further allusion to them would assist your Lordships, though I ought to add that I can find no decision which is contrary in principle to the view which I respectfully submit.

DENMAN, J.—My Lords,—In answer to the question put by your Lordships, I am of opinion that, on the facts stated in the special case, and having regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury.

The action was brought by the plain-

tiff as executrix of her deceased husband for damages occasiond by his loss.

This declaration is certainly somewhat vague, but no objection on that account appears to be open to the defendants, inasmuch as the leave given at the trial was to enter the verdict for a certain sum, which the jury had assessed, if the Court should be of opinion that there was any evidence of negligence on the part of the defendants which could properly be left to the jury.

By this reservation I understand that the verdict was to be entered for the plaintiff for the sum assessed, if the Court should be of opinion that the accident which caused the death of the plaintiff's husband was or might reasonably have been found to have been due to any proved fact or set of facts which might be reasonably considered by a jury to constitute negligence on the part of the defendants or their servants, in the course of the conveyance of the deceased to and his safe deposit at Highbury Station, or at least in the latter respect.

Plans of the station at which the plaintiff was to have alighted, and of the scene of the accident, were used at the trial, and were annexed to and formed part of the special case. The Court was to be at liberty to draw any inferences of fact from these plans as well as from the facts stated.

The jury at the trial, as appears from the case, after hearing the plaintiff's evidence, expressed a strong opinion in favour of the plaintiff. The learned judge who tried the cause nonsuited the plaintiff; but owing to the view expressed by the jury took their opinion as to the amount of damages, and gave her leave to move in the terms above mentioned.

The material facts of the case, as it appears to me, may be fairly stated as follows,—I do not use the exact language of the special case, but state what appears to me to be the fair result, drawing only such inferences as the understanding between the parties empowers the Court to draw.

The deceased, a man of fifty-two years of age, and very short-sighted, travelled on the night in question (the 20th of January) in about the centre compart-

ment of a second class carriage, the most of a train of five or six carr It was seven p.m., and therefore His short-sightedness would on th hand render it incumbent upon hi take more care than would be need a sharp-sighted person, because he not trust to appearances so confid On the other hand it would go to ac for a mistake on his part, which not have been made by a man of vision as to the actual condition place upon which he was alighting.

The deceased lived close to the bury Station, and had for a consid time been a daily traveller on the l and from that station. He would fore well know the proper place at to alight, as well as the usual hab the trains. This on the one hand give him a better opportunity t stranger of avoiding danger by av any place of alighting which he di know to be safe as distinguished those places which he knew to be on the other hand this very famil with the station might have a ten to mislead him with a false security had frequently on other occasions ali or known others to alight at the place, and found it safe and practi and if on the particular occasion a expected and dangerous obstructio been placed at that spot.

Approaching the station there tunnel as described in the case a shewn upon the plan. On the nig question the train from some unexp cause, but which the defendants have explained if the nonsuit had not place, stopped while the last two car were in the tunnel. The platfor for a short distance under the tun the same level as at the station pro then gradually sloped down to the of the line. The front compartm the carriage in which the decease was opposite the slope. On the nig question there lay a quantity of rubbish of the average height of 1 inch, and of the average width feet which extended from the fo the slope for about 50 feet furthe the tunnel, so that any person g out of that compartment in whic

plaintiff was, would, if he put his foot down at that place, believing the ground to be in its normal state and at its usual level, have probably come in contact with the heap of rubbish, and fallen in consequence. It was, I think, also quite possible on the night in question that a person even with good sight might have mistaken the heap in question either for that part of the platform which lay within the tunnel, or for the upper part of the slope above mentioned. There was no lamp in the tunnel, but there was one at the mouth of the tunnel, 27 feet 11 inches from the spot where the deceased alighted. Owing to the dampness of the night the tunnel was full of steam. The surface of the heap described above was irregular, so that if a passenger in alighting once stumbled over it he might in struggling to save himself have fallen in such a manner as to cause a serious accident. There was a cry of "Highbury" as the train was stopping or after it stopped, and immediately afterwards a cry of "Keep your seats." The train moved on again after stopping, but not, as I infer, until after the accident had happened. The deceased was found 27 feet 11 inches from the lamp above mentioned, and about 10 feet from the foot of the slope and further within the tunnel.

It is stated in the case, and must be taken as a fact, that the deceased broke his leg in attempting to alight, and received mortal injuries by his fall; from which I infer that either by alighting on the rubbish before he expected to touch the ground he broke his leg from the sudden resistance he unexpectedly met with, or that he fell in consequence of so alighting and broke his leg by falling on the irregular hard surface of the heap of rubbish, whether from a first or second or subsequent fall, or blow of the leg against the rubbish. It is expressly found that the wheels had not touched his legs or body.

Upon the above statement of the facts of the case, as I understand them, having drawn all such inferences as seem to me to be the natural and proper inferences to be drawn, I have felt very considerable doubt, on one ground only, whether this was a case in which the evidence ought to have been left to the jury. The ground I refer to is, whether taking everything to have been proved which I have stated, and all the inferences I have drawn to be correct, the cause of the accident was not left in so much doubt and obscurity that it might properly be laid down that the plaintiff, on whom undoubtedly the burthen of proof lay, had failed to prove that the death of her husband resulted from negligence of the company, and had only made out a case of death by an accident consistent with other possible and probable causes. The judgment of Channell, B., in the Court below puts this view of the case as forcibly as it can be put; but on full consideration of the whole of the case, the evidence given, the inferences fairly to be drawn, the plans put in at the trial, and the measurements given upon them, I have come to the conclusion that the matter is not left in such a state as regards proof as to justify a Judge or Court in withdrawing the case from the consideration of a jury.

Before it could be decided whether the facts proved constituted reasonable evidence of negligence, a great many separate facts had to be considered and some inferences must inevitably be drawn. Probabilities were to be taken into account, plans were to be examined. If a view by the jury had taken place (which does not appear) such view would have been of considerable importance in enabling the viewers to appreciate the evidence, and to report what they might have observed either to the Judge or their fellow jurors, and such report might reasonably influence the mind of the Judge in deciding whether there was a case to go to the jury or not; but it is impossible to mention all these matters without feeling that they are in their nature questions more for the consideration of a jury than of a Judge or Court. This observation becomes still more cogent if it be admitted, as I think it must be admitted, that whoever decided the question of whether there was evidence to go to the jury, would be entitled, if not bound, to take into account his own experience of railway travelling, usual construction of stations and platforms, usual mode of stopping, alighting, giving warning by

voice or lights, and other matters relevant to the present case.

The question of negligence is one peculiarly within the province of a jury, and I apprehend that it is a question with the decision of which the Judge should not interfere, unless he be very certain that the question has been reduced to a mere definition of what is the defendants' legal duty in respect of the matters wherein negligence is alleged, upon a well ascertained and indisputable state of facts. The legal duty itself often depends upon the question what would it be reasonable for a plaintiff or a defendant to do under a complicated state of facts; and this also is a question not of law but of fact, and as such peculiarly within the province of a jury.

After fully considering the evidence in this case, I am strongly of opinion that there was evidence of negligence which ought to have been left to the jury—evidence upon which the jury might not unreasonably have found such negligence to have caused the death of the plaintiff's husband—evidence moreover (in case your Lordships should consider that question open upon the reservation in this case) upon which the jury might have reasonably found that this accident was *wholly* due to the defendants' negligence, and to no other cause whatever.

I do not think it necessary for the decision of the question put by your Lordships that the Court should be able to say exactly how the accident happened; but I may be permitted to say that judging from the statements in the case, and from the plans, and from such inferences as I draw from both, I feel satisfied that the accident happened through negligence of the defendants or their servants in not having some person, either guard, porter, policeman or other person, either by voice or light, to prevent passengers from running the risk of falling over the heap of hard rubbish which lay along the side of the hinder carriage of the train on the night in question.

It is, however, unnecessary to decide whether a verdict for the plaintiff on this ground would have been one in which I, if I had been on the jury, should have concurred. It is enough to say t my judgment there was evidence which a jury might reasonably fin this accident happened wholly th the negligence of the defendants i providing for the safe alighting o sengers at that place, on that nigh under these circumstances.

The argument and judgments i Court below turned mainly on the ing to be attributed to the callin "Highbury" on the arrival of the I do not feel myself entitled to lay any rule to the effect that such c out did or did not amount to an i tion to alight. I think, however the jury were entitled to conside fact as one of importance in the especially when coupled with the fact found that the words "Keep seats" were called out shortly after but not, as I infer, until after the ac had happened. I think the jury entitled to put their own constructi these facts in connexion with the circumstances of the case.

On the whole I think this case w which ought to have been left to the and though in most cases I shoul that the difference which exists betwe own opinion and that of the very le Judges who constituted the majo the Court below, was a strong grou causing me to doubt the correctn my own view, yet I must own t this case the great difference of o which appears in the judgments increases my confidence in thinking the question was one properly fo jury and not for the Judge, and th that cases of the class to which th sent belongs so constantly divid Judges in opinion, and often le decisions which it is almost impossi reconcile with each other, seems to afford an additional reason for thi that in this case the learned Jud nonsuiting the plaintiff departed fro old maxim of the English law, *quæstionem facti non respondent Jud*

My brother Keating concurs i opinion.

BRETT, J.—Before determining wl there is or is not evidence fit to be

a jury in support of questions, one must know what the questions are which are to be so left. It seems impossible to answer satisfactorily the question whether there was or was not evidence of negligence which ought to have been left to the jury, without first determining the form in which the question of negligence, if left, should be judicially stated to a jury. It is further necessary, as it seems to me, to consider the formula which should be applied to the facts in evidence, in order to see whether they ought or ought not to be left to the jury. And further, how much of the dealing with facts is within the province of the Judge, and how much is exclusively within the province of the jury. These are the questions which have been differently treated in form by different Judges, and which might be rendered more easy of solution as they arise, if definite propositions with regard to them were enunciated by a paramount authority. They are all questions of law; that is to say, of principle. It seems to me that nothing can be a principle or rule of law; that is to say, there is nothing which a Court or Judge can have to rule as a question of law, which cannot be brought within some general rule or principle which may be predicated.

The cases to which your Lordships' question refers are cases in which a passenger by railway brings an action against the railway company to recover damages for injuries alleged to have been incurred by reason of the negligence of the defendants or their servants. What is the direction in point of law which ought to be given to the jury at the trial? It is this: that the plaintiff founds his claim upon an allegation that he has suffered injury by reason of the negligence of the defendants or their servants. If he has suffered from such a cause his claim is so well founded, because it is an implied part of the contract of carriage that the company and their servants will use reasonable care and skill in the conveyance of the passenger to his agreed destination. And if the company or their servants have been negligent or wanting in reasonable skill in the conveyance, and the passenger has been injured, there has been a breach of contract for which the company are liable, and for which the passenger is entitled to compensation by way of damages.

The proposition, therefore, which the plaintiff undertakes to substantiate is that he has suffered injury by reason of the negligence of the defendants or their servants. In order to make this out the plaintiff must prove that the defendants or their servants or both have been guilty of negligence, that such negligence caused him injury, that as between him and the defendants it was the sole cause of the injury; that is to say, that he did not by any negligence of his own contribute to the injury he has suffered. This direction, however, is not yet sufficient. It requires to be amplified by a legal definition of what amounts to negligence. That definition is that negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances. The final and full and strict direction to a jury therefore in such cases is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? Have they or their servants by such act of commission or omission caused injury to the plaintiff? Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? The plaintiff can only recover if he satisfies the jury by evidence that the defendants or their servants were guilty of negligence as described and that he has been injured thereby, and that he has not been guilty of negligence as described contributing to the accident.

Such is the direction to the jury, but

before giving this direction it is the duty of the Judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. This being a duty cast exclusively on the Judge is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the Judge is bound to apply to the evidence in order to determine this question of law? It cannot merely be, is there evidence? That has no meaning without a further proposition defining when it is to be considered in point of law that there is evidence. Without a proposition or rule which can be enunciated or predicated, there is no rule of law; a rule of law can always be predicated in terms. The proposition seems to me to be this: are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the Judge after all to say whether in his individual opinion the facts in evidence would prove the proposition, but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at. And a Court or Judge may be able reasonably to say frequently, that although they or he would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the conclusion of the jury, or in other words that although they or he would not have arrived at the same conclusion it is not contrary to reason to have arrived at it.

The Judge must, therefore, before directing the jury in the terms above set forth, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that such act or acts of commission or omission was or were such as a pe reasonable care and skill under the circumstances would have done or o to do? Are there facts in evidenc which, if unanswered, men of or reason and fairness might fairly sa the plaintiff had not in a manner buting to the accident, done any omitted to do anything which a pe ordinary care and skill under the circumstances would not have do would have done?

If the Judge, not deciding the issues according to his own indi view, but determining according t propositions last laid down, hold there is no evidence fit to be left to th on some one of the cardinal questic fore stated, he must direct the j matter of law that there is no case vour of the plaintiff, or he must n the plaintiff. If he holds that th evidence on each of the cardinal que he must leave the case to the jury a ing to the direction in point of law laid down in this opinion. Whe Judge has so directed the jury as law he has finished all which it is for him exclusively to determine case. He ought then, though I d think there is any legal absolute c tion on him to do so, to point out jury the bearing of the facts in evi upon each of the questions which must determine, and which of the are in his judgment in dispute, and there are not only the facts direct posed to which are to be consider facts or propositions of fact which be inferred by them from the fac rectly deposed to, and finally that it them to say whether the facts direc evidence and adopted by them, an facts and propositions of fact inferr them, do or do not amount in their ment to proof of the propositions the plaintiff is bound to maintain. the Judge has no legal right, eith rectly or indirectly, to force upon th his view of any fact or inference o Yet he may do so if he states questi fact as if they were questions of law instance, when he asks whether happened amounted to an invitati the plaintiff to alight. If he leave

question without explanation, he leads the jury to conclude that if there was nothing amounting to an invitation, the plaintiff in alighting must have been guilty of want of ordinary care. Yet, surely, he may not have been so guilty though there was nothing like an invitation. So, when it is asked whether what was done or omitted amounted to a trap, the jury is led to believe that if there was no trap the plaintiff must have been guilty of a want of ordinary care or skill in alighting. Yet, again, he may not have been so guilty though there was nothing like a trap. So, when Judges have stated that the calling out of the name of a station is no intimation that the passengers may on the stopping of the train alight; that seems to me to be a matter of experience of life and habits, which is solely for the determination of the jury. And so, finally, when a Judge lays down that if such and such things were done, or omitted to be done, there was or was not a want of ordinary care or skill, he has in my opinion laid down a proposition of fact and not of law. What men of ordinary care and skill would or would not do under certain circumstances is matter of experience, and so of fact, which a jury only ought to determine. It seems to me that it will aid the consideration of what is the proposition or rule of law, which is to govern the determination of a Judge, whether there is or is not evidence fit to be left to a jury to consider what duty with regard to facts is cast upon the Judge after the jury has found a verdict. He must undoubtedly determine whether the verdict is against the weight of evidence. Here, again, I think that a definite rule of conduct, or in other words, a definite proposition for legal application, which is, I think, a proposition of law, to be applied to the facts in evidence, should be laid down. That proposition cannot be whether the Judge agrees in opinion with the jury. If so, the Judge has left to the jury evidence which he has already decided to be such as it is not unreasonable to act upon it, and yet when it is acted on he overrules it. I do not speak here of cases in which a Judge may for precision leave the case to the jury, reserving for more careful consideration by the Court the question whether there was evidence fit to be left to the jury. The proposition or rule of conduct to be applied to the consideration of the verdict seems to me to be identical with that to be applied to the evidence before leaving the case to the jury. It is, again, not whether the Judge would have decided in the same way, but whether the verdict is such as reasonable and fair men might not unfairly arrive at, or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

The importance of the distinction as applied to this class of cases seems to me to be manifest. A Judge may be of opinion that the calling out of the name of the station ought not in any way to actuate the passenger; jury after jury may decide that according to the ordinary understanding both of railway officials and passengers it is an indication upon which a passenger may fairly rely that directly the train stops he may, unless he receives some other warning, safely alight. A Judge may think that if a passenger himself opens the carriage door and alights, it is conclusive against him that he alighted without ordinary care; jury after jury may find that a passenger may, without being guilty of a want of ordinary care, himself open the door and alight. A Judge may propose this dilemma: if the passenger alights and falls when it is dark he is imprudent and cannot recover. If he descends and falls when it is light, he is unskilful, and cannot recover. A jury may find that neither part of this dilemma is true. If a Court or Judge may overrule such decisions, because they or he do not agree with them, they ought logically to overrule decision after decision. And yet each successive decision would prove more distinctly the opinion of men of ordinary intelligence. If such decisions may be overruled on the mere ground that the Courts or Judges do not agree with them juries are bound to matters of fact by the view of the Judges as to facts. This cannot be.

But if the proposition which I have intimated as correct be true, and be enun-

ciated by the authority of your Lordships' House, the discussion will be narrowed, and it will be settled that the Judge in determining whether there is evidence fit to be left to the jury, and the Court or Judge, in determining whether a verdict is against the weight of evidence, ought not to decide on the mere ground of their or his own individual opinion, but to determine whether it can be truly said that men of ordinary sense and fairness might not decide in one way or the other. This view seems to me to be that adopted in the Court of Exchequer Chamber in *Cockle* v. *The South-Eastern Railway Company* (3).

My Lords, the paramount importance which I attach to the enunciation of a rule of conduct or of decision by your Lordships is that it will prevent the decisions in these cases from being governed by the many different views taken by different Judges of facts of every day occurrence in life, and which no one can say are questions of law. The kind of discussion which may be found in this case in the Courts below, and the differing grounds of decision to be found in so many cases, would not be repeated.

Applying to the question proposed by your Lordships the rule I have submitted to be the right one, I cannot entertain any doubt that there was in this case evidence fit to be left to the jury, and I therefore answer your Lordships' question in the affirmative.

THE LORD CHIEF BARON.—My Lords, having had the advantage of reading the opinions delivered in this case by my brother Denman and my brother Pollock, in which, and in the chief reasons which they assign, I substantially concur; and having fully expressed the view I had taken upon the questions now before your Lordships, in the judgment which I pronounced in the Exchequer Chamber, and which appears in the appendix, I forbear to trouble your Lordships further with the grounds upon which I submit that there was evidence of negligence on the part of the respondents which ought to have been left to the jury; except indeed to observe that as it appears that upon the arrival of the train at the station at which the dec was to alight, an officer or servant company called out the name of th tion, it became a question whethe deceased was or was not ju in presuming that he might with safety at that spot, and was justified in so presuming, wh under all the circumstances of the there was negligence on the part company in not warning the passe in the tunnel that it would be unsa them to alight there. And thes questions which could not be deter as matters of law, and which I am fore of opinion ought to have bee mitted to the jury. Then, inasmu it appeared that there was afterw cry of "Keep your seats," again a tion arose whether that was heard b deceased in time to prevent him alighting, and this also being a question of fact, was obviously fo jury and not for the Judge to deter I am, therefore, of opinion that Lordships' question should be ans in the affirmative.

LORD CHELMSFORD [his Lordship the nature of the case and the as found in the case, and said]—In state of things I will point out to Lordships in the first place that the some of the facts which are perfectly and which admit of no dispute. perfectly clear that before this acc occurred the train had come to a stan It is perfectly clear that the carri which the deceased was seated was of the tunnel. It is equally clear there was no platform opposite tha of the tunnel where the carriage sto It is perfectly clear that the tunnel a place in question was, even on a night, imperfectly lighted, and on night in question, the tunnel being with steam, practically it was wi light. It is also clear that opposit carriage where the deceased was s there was, in place of a platform, a of hard rubbish; and it is clear t the deceased in that state of thing out in the tunnel opposite this ru he was exposed to the imminent d of receiving a fall from alightin

the rubbish heap in place of on the platform.

Up to that point it appears to me that there neither is negligence nor evidence of negligence to go to a jury. It was not negligence to stop the train in the tunnel, it was not necessarily negligence not to have a platform in the tunnel; but the question, and the only question in the case, appears to me to be this, was there evidence to go to the jury that in this state of things the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time that he did get out of it? Now I certainly do not desire to lay down any rule whatever as to what may be the consequence of calling out the name of a station by the officers of a company. But your Lordships will see that it was stated in the evidence, and at the stage at which the trial stopped it was uncontradicted, that a passenger who was in the last carriage but one, and who was called as a witness, gave evidence that he heard "Highbury" called out at the far end of the platform. He got out, and after he got out he heard a warning, "Keep your seats," after which the train moved on to the station. Hearing a groan, he proceeded further back into the tunnel, and found the deceased lying with his legs across the rails, having sustained injuries which it is admitted caused his death. In that state of things, the train having actually stopped, the servants of the company having called out "Highbury," a station at which the train was intended to stop, and the requisite time having elapsed (as was proved by the witness I referred to) for any of the passengers to get out and leave the carriage, and then the same servants of the company having corrected their mistake and called out "Keep your seats," thereby admitting that the first call was an invitation to leave their seats,—in that state of things it appears to me that without explanation or contradiction from the other side there clearly was, upon the facts which I have stated, evidence to go to the jury of negligence on the part of the company. I am bound to say if it had fallen to me to review a verdict of a jury given against a company under the circumstances, without any evidence to explain the facts which I have stated, I should have been of opinion that the jury had come to a natural and proper conclusion. But the only question which your Lordships have to deal with is, was there in this case evidence of negligence to go to the jury? In my opinion there really was.

My Lords, the fate of this litigation is somewhat singular. The course of it appears to me to afford a strong and marked proof of the advantage which sometimes arises from a fresh hearing by way of appeal of a cause of this kind. At the trial Mr. Justice Blackburn was of opinion that there was no evidence to go to the jury and nonsuited the plaintiff. On the application to the Court of Queen's Bench for a rule to set aside the nonsuit, there were present Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Lush and the Lord Chief Justice. As I understood the observations of the Lord Chief Justice, he would have been himself of opinion, with a certain qualification, that there was evidence of negligence to go to the jury; but he said if a rule was granted, it would be certain in that Court to be discharged, and therefore it was refused. I take it, therefore, that in the Court of Queen's Bench in this case there was that amount of difference of opinion to which I have referred. In the Court of Exchequer Chamber four Barons of the Exchequer were of opinion that the nonsuit was right, and that there was no evidence to go to the jury. The Lord Chief Baron, Mr. Justice Willes and Mr. Justice Keating were of a different opinion; therefore there was a division of four against three. Your Lordships have had the benefit of the opinion of five learned Judges two of whom were those who had already given their opinions in the Court below, and they are unanimously of opinion that there was evidence of negligence to go to the jury; and so far as I am aware any of your Lordships who heard the case would also have no doubt there was evidence of negligence to go to the jury. Therefore, looking both to the advice of the learned Judges to this House, and to the opinion of your Lordships, I think it may be taken that there was no difference

of opinion in this House that there was evidence to go to the jury. I think that that unanimity had been arrived at from the repeated hearings of this case which have no doubt caused some delay and some expense, but I trust the case may be found useful in future as negativing the idea that, under circumstances such as I have described, a case is to be withdrawn from the jury, and the mind of the jury not to be further exercised upon it.

I submit that the proper course will be to reverse the judgment of the Exchequer Chamber, and to enter up judgment for the sum assessed by the jury, namely, 1,200*l.*

Lord Hatherley.—I entirely concur with the views taken of this case by the noble and learned Lord on the woolsack; and concurring with him, especially in that part of his observations in which he stated that he thought we were not bound to lay down any special rule as to what the effect of calling out the name of a station would be, I cannot help observing that when the name of a station has been called accompanied by a stoppage, and a considerable interval has elapsed (as has been proved by the evidence of a passenger to have occurred in this case), there is a certain amount of evidence to go to the jury to authorise them to find a verdict for the plaintiff, unless some explanation could be given of the facts by the company, instead of merely submitting that the plaintiff had not produced sufficient evidence to call upon them for a defence.

It is curious to remark how strongly the evidence, when you examine it, bears upon the interval of time during the stoppage. It appears that the passenger who gave evidence got out just as the unhappy passenger who was killed may have got out, and after he had got out he heard the warning, "Keep your seats," after which the train moved on into the station. And then the case says, "The witness hearing a groan proceeded further back into the tunnel." At first you might read that as meaning that he heard the groan after he had heard the cry "Keep your seats," and after the train had moved on into the station. But if you look narrowly into it you wil that that is not so, and that the trai not moved on when he heard the g for having heard a groan, he proc further back into the tunnel, and the deceased lying with his legs a the rails between the wheels of the riage and his body upon the rubbisl wheels had not touched his legs or It is obvious that there could have no motion forward as his legs wer tween the wheels without the w touching him; and therefore it must been a considerable time that this was stopped. The other passenge only gets out, but has time to hea groan, and has time to find the unl deceased with his legs between the w and has time to find that the wheels not moved on or in any way to him. The death was therefore occas in consequence of the fall. Now i state of circumstances, the train h stopped sufficient time to enable two passengers to alight, and it not h been established in any way that th "Keep your seats" was made before passengers got out—indeed as regar of them it was clearly made after h got out—I say, in this state of ci stances, I think it would be very s to say that there was not evidence to the jury in this case.

Judgment of the Court of Exch Chamber reversed, and a v entered for the plaintiff f sum of 1,200*l.*

Attorneys — James Fluker, for the app R. F. Roberts, for the respondents.

1874. June 5. } MULLER (*appellant*) *v.* BA (*respondent*).

Port Dues—Coals "exported"—F Voyage—"Bunker Coals."

By a special Act dues were granted tain commissioners on all coals "expo from the port of Newcastle:—Held, *coals taken away by a foreign steamer purpose of being wholly consumed on*

beyond the limits of the port, were coals "exported" within the meaning of the Act, and therefore that the commissioners might insist upon payment of the dues in respect of such coals.

Appeal from the decision of the Judge of the County Court of Northumberland holden at Newcastle.

The Case stated substantially as follows.

Previous to the passing of the River Tyne Improvement Act, 1850, the Corporation of Newcastle-upon-Tyne held the town and port of Newcastle-upon-Tyne and divers dues in fee farm under the Crown, and were conservators of the port extending from a point in the sea at the mouth of the river Tyne to Hedwin Streams, about seven miles above the town of Newcastle-upon-Tyne. By that Act the conservatorship of the river Tyne, and the powers of the corporation, became vested in the Tyne Improvement Commissioners.

Under the provisions of the River Tyne Improvement Act, 1850, the Corporation of Newcastle continued in receipt of the coal dues, from time to time paying over to the Tyne Improvement Commissioners the net proceeds of three-eighth parts.

In the year 1872, after a protracted negotiation, the Tyne Improvement Commissioners came to an agreement with the Corporation of Newcastle for the purchase of the five-eighths of the coal dues which remainded the property of the corporation under the Act of 1850. The basis of that negotiation was the annual produce of such dues, and it was part of that agreement that in future these and all other dues should be received directly by the commissioners.

This agreement between the Corporation of Newcastle and the Tyne Improvement Commissioners was carried out by Act of Parliament passed in the year 1870, which is hereinafter referred to as the Tyne Improvement Act, 1870.

In the course of the year 1871, negotiations took place between the Tyne Improvement Commissioners and the various parties interested in the trade of the Tyne, which led to the passing of the Tyne Coal Dues Act, 1872.

The Act is entitled "an Act to abolish the Tyne Coal Dues," and in lieu thereof to provide new dues, to extinguish the right to increase rates under "The Harbours and Passing Tolls, &c., Act, 1861," and to extend the time for the completion of the piers and other works.

Sec. 3 enacts, that on and after the 1st day of June, 1872, the coal dues shall be abolished, and in lieu thereof, and in extinction of the right, power or claim by the commissioners, under "The Harbour and Passing Tolls, &c., Act, 1861," to indemnify themselves for the loss of compensation paid to them for differential dues, by raising any of the rates which they have power to levy, there shall be payable to the commissioners in respect of coals, cinders, coke, grindstones and salt exported from the port, the following dues, that is to say, in respect of coals, cinders and coke, one penny per ton of twenty cwt.; in respect of grindstones, threepence per ton of twenty cwt.; and in respect of salt, one penny per ton of twenty cwt., which dues shall be called "River Tyne Export Dues," and shall be carried to the account called "The Tyne Improvement Fund," and shall be applicable to all purposes to which the Tyne Improvement Fund shall, from time to time, be applicable.

When, in the year 1870, the Tyne Improvement Commissioners became entitled to the receipt of the whole of the "Tyne coal dues" without the intervention of the corporation, they found it to have been the uniform practice of the corporation, with one exception hereafter to be mentioned, not to charge the Dues on coals carried out of the port on board steam vessels, and intended to be used for the purpose of raising steam power to work the engines of the vessels which carried the coal, such coal being called "Bunker coal" or coal for ship's use.

The Tyne Coal Dues Act, 1872, came into operation on the 1st of June, 1872, and on the 1st of April, 1873, the commissioners for the first time claimed the right to levy, under that Act, as being dues by that Act authorised to be taken, dues on "bunker coal" or coal for ship's use, and in pursuance of such claim, they demanded from the plaintiff, under the

following circumstances, the sum of money in dispute in this action.

On the 19th of April last, a Norwegian steam vessel, called the *Hakar Adolstein*, sailed from the port of Newcastle-on-Tyne with 530 tons of coal alleged to be "bunker coal" or coal for ship's use on board. The defendant, who was the duly authorised collector of dues for the Tyne Improvement Commissioners, demanded from the plaintiff, who was the master of the said steam vessel, a due of one penny per ton, amounting to the sum of 2*l.* 4*s.* 2*d.*, in respect of the said 530 tons of coal. The plaintiff at first refused to pay on the ground that the coal was intended solely for ship's use, but afterwards, as the defendant, who was also the collector of customs, stopped his vessel, he paid under protest the sum demanded, and then brought in the County Court this action to recover back the sum so paid.

The following was a copy of the particulars of claim as stated in the plaint—

To dues illegally charged on 530 tons coals shipped on board my vessel, *Hakar Adolstein*, for ship's use at 1*d.* per ton.	£2 4*s.* 2*d.*

The cause came on before the County Court Judge on the 31st day of October last, when the following admissions were entered into.

"We, the attorneys for the above-named plaintiff and defendant, mutually agree to admit, at the trial of this cause, the following facts; namely—

"1. That the above-named plaintiff was in the month of April last master of the Norwegian vessel *Hakar Adolstein*, and the above-named defendant was at the same time the authorised collector of the dues of the Tyne Improvement Commissioners.

"2. That in the month of April last there was shipped on board the said vessel, *Hakar Adolstein*, and carried therein out of the port of Newcastle-upon-Tyne, 530 tons of coal of twenty cwt. each, and that the said vessel cleared for the port of Christiania, in Norway, taking in goods at Newcastle for New York, and the said vessel proceeded to Christiania, and from thence *via* Bergen to New York, her ultimate port of destination.

"3. That the said vessel is a ship.

"4. That forty-five tons of coa be required for the purpose of nav from the Tyne to the port of Chri and 300 tons for a voyage from Chr to New York.

"5. That the sum of 2*l.* 4*s.* 2*d.* to be due to the Tyne Improveme missioners in respect of the said was paid by the plaintiff to the de under protest, and that the said pla entitled to recover so much of t sum (if any) as shall have been ously paid."

On the trial evidence was given usage of the port as regards " coal" or coal for ship's use, from t 1840, and it was proved that, w exception of about ten days in tl 1870, the Corporation of Newcas never attempted to levy dues o coal; that at the expiration of th days, the corporation had stopp levy, and had returned the sun during these ten days to those w asked for a return, and that the o sioners had not, until ten month the passing of the Tyne Coal Du 1872, attempted to levy dues in res such coal, and it was also prove dues are not charged on coal u raising steam in the steam-tugs em in towing vessels in and out of t bour. Evidence was also given, jected to as not binding the commis that coal taken out of the port fo use does not appear as coals e in the customs returns, and the vessels leaving the port with co ship's use only, are treated as b ballast, and not as carrying cargo. reference was made, but objecte the same ground, to the use of th "export," and its meaning in th relating to the customs.

The Judge gave judgment f plaintiff for 1*l.* 14*s.* 6*d.* (1). Agai judgment the defendant appealed.

(1) The learned Judge arrived at the 1*l.* 14*s.* 6*d.* in this way. He was of opini the commissioners were not entitled to de charge dues on coals shipped as stores for t

The following were the questions for this Court.—First, whether the Judge of the County Court was right in deciding that the plaintiff was entitled to recover the said sum of 1*l.* 14*s.* 6*d.*; secondly, if the plaintiff is not entitled to recover the said sum of 1*l.* 14*s.* 6*d.*, is he entitled to recover any other sum, and if any, what sum?

The case was argued (on June 2) by

Sir J. B. Karslake (*Charles Russell* and *G. Bruce* with him), for the appellant; by *Manisty* (*Beresford* with him), for the respondent.

Cur. adv. vult.

The judgment of the Court (2) was (on June 5) delivered by

LUSH, J.—The question raised by this appeal is whether coals taken out of the port of Newcastle in a foreign steamer, for the purpose of consumption on board in the course of a foreign voyage, are liable to the coal dues of one penny per ton granted to the Tyne Improvement Commissioners by "The Tyne Coal Dues Act, 1872," on all coals exported from the port of Newcastle. The learned Judge of the County Court considered that, having regard to the usage of the corporation, while the coal dues belonged to them, of treating coals taken on board for consumption as exempted from duty, the term "exported" must receive a qualified interpretation, and be taken to mean coals exported for the purpose of commerce as distinguished from what are called "bunker coals," that is, coals taken on board for the purpose of consumption on the voyage. We agree as to the reasonableness of making a distinction between coals taken away for sale and coals taken for the necessary use of the vessel, but we are constrained to differ from the learned Judge in his construction of the Act. There is nothing in the language of the Act to shew that the word "exported" was used in any other than its ordinary sense, namely, "carried out of the port," and considering how easily and how extensively the privilege of storing for use may be abused, and what quantities may be carried away under the name of "bunker coals," we think that if it had been intended to exempt from duty coals taken on board for fuel, some limitation as to quantity would have been imposed. Nothing would have been easier than to insert a proviso to that effect. We cannot, however, speculate upon the intentions of the legislature, which are neither expressed in terms, nor conveyed by implication. Our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context. Construing the words of the Act upon this principle, we feel bound to hold that coals carried away from the port, not in a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructivly within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals "exported" within the meaning of the Act. We therefore give judgment for the appellant.

Judgment for the appellant.

Attorneys—Cookson, Wainewright & Co., agents for J. & N. G. Clayton, Newcastle-upon-Tyne, for appellant; John Tucker, agent for Daglish & Stewart, Newcastle-upon-Tyne, for respondent.

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use. But in order to protect themselves from fraud or evasion, they are entitled to restrict the exemption to such a quantity as shall be reasonably required for the purposes of the ship in each particular case." He therefore ordered "one penny per ton on 345 tons, which is the admitted minimum quantity of coals required for a voyage to New York under the conditions in evidence in this case, to be returned to the plaintiff," and he also allowed in this case, "without attempting to lay down any rule, twenty per cent. additional as a margin for consumption in port, and for contingencies on the voyage out."

(2) Mellor, J.; Lush, J.; and Archibald, J.

1874. } TAYLOR *v.* GREENHALGH.
July 6. } PENDLEBURY *v.* THE SAME.

Negligence—Surveyor of Highways—Repairs of Highway—Liability in Action.

The defendant had been appointed by the vestry surveyor of highways. The vestry resolved that a part of a highway should be raised, and ordered the defendant to employ men to do it. He contracted with G. to do the work, at so much per yard, and the vestry found the materials. G. employed his own men, and proceeded to perform the work. The defendant did not personally interfere with the work. G. left the road in such a state that the plaintiff, in driving along by night, was overturned and injured. The defendant did not give any direction that the road should be left in such a state:—Held (*in an action by the plaintiff*), *that the defendant was not liable.*

Declaration: that the defendant wrongfully and improperly placed and laid upon certain parts of a certain highway large quantities of earth, stones, rubbish and materials, and caused the said highway to be raised in the said parts, and thereby to be dangerous to persons driving along the said highway in the dark; and the defendant wrongfully and improperly suffered the said quantities of earth, stones, rubbish and materials to be and remain upon the said parts of the said highway, and the said parts of the said highway to be raised as aforesaid, during the dark, without any light or means to prevent persons from driving against the same, whereby a certain carriage in which the plaintiff was then being lawfully driven along the said highway, was driven and struck against the said earth, stones, rubbish and materials, and the said raised parts of the said highway, and was upset, whereby the plaintiff was thrown out of the said carriage, and greatly bruised and injured, and his collar-bone broken, and by reason of his said injuries has been prevented from attending to his business and employment of a book keeper, and has lost profits and wages which he otherwise would have derived therefrom, and has been put to and incurred great expense in medical and surgical attendance and otherwise, in endeavouring t cured of his said injuries.

Pleas—1st. Not guilty.

2nd. That the defendant was, a time of the alleged grievances, sur of highways for the township of Totti Lower End, and that it then wa the defendant's duty, as such surv to repair the highway in the de tion mentioned, and that the defen as such surveyor, was executing c necessary repairs in and upon the highway, and certain parts of the highway were then being and wer cessarily raised for the purpose of repairs, and the plaintiff, by his own ligence and improper conduct, and wi any fault of the defendant, drov said carriage against the said part c highway so raised as aforesaid, and c the injuries complained of.

Replication. Taking issue.

At the trial, which took place l Mellor, J., at Manchester, on the 3 November, 1872, it appeared tha action was brought to recover da in respect of injury caused to the pl by reason of his carriage being up consequence of stones and material upon the turnpike road from Totti to Bury in Lancashire. The defe had been appointed surveyor of the ways by the vestry of Tottington I End, at a salary of 20*l.* a year. vestry had, by resolution, ordered th part of the road where the accident pened should be raised, and the defe was ordered to employ men to do it. contracted with one John Greenh do the work at 3½*d.* per yard, the finding the materials. Greenhow ployed and paid his own men, and ceeded with the work. The plaint driving along the road in the dark, to that part which was being rep There was neither light or fence o tection. Half of the road had been r and the other half was left tempora the old level. The difference in lev about a foot, and the plaintiff wit horse and cart were upset.

It was contended that there w liability on the defendant, but Mell left the case to the jury, who retu verdict for the plaintiff. They foun

there was negligence in not lighting the road, but that the defendant did not personally interfere in doing the work, or in directing the road to be left in such a condition as it was left in. Leave was given to the defendant to move that the verdict should be set aside, and a verdict entered for him, on the ground that no personal liability on his part was shewn.

A rule *nisi* was subsequently obtained, against which cause was shewn (on June 3rd) by

The Solicitor-General (*Sir John Holker*) and *R. G. Williams*. They referred to 5 & 6 Will. 4. c. 50. s. 56 (1), *Couch* v. *Steel* (2), *Davis* v. *Curling* (3), *Newton* v. *Ellis* (4), *Foreman* v. *The Mayor of Canterbury* (5), *Story on Agency*, sec. 453, *Atkinson* v. *The Newcastle and Gateshead Waterworks Company* (6), *Gibson* v. *The Mayor of Preston* (7), *M'Kinnon* v. *Penson* (8), *Young* v. *Davis* (9).

Pope and *Edwards*, in support of the rule, referred to *Lane* v. *Colton* (10), *Smith's Law of Master and Servant*, and *Stone* v. *Cartwright* (11).

Cur. adv. vult.

The judgment of the Court (12) was (on July 6th) delivered by

BLACKBURN, J.—This was an action tried before my brother Mellor, at Manchester. It appeared that the defendant was the surveyor of highways appointed by the vestry, at a salary of 20*l.* a year.

By a resolution of the committee of management of the vestry, it was ordered that a part of the road between Tottington and Bury, about 150 yards in length, should be raised, and the defendant was ordered to employ men to do it. He accordingly contracted with one John Greenhow to do the work at 3½*d.* per yard, the vestry finding the materials. Greenhow employed and paid his own men, and proceeded to perform the work accordingly.

At the time of the accident to the plaintiff one half of the road had been raised, and the other half was left temporarily at the old level. The difference in level was about a foot; no fence or light, or any other protection was put up, to warn persons using the road at night of this difference in level, and the plaintiff driving along fell over with his horse and cart and was injured.

The jury found that the defendant did not personally interfere in doing the work, or in directing the road to be left in such condition as it was left in. The verdict was entered for the plaintiff, with leave to move, and a rule was obtained accordingly.

Under these circumstances, we are of opinion that the defendant is not responsible to the plaintiff for the injury caused to him in the manner above-mentioned.

The defendant, as surveyor of highways, is but the servant of the inhabitants, on whom the obligation to repair the road lies—see *Young* v. *Davis* (13).

(1) In addition to the general question of the liability of the defendant, it was contended, in shewing cause against the rule, that the defendant was liable to a penalty under the 56th section of 5 & 6 Will. 4. c. 50, which provides "that if any surveyor . . . shall lay or cause to be laid any heap of stones . . . upon any highway, and allow the same to remain there at night, to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the said surveyor to guard against the same," and it was argued that a statutory liability was therefore created, but the Court, without hearing the counsel in support of the rule upon this point, held that that section did not apply.

(2) 3 E. & B. 402; s. c. 23 Law J. Rep. (N.S.) Q.B. 121.

(3) 8 Q.B. Rep. 286; s. c. 15 Law J. Rep. (N.S.) Q.B. 56.

(4) 5 E. & B. 115; s. c. 24 Law J. Rep. (N.S.) Q.B. 337.

(5) 40 Law J. Rep. (N.S.) Q.B. 138; s. c. Law Rep. 6 Q.B. 214.

(6) Law Rep. 6 Exch. 404.

(7) 10 B. & S. 942; s. c. 39 Law J. Rep. (N.S.) Q.B. 131.

(8) 9 Exch. Rep. 609; s. c. 23 Law J. Rep. (N.S.) M.C. 97.

(9) 7 Hurl. & N. 760; s. c. 31 Law J. Rep. (N.S.) Exch. 250.

(10) 12 Mod. 438.

(11) 6 Term Rep. 411.

(12) Blackburn, J.; Mellor, J.; and Quain, J.

(13) 31 Law J. Rep. (N.S.) Exch. 250; s. c. 7 Hurl. & N. 760; in error, 2 Hurl. & C. 197.

It was not proved that the defendant himself was guilty of any negligent act, and it is clear that Greenhow and his men, who actually did the work, were not the servants of the defendant. As surveyor of highways, he employed Greenhow by direction of the committee or vestry, but that does not constitute Greenhow a servant of the defendant, so as to make the defendant responsible for the acts of Greenhow or his men—see *Foreman* v. *The Mayor of Canterbury* (5). The rule must be made absolute.

In the other case of *Pendlebury* v. *Greenhalgh* the judgment will be the same.

Rule absolute in each case.

Attorneys—Shaw & Tremollen, agents for P. and J. Watson, Bury, for plaintiff; Woodcock & Ryland, agents for T. A. and J. Grundy & Co., Manchester, for defendant.

1874. May 26. } TOOLE *v.* YOUNG.

Copyright—3 & 4 Will. 4. c. 15—Dramatic Piece—Action for Infringement—Novel—Publication.

H. wrote a story which he printed and published. He afterwards wrote a drama, being the same as the story with slight alterations, and he sold the copyright to the plaintiff. After this was done, and after the story was published, G. wrote a drama founded upon the story. The defendant produced G.'s drama upon the stage:—Held, *that the plaintiff had no copyright, for the infringement of which he could maintain an action against the defendant.*

The first count of the declaration stated—For that the plaintiff before and at the time of committing of the grievances hereinafter next mentioned, was the proprietor of and had the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment, in any part of the United Kingdom of Great Britain and Ireland, and in various other places in that behalf, a dramatic piece called "Sho the assignee of the author thereof, dramatic piece had been and was posed after the passing of an Act c liament, made and passed in the s of Parliament holden in the 3rd a years of the reign of his late M King William the 4th, to amend th relating to Dramatic Literary Pro by one John Hollingshead: Ye defendant during the continuance o sole liberty as aforesaid, and within calendar months next before the comm ment of this suit, and contrary intent of the statute in that behal the rights of the plaintiff as such as as aforesaid, wrongfully on divers (t 100 several occasions, represente caused to be represented withou consent in writing of the plaintif had and obtained, at divers pla dramatic entertainment in Englan said dramatic piece and divers thereof to the great injury, los damage of the plaintiff, and there defendant became liable for and spect of each and every of such repre tions to the payment to the plain an amount not less than 40*s.*, or full amount of the benefit or adv arising therefrom, or the injury c sustained by the plaintiff ther whichever should be the greater da and the plaintiff avers that the s 40*s.* for each of the said represent was and is the greater damages re able by him by virtue of the said s in respect of each of the said repre tions by the defendant, and the su amount payable by the defendant plaintiff by reason of the premises the defendant hath not paid the sa

Second count. For that the pl before and at the time of the mitting of the grievances herei next mentioned, was the proprietor had the sole liberty of representi causing to be represented at any pl places of dramatic entertainment i part of the United Kingdom of Britain and Ireland, and in divers places in that behalf, a dramatic called "Shop," as the assign the author thereof, which dr piece had been and was composed

the passing of the said first mentioned Act, by the said John Hollingshead: Yet the defendant during the continuance of such sole liberty as last aforesaid, and within twelve calendar months next before the commencement of this suit, and contrary to the intent of the statute in that behalf, and the right of the plaintiff as such assignee as aforesaid, wrongfully on divers (to wit) 100 several occasions, represented and caused to be represented, without the consent in writing of the plaintiff first had and obtained, at divers places of dramatic entertainment in England, the last-mentioned dramatic piece and divers parts thereof, to the great injury, loss and damage of the plaintiff, whereby the defendant became liable for and in respect of each and every such last-mentioned representations to the payment to the plaintiff of an amount not less than 40*s*., or to the full amount of the benefit or advantage arising therefrom, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages. And great benefit and advantage arose from each of such last-mentioned representations. And the plaintiff avers that the full amount of the benefit or advantage arising from each of such representations was and is the greater damages recoverable by him by virtue of the said statute, in respect of each of such last-mentioned representations by the defendant, and the sum and amount payable by the defendant to the plaintiff by reason of the last-mentioned premises: Yet the defendant hath not paid the same.

Third count. For that the plaintiff, before and at the time of the committing of the grievances hereinafter next mentioned, was the proprietor of and had the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment, in any part of the United Kingdom of Great Britain and Ireland, and in divers other places in that behalf, a dramatic piece called "Shop," as the assignee of the author thereof, which dramatic piece had been and was composed after the passing of the said first-mentioned Act by the said John Hollingshead: Yet the defendant during the continuance of such sole liberty as last aforesaid, and within twelve calendar months next before the commencement of this suit, and contrary to the intent of the statute in that behalf, and the right of the plaintiff as such assignee as aforesaid, wrongfully on divers (to wit) 100 several occasions, represented and caused to be represented, without the consent in writing of the plaintiff first had and obtained, at divers places of dramatic entertainment in England, the said last-mentioned dramatic piece and divers parts thereof: Whereby the defendant became liable for and in respect of each and every such last-mentioned representation, to the payment to the plaintiff of an amount of not less than 40*s*., or to the full amount of the benefit or advantage arising therefrom, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, and the plaintiff sustained great injury and loss from each of such last-mentioned representations. And the plaintiff avers that the injury or loss sustained by him from each of such representations was and is the greater damages recoverable by him by virtue of the said statute in respect of each of such last-mentioned representations, and the sum and amount payable by the defendant to the plaintiff by reason of the last-mentioned premises: Yet the defendant hath not paid the same.

Pleas—First. Not guilty.

Second. That plaintiff was not the proprietor of and had not the sole liberty of representing or causing to be represented the said dramatic piece as alleged.

Third. That the plaintiff was not the assignee of the author of the said dramatic piece as alleged.

Fourth. That the said dramatic piece was not composed by the said John Hollingshead as alleged.

Issue thereon.

At the trial before Cockburn, C.J., at Guildhall, it appeared that in the year 1863, a Mr. Hollingshead wrote a novel which he called "Not Above his Business," and which was published in a monthly periodical called "Good Words." Subsequently he wrote a drama called "Shop; or, What's Bred in the Bone," being in fact the novel with slight verbal alterations. He locked it up and sold the

copyright to the plaintiff. The novel having been published, one Grattan wrote a drama called "Glory," which was founded upon "Not Above his Business." The plaintiff purchased Hollingshead's drama, and the defendant produced Grattan's drama on the stage, whereupon this action was brought for the infringement of the plaintiff's alleged copyright. By the direction of the learned Judge the plaintiff was nonsuited, leave being given to move to set that nonsuit aside and enter a verdict instead thereof for the plaintiff for 50*l.*

A rule *nisi* was subsequently obtained on the ground that there had been an infringement of the plaintiff's right.

D. Seymour and *Lumley Smith* shewed cause against the rule.—The nonsuit was right. The defendant has not, contrary to the right of the author or his assignee, represented a dramatic piece within the meaning of section 2 of 3 & 4 Will. 4. c. 15. It is a question whether Hollingshead could be said to be an "author" within that meaning. In *Copinger on Copyright*, p. 21, it is said, "In whatever way he claims the exclusive privilege accorded by these laws, he must shew something which the law can fix upon as the product of his, and not another's labour." See also *Sayre* v. *Moore*, reported in note 1 East 361. In speaking of the author of a dramatic piece, the Legislature means the author for the first time of such dramatic piece, not the author of a novel from which a dramatic piece is afterwards adapted. *Reade* v. *Conquest* (1) shews that dramatizing a novel and causing it to be represented on the stage without the author's consent is no infringement of his copyright in the novel. Here there is no right of action in respect of the story, or in respect of the dramatic piece as it was not known at the time. In *Reade* v. *Conquest* (1) Erle, C.J., said, "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatizing it himself." But his language is very vague; he does not say whether before or after th lication of the novel. Another ac *Reade* v. *Conquest* (2) was br there the author had written a dr the first instance; and after it ha printed and reprinted on the sta published a novel founded upon it defendant caused another drama constructed from the novel, taking of the scenes from the novel whi been imported into it from the c drama. It was held that the proc by the defendant upon the stage infringement of the plaintiff's co in his drama. But that case is not thority against the defendant in th inasmuch as here the novel was before the drama. In *Tinsley* v. *L* Page Wood, V.C., said, "The on in which an author can prevent persons from reciting or presentir dramatic performance, the whole portion of a work of his composi himself to publish his work in th of a drama, and bring himself wit scope of dramatic copyright." A as a story is unpublished the aut determine when it should become to the world; but as soon as he pu it he loses all rights, except such Copyright Acts give him, that is to can prevent the printing of the w the multiplication of copies of it. v. *Taylor* (4) shews that there wa right at common law.

[BLACKBURN, J.—But though Mansfield and other Judges thou *Donaldson* v. *Becket* (5) shews th were wrong.]

See also *Webb* v. *Rose* (6), ref in *Taylor* v. *Millar* (7), and *Pope* (8), where an injunction was gr restrain the publication of letters by Pope, such letters being wit intention of 8 Anne c. 19. See

(1) 9 Com. B. Rep. N.S. 755; s. c. 30 Law J. Rep. (N.S.) C.P. 209.

(2) 11 Com. B. Rep. N.S. 479; s. c. 3 Rep. (N.S.) C.P. 153.

(3) 1 Hem. & M. 747; s. c. 32 Lav (N.S.) Chanc. 535.

(4) 4 Burr. 2303.

(5) 4 Burr. 2408; s. c. 2 Bro. P.C. 12

(6) 2 Mod. 437.

(7) 4 Burr. 2330.

(8) 2 Atk. 342.

Duke of Queensberry v. *Shebbeare* (9). These cases shew that if a man gets possession of the work of another he cannot publish it. All the cases are collected in *Prince Albert* v. *Strange* (10) and the same case subsequently (11); and it appears that where an author publishes a story, he makes the ideas known, and has no right to prevent other persons from dramatizing them. So the plaintiff has no right of action against the defendant; both plays come from the novel which has been made known to the public; the fact of the drama which the author adopted being kept locked up makes no difference.

Sir J. B. Karslake (*L. Kelly* with him) in support of the rule.—If a man publishes a novel and then brings new talent to bear and dramatizes it, he does not lose his right to maintain an action in respect of the infringement of the drama. This is no question of copyright at common law, but it turns entirely on the statute, 3 & 4 Will. 4. c. 15. ss. 1 and 2. The first question is this: is Hollingshead the author of a drama composed, and not printed or published by the author under section 1? Why is he not so? He has produced the novel it is true; but by further ingenuity he has produced the drama. Then, secondly, has not the defendant caused the drama of Hollingshead to be represented? He has done so. It is said that both the dramas came from the same common source, that is to say, the novel, but the real common source was the brain of Hollingshead. All that the defendant can say is that he took his drama from the novel, not that he created it himself. In *Reade* v. *Conquest* (1), Erle, C.J., in delivering the judgment of the Court, said, "The Court has already decided in this case that the representation of the brother's drama was no infringement of the plaintiff's book copyright in his novel; and the defendant now further contended that such representation was no infringement of the plaintiff's stage copyright in his drama called 'Gold,' because the brother was the author of his drama. But we think that this ground of defence fails. The defendant's brother was not the author of those parts of the drama 'Never too late to mend,' which he copied directly from the plaintiff's novel, and so indirectly from the plaintiff's drama 'Gold.'" The observations of Wood, V.C., in *Tinsley* v. *Lacy* (3),—see the Law Journal Report, p. 537,—are strongly in favour of the plaintiff.

COCKBURN, C.J.—I am of opinion that this rule must be discharged.

The question turns upon the true construction and effect of the Act 3 & 4 Will. 4. c. 15, an Act for the protection of literary composition.

Now the facts of this case are very shortly these. Mr. Hollingshead wrote a story which he published in a work called *Good Words;* and having in his mind at the time he wrote and published it, the intention of afterwards dramatizing the story, although he published it in the shape of a story, he composed it with very much of a dramatic character. After the story had been thus published and given to the world, he dramatized it, and thus formed a story very like the other, but it was a little more full; he took the story to pieces, and recast it in the form of a drama. He assigned the drama, which he had so composed, to the plaintiff, but it was never published and never represented on the stage, but was kept by the plaintiff with the view of putting it on the stage one day or other when a convenient opportunity should offer. In the mean time the defendant, having read the story, and seeing in it the elements of a taking drama, went to work and dramatised it, thus deriving the materials for the composition of his drama from the same source to which Mr. Hollingshead had himself resorted, namely, his own novel.

The question is, whether that is an infringement of the copyright; and for the purposes of the argument we must consider it as though the two dramas were substantially the same, the fact being that they are quite independent of each other. The proceeding on the part of the defendant being quite *bona fide*, without any knowledge or idea that Mr. Hol-

(9) 2 Eden 329.
(10) 2 De Gex & S. 652.
(11) 1 Mac. & G. 25; s. c. 18 Law J. Rep. (N.S.) Chanc. 120.

lingshead had dramatised his own work before, but proceeding just as any other dramatic author might have done in the assertion of what he believed to be a perfect and undeniable right.

That being so, the question is, whether the defendant has been guilty of any infringement. He has caused the drama which he composed of materials taken from Mr. Hollingshead's story to be represented; and if that drama is the production of Mr. Hollingshead, and it is taken and represented by anyone else, Mr. Young is to be taken as guilty of an infringement of the right, and is liable. But has he been guilty of any infringement? Has he caused to be represented the production of Mr. Hollingshead? That is the question.

Now the case of *Reade* v. *Conquest* (1) establishes this proposition, as was established, I think, by prior authority: A man has a perfect right to take a novel, the production of another man's brains, and convert it into a drama, and he is guilty of no infringement of the copyright of the author of the novel in so doing. It follows that any two persons may do the same thing; a novel is common property, and if one person may resort to it for the purpose of dramatising it, so may another. It is very true that the second man cannot produce, publish, and represent a drama which he has himself taken from the drama of the previous dramatic author. He would then be guilty of an infringement, and would be within the terms of the Act of Parliament. He would be representing the production of the first dramatist. I wish to guard myself against saying, or against being supposed to lay down upon the present occasion, that, supposing the second man resorting to the same common source, taking the incidents, character and dialogue, of the first drama, should reproduce that which in substance would be identical with the first drama, that might not be an infringement of the right of the first by being a representation or a reproduction of the first drama. It is not necessary, however, I think, to decide that, because this work cannot be said to be identically the same. There is a great deal of difference between the two, the later work being by far the large more complete, and the more perf form. I do not wish to proceed any such ground in the present cas seems to me that, inasmuch as the a of a novel or story is not prot against having his novel put int form of a drama by one, two, or persons, all having a common right sort to the original source, it would no difference, he having once give novel to the world, and not being b law of copyright, as it exists, prot against that novel being transforme a drama,—it makes no difference th himself may have dramatised it; he c take away, by so doing, from other p the right to do that which they have had if he had not converted hi story into a drama, unless they ste from his novel but from his drama, they would be infringing his drama his right to the copyright of his d according as they publish it or upon the stage. So long as they d take from his drama, it seems to me it cannot be said that, within the of this Act of Parliament, they a fringing his right by representing production.

I think Mr. Lumley Smith very expounded the matter in his able ment—the novel having been publ to the world becomes the property o world, except so far as it is protect the statutory law of copyright. inasmuch as the statutory law of right does not protect the author o novel from having it dramatised, it m nothing, as it seems to me, wheth dramatises it himself or some one els it, as regards the rights of a third unless that third party commits a b of the Act by taking from the d either the whole or parts of the dra therefore think the nonsuit was righ

BLACKBURN, J.—I am of the opinion. I take it that when Mr. lingshead wrote and published his which he did in a dramatic form, no with the expectation or intention being turned into a drama, but yet tainly not in form as a drama, he lished that novel, so that accordi

the decision in the first case of *Reade* v. *Conquest* (1), which I think is perfectly right, he acquired no further title to it than simply a right to restain persons from printing and publishing and multiplying copies of it, that being his copyright—his book copyright—to that extent, and no more.

Then according to the case of *Reade* v. *Conquest* (1), however much we may consider it shabby or discreditable, any person has a right to take from that novel and make a drama, without being liable to any action simply because Mr. Hollingshead had a right to the copyright of the novel.

Now, in the present case, the defendant seems to have acted a drama that was taken from this novel of Mr. Hollingshead. Mr. Hollingshead himself had also composed a drama, made from the novel, which he had sold and assigned to Mr. Toole, who, consequently, is the owner of that drama; and therefore he says he had a monopoly of acting not only that drama, but also any drama that Mr. Young might make from the same source, and he had a right to restrain him from acting the other.

Upon that the question really turns upon the construction of the first and second sections of the 3 & 4 Will. 4. c. 15. By the first of those sections it is said, "That from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole property of representing or causing to be represented, at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey and Guernsey, or in any part of the British dominions, any such production as aforesaid." So far it is clear.

Now Mr. Toole is the plaintiff. He has his drama assigned to him by Mr. Hollingshead, who made his drama from his novel, and so far as that goes he is to have the sole right of representing that drama.

Then comes the question, is Mr. Young liable under the second section of this Act, which says, "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof," that is, any part of the dramatic production.

Now, upon that, and looking at the case and the facts, I think the defendant has not done that at all. It does not seem to be disputed, although Sir John Karslake was rather unwilling at first to admit it, that if it had been a third person who had first made the drama from the novel, he could not have maintained an action against Mr. Young for representing this drama inasmuch as Mr. Young did not take it from the drama, but only took it from the novel that was the common source. It seems to be admitted that he would not then be reproducing the drama. Notwithstanding that there was a dictum of Lord Chief Justice Erle, and another dictum of Lord Hatherley, saying that for the moment they supposed it might be different, I cannot say that the mere fact that Mr. Hollingshead is himself the author of the novel makes any difference, and I think that from the second case of *Reade* v. *Conquest* (1) that distinction is quite obvious when it is considered. There Mr. Reade had written a novel from a play called "Gold," he took out some portion of that play, and put them into his very much better known book, his novel of "Never too late to mend," and then the defendant being in ignorance of that, stole portions of the novel of "Never too late to mend," which were also in the play of "Gold." The decision of the Court of Common Pleas was, that inasmuch as the defendant took portions of "Gold" out of "Never too late to mend," and had reproduced parts of "Gold," that his ignorance of his having infringed the rights of copyright in "Gold" was no reason why he should not be liable. But, instead of the de-

fendant in this action having taken parts of Mr. Hollingshead's dramatic production which were in the novel, into which they had been brought from the drama, it is the other way, he has taken parts of the novel which have been taken out of the novel and put into the drama. Had he made a novel of Mr. Hollingshead's drama, and put in those parts which were parts of the drama, then it seems to me that the case of *Reade* v. *Conquest* (1) would have been in point, as shewing that he had infringed the book copyright in the novel. But I think that he is not to be held liable for taking parts of the novel which had been put into the drama. I need only add that, in the event of its having been plagiarised direct from the drama, I should have said, as at present advised, that he was liable to an action. But in the present case, the defendant is entitled to keep the nonsuit which he has obtained, and, therefore, this rule must be discharged.

QUAIN, J.—I am of the same opinion. It seems to me, in order to enable the plaintiff to succeed in his action upon the second section of this statute, he must prove that the defendant has represented, or caused to be represented, the dramatic production of the plaintiff or the plaintiff's assignee. Now it seems to me upon the facts, as they are proved in this case, that has not been established. I think that he has not represented or caused to be represented the dramatic production either of Mr. Hollingshead or of the plaintiff, the assignee. In the first place, the dramatic production of Mr. Hollingshead was never either printed, published or represented. It is clear on all hands that the defendant had no idea or knowledge of its existence. It seems that there was a novel published by Mr. Hollingshead some time before he dramatised it. That novel had been published, but it was unknown to anybody that Mr. Hollingshead had at some later period also dramatised this same novel. He did so, but he kept his drama to himself, he never either published, printed or caused it to be represented. Therefore, in point of fact, I do not see how it can be established, or was estab that the defendant caused to be sented the dramatic production o Hollingshead. Now, as long as he not print it, or publish it, he has a a right, as I understand, under th of Parliament, to represent it as l he pleases. There is no time li for that; the time only begins t when he prints it and publishes it long as it is neither printed nor publ but he keeps it in his desk, it is hi property, and as his sole property, re the words of the Act of Parliame has the sole liberty of representi or causing it to be represented. I c see upon the evidence in this case the defendant can be said, in any to have caused to be represente dramatic production of Mr. Hol head.

Now the case of *Reade* v. *Conqu* and some dicta of Chief Justice and Lord Hatherley have been cit us to the effect that it is possible man who writes a novel and ther matises it, although he may keep drama in his desk and never print publish it, to prevent all other person dramatising the novel. I am not aw any authority for that, and these were not in the least necessary fo decision of the cases in which they uttered, especially that of Lord Ha ley, where he had only to decid question of book copyright, and dramatic copyright at all.

It seems to me undoubtedly tha present case differs from *Reade* v. *quest* (2). I own I think that goes a very long way indeed, be there the first production was a d that drama was expanded in novel, and then the defendant, in case, dramatised from the novel; admitted upon all hands he never of the previous drama; and yet i held that he was indirectly infri the right of representing the first d The decision of the Court of Co Pleas, as I have said, seems to go a very long way, but it certai very distinguishable from the p case, inasmuch as here the nove written first, and until Mr. Holling

dramatised his own novel, it is clear from the first judgment in the case of *Reade* v. *Conquest* (1) that anybody might have dramatised that novel. I cannot myself understand how the subsequent dramatisation, if I may use the expression, of the novel can deprive the parties of the right of dramatising that novel which they had before, and especially deprive them of it, when the fact that Mr. Hollingshead had dramatised it himself was kept entirely to himself, and the dramatic work was neither printed, published, nor represented in any way whatever to the world. Therefore this case differs from the second case of *Reade* v. *Conquest* (2) in the very important fact that here the novel was written first, and in that case, it was written second. Here it is admitted that the production of the defendant was taken entirely from the novel, that in so doing he was acting within his rights, according to the first decision in *Reade* v. *Conquest* (1), and I cannot conceive how it can be said that the subsequent dramatisation by the author himself, or by anybody else, would deprive Mr. Young of his right to dramatise a novel which had been first published to the world, before any drama had been composed at all.

For these reasons I agree with the other members of the Court in thinking that this rule ought to be discharged.

ARCHIBALD, J.—I am of the same opinion. The rights of the parties here are all creatures of, and dependent upon, the true construction of this statute, 3 & 4 Will. 4. c. 15. There is no complaint made here of any infringement of the plaintiff's book copyright in his novel; the complaint is of an infringement of his stage right, so to speak, in the drama, and the question is whether there has been a representation, of any production of the plaintiff's, which falls within the description of the first section of the Act. Now, without going again into the reasons given by the other members of the Court, it seems to me there is a clear and intelligible distinction between this case and the second case of *Reade* v. *Conquest* (2). The ground of that decision appears to be this: there the drama was first composed, and afterwards the novel, and if there had been a direct copying by the defendant from the drama, that clearly would be a violation within the terms of the second section of the Act, and the novel having been composed after the drama, in that case, was regarded by the Court as, in some sense, a copy of the drama. So that copying from the novel, and using the novel for the purpose of dramatising it, the defendant in that case was treated as copying indirectly in that way from the published drama. One can well understand, therefore, that a drama produced under those circumstances was a reproduction of that which was the composition of the plaintiff. But here the case is entirely the reverse; here the novel is first composed, and, in copying from the novel, or in using the novel for the purpose of the drama, it cannot be said that, in any way, there is an indirect use of the drama, and as the defendant in this case knew nothing whatever of the drama, which is admitted, and as the novel by publication became open to him, as to all the public, to use in that way for the purpose of dramatising, I think that the case, therefore, does not fall within this second section, and that the representation of that drama is not a representation of any "such production as aforesaid" within the meaning of the second section, that is to say, any representation of the drama of the plaintiff.

For these reasons I agree with the other members of the Court that this rule should be discharged.

Rule discharged.

Attorneys—Tindell, for plaintiff; James and John Hopgood, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Queen's Bench.*)

1874. June 13. } FOX *v.* CLARKE.

Conveyance — Easement — Adjoining Houses—Front of one overlapping the other.

The plaintiff purchased two adjoining houses, one of which he had agreed to sell to P. in whose occupation it then was. This house had in front a projecting portion, which, to the extent of between two and three feet, overlapped the adjoining house, so that it extended to some distance beyond the party wall of the two houses. The door of the house was in the centre of the projection, which formed a portico with a pillar, cornice, string course and pediment, all of which in part overlapped the adjoining house of the plaintiff. P. conveyed his house to the defendant, who painted the front including the whole of the projecting portion. In the conveyance to P., which the owner of the two houses had prepared at the request of the plaintiff, the projecting part was not specifically mentioned as being conveyed. The plaintiff brought an action of trespass against the defendant:—Held, *reversing the judgment of the Court below, that the plaintiff was not entitled to recover, inasmuch as either the projecting portion passed by the conveyance to the defendant, or he had an easement in it.*

The following CASE was stated by way of appeal.

This is an appeal by the defendant under the provisions of the Common Law Procedure Act, 1854, against the decision of the Court of Queen's Bench in discharging a rule of that Court obtained by the defendant and calling upon the plaintiff to shew cause why a verdict should not be entered for the defendant on the second and third issues, pursuant to leave reserved, on the ground that, upon the evidence adduced at the trial, the verdict ought to have been entered for the defendant upon those issues.

1. This action was brought to recover damages for an alleged trespass to the plaintiff's house, No. 5, Museum Street, Ipswich, and the defendant pleaded, for a second plea, that the said house was not the plaintiff's, and for a third plea the said house was the freehold o defendant; on which pleas issues joined.

2. The cause came on to be tried Blackburn, J., at the Spring A 1872, held at Ipswich, in and fo county of Suffolk, when the foll facts were proved.

3. The plaintiff was, at the time alleged trespass, and still is, the ow fee simple of a dwelling-house, N Museum Street, Ipswich, and the de ant then was, and still is, the owi fee simple of the adjoining house, in the same street.

4. The photograph marked B., is annexed and forms part of this shews the defendant's house and ent door under a portico (the left hand of which is coloured red), and a p of the plaintiff's house and of the ent door of the same situated to the the said door of the defendant's The defendant, when painting such of the exterior of his said house usually painted, painted the pillar portico, and the portion of the po string course, and pediment, colours upon the said photograph, and, wh painting, placed his ladder agains plaintiff's house at the spots colours upon the said photograph, which constituted the alleged trespasse respect of which this action was bro The said photograph is a copy of th ticulars of trespasses delivered un Judge's order, and money was paid Court in respect of the trespass placing the ladder against the plai house as aforesaid.

5. By indenture, dated the 18 August, 1858, the then owner i simple of the two above-mentioned h and who had contracted to sell the to the plaintiff, with the consent, by the direction of the plaintiff, gra bargained, sold and released to Richard M. Phipson, his heirs and a for ever, all that messuage and dwe house, being the said house No. 7, Mu Street, aforesaid, with the garden th belonging, then in the occupation c said Richard M. Phipson, together the walls belonging to the said mes

and premises, and the walls bounding or dividing the said garden, except nevertheless that the wall dividing the said messuage from the said messuage in the occupation of Charles Burton, and retained by the plaintiff, which was the said house, No. 5, Museum Street, aforesaid, was to be considered a party wall, and to be enjoyed by the plaintiff and the said R. M. Phipson and their respective heirs and assigns, and their respective tenants accordingly, and also subject, as to the wall dividing the said garden from the premises so retained by the plaintiff, to the use of the same by the plaintiff, his heirs and assigns and their tenants in common with the said R. M. Phipson, his heirs and assigns and their tenants, which said messuage and dwelling-house, garden, walls, passages and hereditaments were by way of further identity laid down and delineated in the map or plan thereof drawn in the margin of the said indenture, together with all and singular the houses, outhouses, edifices, buildings, yards, gardens, rights, ways, paths, passages, waters, watercourses, liberties, privileges, easements, profits, commodities and emoluments whatsoever, to the said messuage or dwelling-house, &c., thereby granted and released, or intended so to be, or any of them belonging, or in any wise appertaining or reputed to belong or appertain.

6. By indenture, dated the same day as, but executed after, the execution of the conveyance to the said R. M. Phipson mentioned in the 5th paragraph of this case, the said owner in fee simple of the said two houses, after reciting the above-mentioned conveyance to the said R. M. Phipson, granted to the plaintiff in fee simple the messuage or tenement then in the occupation of one C. Burton (being the said house and premises No. 5, Museum Street, aforesaid) and bounded on the south by the messuage or tenement and hereditaments thereinbefore mentioned to be conveyed to the said R. M. Phipson, which said messuage or tenement and hereditaments intended to be thereby conveyed were by way of further identity delineated and described on the map or plan thereof drawn in the margin of the said indenture.

7. By indenture, dated the 2nd of January, 1866, the said R. M. Phipson granted, released and assured to the defendant, his heirs and assigns for ever, all and singular the freehold messuage or tenement and hereditaments comprised in the said first mentioned indenture as the same were then in the tenure or occupation of one Drake, together with all fixtures, edifices, buildings, &c., and appurtenances whatsoever, to the said messuages or tenement and hereditaments belonging or appertaining.

8. The plan marked F., which is annexed to and forms part of this case, is a ground plan of the defendant's house, and an enlarged plan of the entrance hall of the same, and that portion of the party wall between the plaintiff and defendant's houses, including the portion of the wall at the back of the scraper and left hand pillar of the portico over the defendant's doorway which is coloured red, represents the ground plan of the portions of the party walls, which the defendant contends passed to him by the said first mentioned conveyance. If the wall which divides the interior of the plaintiff's house from the interior of the defendant's house, as shewn on the said plan, is carried out straight to the street, without the return referred to in the next paragraph, the parts of the pediment, and string course, and porch, coloured red on the photograph, extend beyond the centre of such wall. Before the conveyance by the said R. M. Phipson to the defendant mentioned in the 7th paragraph of this case, namely, in October, 1865, the plaintiff painted the parts of the pediment and string course, coloured red on the photograph, and afterwards the said R. M. Phipson painted the remainder of the said pediment and string course and porch.

9. A builder of great experience was called on behalf of the defendant who stated that, in his opinion, the party wall between the two houses did not terminate in a line drawn straight out into the street in the direction of the black line marked C. B. on the said ground plan, but was continued to the end of what is known by builders and architects as "the return," and which is the portion of the wall at the back of the said left hand

pillar of the portico and the scraper belonging to the defendant's house, and the half of which is coloured red on the said ground plan. That the whole of the portico and pediment belonged to the defendant's house, and that the wall up to the back wall, as shewn on the said photograph, at the left hand end of the said portico and pediment, and which supported the portico and pediment, was party wall. He added that he founded his opinion on the fact that the whole portico belonged to the said R. M. Phipson. This evidence was objected to on the part of the plaintiff, and the question of its admissibility reserved for the opinion of the Court.

10. The iron railing shewn on the said photograph above the said pediment was put up by the plaintiff in the year 1868, and long after the date of the said conveyance to the defendant.

11. The learned Judge ruled that there was no question of fact to go to the jury, and that if the whole of the portico had passed by the conveyance to Phipson, the defendent's contention that the wall upon which the left hand pillar or column of the portico and the said portion of the portico and pediment rested was party wall would have been correct, but that upon the true construction of the documents, no part of the pillar, portico or pediment to the left of the said black line which was drawn by his Lordship upon a copy of the said enlarged ground plan and shewn upon the said plan marked with the initials "C. B." passed to the said R. M. Phipson or to the defendant, and his Lordship therefore directed a verdict to be entered for the plaintiff upon the second and third issues (the jury being by consent of the parties discharged from giving a verdict upon the other issues), and reserved leave to the defendant to move the Court of Queen's Bench to enter the verdict for the defendant upon the said issues, if upon the evidence adduced at the trial the verdict ought to have been entered for the defendant upon these issues, the said Court to have power to draw inferences of fact.

A rule *nisi* which was granted pursuant to such leave was discharged, Lush, J., dissenting from the judgment.

The defendant appealed. The que for this Court was whether such ought to have been discharged or to have been made absolute.

The case was argued by *Manisty* (*Bulwer* and *Graham* him), for the defendant, and by *O'Malley* (*Blofield* with him), fo plaintiff.

BRAMWELL, B.—I feel very much posed to read the judgment of my br Lush (1) as my own, and to say there would be no question as to ought to be the decision, if it wa that my brothers Blackburn and K entertained a contrary view of the I shall put the case upon a short tech ground. The declaration states tha defendant painted part of the house plaintiff. This is denied by the plea the plaintiff must make out that the ments in the declaration are borne o the evidence. To my mind they ar As to the pillar, I can see no grou saying so, except that it is in front plaintiff's house, which is not at substantial reason. It is said that th that may be so as regards the port is not so as to the string course an pediment. It is almost idle, whe looks at the photograph, to say tha part of the portico belongs to the de ant and that the other does not, b plaintiff says that the string cours the pediment depend for their contin upon his wall. But I think that in this dilemma. Either the proje part of the wall does not belong to or if it does, the defendant has a ri the use of it as an easement. I opinion the plaintiff has failed to that the defendant has broken and e his house as alleged in the declarati

KEATING, J.—I am of the same op No doubt, whatever way this quest decided, points of considerable dif are involved, but I agree with the ment of my brother Lush. It appears that the question turns upon whethe projection is part of the house whic conveyed by the indenture of 1858

(1) See Law Rep. 7 Q.B. 748.

that time the buildings were in the same state as they are now. The house is described as being in the occupation of Phipson. In the original structure, the projecting part, as shewn by the photograph, must have been placed upon the flat surface of the wall, and there is nothing in law to prevent that projecting portion from passing as part of the house if it was so intended by the parties. The mere fact of its overlapping the plaintiff's house would not prevent it from so passing. Was it intended to pass? In part that would be a question of fact, unless there be something contradicting the expression in the indenture, "All that messuage or dwelling-house, with the garden thereto belonging, site, &c., lately in the occupation of Miss Gooch, now in the occupation of the said R. M. Phipson, together with the walls belonging to the said messuage and premises," &c. Did the owners who conveyed that house intend to retain the overlapping portion? I think not. It became part of the structure, and passed under this indenture. My brother Lush took this view, which is I think just and sound.

BRETT, J.—It seems to me that this question turns upon the construction of the deed, which must be construed according to the state of things existing when it was made. [His Lordship stated the facts, and referred to the photograph of the house.] If I may use the expression, the grant in the deed passed to the defendant his house *proper*, with a right to the common wall as between his house and that of the plaintiff. The wall is a party wall belonging to the defendant and to the plaintiff, in this sense that the wall is the wall of the plaintiff and the defendant, so that neither could pull it down to the injury of the other.

CLEASBY, B.—The respective rights of the plaintiff and the defendant depend upon the proper construction to be put upon the parcels in the deed, which must be looked at in connection with the plan which is annexed to the deed, and with the then existing state of facts. No projection is mentioned, but the deed seems to have been intended to convey all the building which could fairly be said to be appertaining to the dwelling-house; and that would include the projection in question.

AMPHLETT, B.—I am of the same opinion, and for very much the same reasons as those which have been given by my brother Brett. It appears to me also that in construing this deed we must consider it as if the parties had the houses before them. They would look upon the external elevation of the defendant's house as including the whole façade, and then when they went inside they would find that that house intruded upon part of the plaintiff's house. Then they must have intended the external architectural part to go to the defendant, and the interior portion which is overlapped to go to the plaintiff. The wall answers two purposes, the outside constituting the front of the defendant's house, the inside the protection of the plaintiff's house. It was the property of both the plaintiff and the defendant, so that neither could take it away without the leave of the other. If a fire had happened, which resulted in the destruction of the whole of both houses, it would be built again in the same position. The site of the wall would probably belong to the plaintiff, because it does not appear to have been conveyed to the defendant, but that is immaterial, because in fact the external elevation, the projecting part, did pass to the defendant.

Judgment reversed.

Attorneys—J. Crowdy, for appellant; White, Borrett & Co., for respondent.

1874. July 6. } CORY AND ANOTHER *v.* PATTON.

Marine Insurance — Policy — Slip — Agreement by Agent—Ratification—Concealment.

The plaintiffs at Cardiff instructed their agents in London to effect an insurance upon a cargo, at 30s. a ton. The defendant refused to insure at that rate, but initi-

aled a slip at 35s., subject to approval by the plaintiffs, who subsequently ratified the agreement of their agent to the higher premium. Subsequently to the slip being initialed, but before the policy was signed, the plaintiffs became aware that the cargo was lost. They did not communicate the fact to the defendant:—Held, *on the authority of* Hagedorn *v.* Oliverson (2 M. & S. 485), *that the defendant was not entitled to have the fact communicated to him.*

The first count of the declaration was upon a policy of insurance on a cargo on board the ship *Ceylon*, on a voyage from Blythe to Port Said, underwritten by the defendant. The ship was lost upon her voyage.

The second count was for money received by the defendants for the use of the plaintiff, and for money found to be due upon accounts stated.

The defendant pleaded, among other pleas, sixthly, to the first count, that at the time of the making of the said policy of insurance as in the declaration mentioned, the plaintiffs concealed from the defendant a fact then known to the plaintiffs, and not known to the defendant, and material to the risk; that is to say, that the said ship having set sail and departed on the said voyage with the said goods on board, had met with an accident and misfortune whilst proceeding on the said voyage.

Replication to the said sixth plea—That before they had any knowledge of the said material fact, they, being at a distance from the defendant, by a letter written by them to their agent, instructed their said agent to effect the said insurance. And the plaintiffs say that they had no knowledge of the said material fact until after the lapse of a reasonable time for their agent to agree with an underwriter or underwriters to insure the said goods, and to settle with him or them the terms and premium with and for which the said insurance should be effected; and the plaintiffs say that, in the ordinary course of business, the said agent ought to have agreed and settled as aforesaid before they, the plaintiffs, knew of the said material fact; and the plaintiffs say that before they the said fact the said agent did ap the defendant, as such underwri aforesaid, to insure the said good settled and arranged with the defe the terms and premium on and for the defendant would insure the sam the defendant made a parol agre with the said agent to insure the sa those terms and for that premiun became in honour, conscience and faith, though not in law, bound to s a policy for insuring the said goo those terms, and for that premium the plaintiffs say that if the said ma fact and plaintiffs' said knowled it, and the premises aforesaid had wards been made known to the defe he would still in honour, conscienc good faith, have been bound to sub and bind himself to the plaintiffs by a policy as aforesaid; and the pla say that the policy in the decla mentioned is the policy which the d ant was so bound to subscribe as said; and the plaintiffs say that the plaintiffs, knowing as the fact was t due course of business at the time they first had knowledge of the sai terial fact, either a policy for insuri said goods in pursuance of their in tions would be effected, or that an agreement would be made by underwriter or underwriters which v in honour, conscience and good faith him or them to subscribe a poli effecting the said insurance, did in faith abstain from communicating said material fact to their said age to the defendant, which is the co ment in the sixth plea mentioned.

Rejoinder taking issue on this re tion.

At the trial, which took place a sittings in London after Trinity 1872, before Cockburn, C.J., i peared that the plaintiffs were co owners and merchants at Cardiff. E had a cargo of coals shipped on th count on board the *Ceylon* by their a at Newcastle, they wrote, on the of April, 1870, to their insurance b in London to effect an insurance up cargo, but limiting the amount premium to 30*s.* a ton. The br

clerk went to one Rutherford, who was in the habit of underwriting policies for the defendant by his authority. Rutherford refused to insure the cargo at less than 35*s.* a ton, but he ultimately initialed a slip, as the clerk agreed to give the amount required. The clerk shewed Rutherford the letter from the plaintiffs, and the slip was initialed subject to approval by them. The plaintiffs did ratify what the clerk had done. The policy was signed subsequently, but between that time and the initialing of the slip, viz., on the afternoon of the 20th of April, the plaintiffs became aware that the *Ceylon* was lost. They did not communicate that fact to the defendant.

At the trial Rutherford was called as a witness, and deposed as to what was the practice at Lloyds, to this effect:—"If an agent agrees to give a higher premium than his instructions warrant, and the underwriter initials, knowing it, if the principal ratifies, the underwriter is bound."

The jury found that there was a custom at Lloyds whereby the underwriter is bound on the signing of the slip to the party in favour of whom the insurance is made, though the assured is not thereby bound. A verdict was entered for the plaintiff, but the learned Judge gave the defendant leave to move.

A rule *nisi* was moved for and granted, calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered instead thereof, on the grounds that the custom found by the jury was not sufficient in law to support a verdict for the plaintiff, and that upon the whole case there was no evidence to support the replication.

Shield (on May 5) shewed cause against the rule.—He referred to *Cory* v. *Patton* (1) in a note to *Ionides* v. *The Pacific Fire and Marine Insurance Company* (2), where the replication above set out was held good.

H. Matthews and *W. Williams*, in support of the rule, referred to *Ridgway* v. *Wharton* (3), *Routledge* v. *Grant* (4), *Cooke* v. *Oxley* (5), and *Wolff* v. *Horncastle* (6).

[BLACKBURN, J., referred to *Hagedorn* v. *Oliverson* (7), cited in *Story on Agency*, sect. 242.]

Cur. adv. vult.

The judgment of the Court (8) was (on July 6) delivered by

COCKBURN, C.J.—This was an action on a policy of insurance on goods. The plaintiffs, who are colliery owners and merchants at Cardiff, having had a cargo of coals shipped on their account on board the ship *Ceylon*, by their agents at Newcastle wrote, on the 19th of April, 1870, to Patton & Co., insurance brokers in London, to effect an insurance thereon, limiting the amount of the premium to 30*s.* a ton. The brokers' clerk thereupon proceeded to Lloyds, and saw one Rutherford, who was in the habit of underwriting for the defendant, and whose authority was not disputed; and on Rutherford refusing to insure the cargo at less than 35*s.* a ton, agreed to give that amount of premium, whereupon Rutherford initialed the slip. It did not appear that the broker had a discretionary authority to exceed the limits prescribed by the plaintiffs as to the amount of premium; and it must be taken that the slip was initialed subject to the ratification of the plaintiffs, more especially as in this instance the letter of the plaintiff to the broker was shewn to Rutherford, who thereupon, according to his own account, initialed, subject to approval. By the practice of Lloyds, as stated by Mr. Rutherford in evidence, "if an agent agrees to give a higher premium than his instructions warrant, and the underwriter initials, knowing it, if the principal ratifies, the underwriter is bound." The plaintiffs in the present case did, in fact,

(1) 41 Law J. Rep. (N.S.) Q.B. 195 *n.*; s. c. Law Rep. 7 Q.B. 304.

(2) 41 Law J. Rep. (N.S.) Q.B. 190.

(3) 6 H.L. Cas. 238; s. c. 27 Law J. Rep. (N.S.) Chanc. 46.

(4) 4 Bing. 653.

(5) 3 Term Rep. 653.

(6) 1 Bos. & P. 316.

(7) 2 M. & S. 485.

(8) Cockburn, C.J.; Blackburn, J.; Quain, J. and Archibald, J.

ratify what their broker had done; and if this were all, the case would be free from difficulty. But it so happened that between the time of initialing the slip and the signing of the policy, viz., on the afternoon of the 20th of April, the plaintiffs became aware of the loss of the *Ceylon* and failed to communicate that fact to the defendant.

The case came before this Court on demurrer (9), but as the facts then stood on the record, the fact that the slip was initialed, subject to ratification by the assured, was not before the Court. Upon the facts as then appearing on the record this Court gave judgment in favour of the plaintiffs, on the ground that, according to the usage of those engaged in marine insurance, the initialing of the slip constitutes a complete and final contract, binding upon them in honour and good faith, whatever events might subsequently happen; and that, consequently, the assured need not communicate to the underwriter facts material to the risk insured against, which came to his knowledge between the time of initialing the slip and that of signing the policy; and the only question now before us is, whether the fact appearing on the trial, that the slip was initialed subject to ratification by the assured, constitutes a material difference from the facts as appearing on the record when the former judgment was given, and by reason that the contract was still open, as was contended on the argument before us, entitles the underwriter to have the loss communicated to him. Upon this point we have entertained considerable doubt, but as the case of *Hagedorn* v. *Oliverson* (7) appears to us to be in point, and to govern the present case, we think ourselves bound to abide by that decision, leaving the defendant to take the case to a Court of Appeal if he should be so advised.

Rule discharged.

Attorneys—Ingledew, Ince & Co., for plaintiff; J. McDiarmid, for defendant.

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(9) Law Rep. 7 Q.B. 304.

1874. May 27. } DAVIES (*appellant*) *v.* (*respondent*).

Penalty—Guardian of the Po
of Goods ordered to be given in P
Relief—4 & 5 Will. 4. c. 76. s. 77.

The 4 & 5 Will. 4. c. 76. s. 77, p
under a penalty any person hereaf
appointed, in any parish or union
office concerned in the administratio
laws for the relief of the poor,
person who, after the 25th of Marc
shall fill any such office, from furni
supplying for his own profit or on
account, any goods, materials or pr
ordered to be given in parochial
any person in such parish or union.

The appellant was a guardian of
for the N. Union. He carried on bu
a cabinet maker and upholsterer in
ship with his son. The relieving
purchased at the appellant's shop,
son and partner of the appellant,
bedstead, which was, by the directio
relieving officer, delivered at the
an outdoor pauper in the union.
pellant was not present when the
was ordered, nor when it was paid
when it was delivered, and the pr
paid to his son alone. The bedst
only lent to the pauper, and rema
property of the guardians:—

Held, *first, that the appellant wa*
to the penalty imposed by the section,
proof of any guilty knowledge on h
the bedstead having been supplied
partner with knowledge of the circum
in the ordinary course of the part
business. Secondly, that the case wa
the words "ordered to be given"
section, for the word "given" must
to include a gratuitous delivery of
whether by way of loan or gift. T
that a guardian of the poor is a per
pointed to an office within the mea
the above section.

[For the report of the above ca
43 Law J. Rep. (N.S.) M.C. 121.]

[IN THE HOUSE OF LORDS.]

1874. April 20. { THE NORTH EASTERN RAILWAY COMPANY (*appellants*) *v.* WANLESS (*respondent*).

Negligence—Railway—Level Crossing—3 Vict. c. 20. s. 47.

The railway of the appellants crossed a highway at the level. There were gates across the highway, to stop carriages, horses and cattle, and there was a watch box and a person placed to close the gates as soon as such horses, cattle or carriages should have passed. There were also swing gates for the use of foot passengers. The respondent, a boy aged fourteen, came to the crossing one morning, soon after a cart had passed over the line. When he got there the gates were still open. The gates opened outwards, not across the line. He went through the open gates, and got on the line, but seeing an up train approaching, he waited on the down line till it had passed. While he was thus waiting a down train approached, but the boy did not see it, though he might have done so if he had been on the look-out for it, or if his attention had not been engrossed by the up train. The up train having passed, the boy was just leaving the down line to cross, when the train knocked him down:—Held, *that there was evidence of negligence to go to a jury. For the appellants being bound by section 47 of Stat. 8 Vict. c. 20 to have closed the gates at the time, the fact that they were open was a notice or invitation to the respondent that he might cross without danger, whereby he was put off his guard, and so, perhaps being embarrassed by the train which he did see, he was injured by the other, which, in consequence of that embarrassment, he failed to see.*

This was an appeal from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Queen's Bench, discharging a rule for a new trial.

The action was brought by the plaintiff, by his next friend, to recover damages for injuries sustained, as set out in the declaration, which alleged that the defendants, by their servants, so negligently and unskilfully managed an engine and train of carriages attached thereto, upon and along a certain railway which the plaintiff was lawfully crossing, that he was struck down and injured. The second count of the declaration alleged that the defendants were a railway company, subject to the provisions as to level crossings contained in the Railways Clauses Acts (1), and that their railway crossed a public highway, which was protected by gates which were subject to their control; and that the defendants were guilty of negligence in the management of these gates, and in running a train across the highway without giving notice of its approach, whereby the plaintiff, "who was then lawfully using the highway by the invitation of the defendants," was struck down and injured.

The defendants pleaded not guilty; that the servants were not their servants; and that the plaintiff was not crossing by their invitation.

The cause was tried before Mr. Justice Brett at Durham, in 1869, when the facts were proved, and evidence given, which was stated in a SPECIAL CASE, to the following effect.—

The plaintiff at the time of the accident was a lad of fourteen years of age, residing with his stepfather at Hylton, near Sunderland, and within a short distance of the Hylton station, on the Pensher branch of the North Eastern Railway. From eighty to one hundred trains, including coal trains, pass the station every day. At the east end of the Hylton station a public highway for carriages,

(1) Section 47 of the Railways Clauses Act is as follows—"If the railway cross any turnpike road or public carriage road on a level, the company shall erect, and at all times maintain, good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road, on both sides of the railway, except during the time when horses, cattle, carts or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as, when closed, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway; and the person intrusted with the care of such gates shall cause the gates to be closed as soon as such horses, cattle, carts or carriages shall have passed through the same, under a penalty of 40s. for every default therein."

horses, cattle, and foot passengers crosses the railway on the level. There is at the level crossing, on each side of the railway, a large gate for the passage of carriages, horses and cattle, and also two small swing gates for the passage of foot passengers. All the gates opened outwards from the railway. A gate-keeper's box or cabin is situated at the eastern corner of the gate on the south side of the line. Between six and seven o'clock on the evening of the 27th of April, 1868, the plaintiff, in company with three other boys, came along the road from the village of Hylton, on the north side of the railway, to cross over the line by the level crossing. Shortly before the boys approached the railway, a cart and horse had passed over the level crossing through the carriage gates, and evidence was given by witnesses, called for the plaintiff, that from that time till the time of the accident, the carriage gate on the north side was standing open latched back, and the boys passed through such gate. On the other hand, witnesses called for the defendants denied that the carriage gate on the north side was standing open, and gave evidence that the boys went through one of the small foot gates. About the same time that the boys reached the gate the engine of a long train of forty-eight empty coal trucks, which was proceeding on the up or south line of rails from Sunderland to Pensher, was just passing the gate-keeper's box or cabin. This train passed through the Hylton station without stopping. The boys had with them a dog, and some persons standing near to the gate on the north side shouted to them to keep the dog back from going through the empty trucks. The plaintiff and the other boys saw this train, and after passing the gates on the north side, they stood close to the rails on the down line till the last truck of the train was passing the level crossing, when the plaintiff stepped forward to cross the line; but as he stepped on to the line he was struck down and seriously injured by the engine of another train of loaded trucks, which were coming at that moment from Pensher to Sunderland, on the down line of rails. This train which, like the other, passed through Hylton station without stopping, belonged to and was by servants of Lord Durham, bu all other trains using the said ra was under the control of the defen

The distance between the carriag on the north side and the rails is twelve feet. Evidence was given defendants that a person crossing said level crossing can, at any di within eight feet of the rails on the or down side of the railway, see from Pensher to Sunderland for a di of half a mile; but evidence for the tiff was given that, in consequenc projecting screen which was at the on the north side of the line, th would have to be within four or fi from the rails on that side befor could see a train coming from Pens Sunderland, but the boys would th eight or seven feet within the ca gate on the north side. The foll rule, entitled, "Regulations to be ob by gate-keepers and signal-men" the railway was given in evidence, n rule 174, "Unless a written order contrary be given by the engine gates shall be kept shut across the age roads, except when required opened to allow the railway to be cro and rule 175, "When the railway quired to be crossed the gate-keeper before opening the gates, satisfy h that no engine is in sight; he shal show his danger signals, and keep exhibited until the line is clear, wh shall close the gates and alter the sig No signal was exhibited, or other w given, by the said gate-keeper, other servant of the company, t notice of the approach to the stat the coal train from Pensher to S land. Evidence was given for t fendants that the engine-driver coal train whistled before coming said station; but evidence was giv the plaintiff that no whistle was he the station. On behalf of the d ants it was contended at the tri there was no evidence to go to the negligence on the part of the defe to make them liable for the injuri tained by the plaintiff as above stat

The jury found a verdict for the tiff for one hundred pounds damages

being reserved to the defendants to move to set aside the verdict, and to enter a nonsuit or verdict for the defendants instead, if the Court should be of opinion that there was no evidence of negligence on the part of the defendants. A rule was obtained accordingly, but it was discharged, and on appeal to the Exchequer Chamber the judgment discharging the rule was affirmed.

Hence this appeal.

Manisty and *Kemplay* for the appellants.—The duty imposed on the company by the statute as to keeping the gates closed was only in respect of cattle, horses and carriages, not in respect of foot passengers, who are not even mentioned in the section. For them swing gates are provided, and it does not appear from the evidence whether the boy used them or not, nor, indeed, how he got upon the line at all. The swing gate was at all times available for foot passengers, subject only to their own observation. The carriage gate, whether open or shut, offered no barrier to foot passengers, their safety depended of necessity on the exercise of their own faculties of observation. If the foot passenger neglected to use ordinary caution in the particular matter which was left to his own discretion, the company ought not to be called upon to indemnify him in case of accident on the ground of negligence on their part in respect of a totally different matter.

Charles Russell, *R. G. Williams*, and *W. Lewers*, for the respondent, were not called on to argue.

THE LORD CHANCELLOR (LORD CAIRNS), after remarking on the smallness of the sum at stake, said.—This case may be useful if it leads to companies properly performing the duties cast on them by law of keeping gates at level crossings closed in times of danger. The only question raised in the case for our determination is, whether there was here evidence of negligence to go to a jury? Whether upon the evidence the jury ought or ought not to have awarded damages is not any question which we have now to consider. As the facts have been so recently stated I will not go through them again. The circumstance that the gate was open at the time amounted to a statement to the public that the line was safe to cross, and a person going inside the gate, with a view of crossing the line, may well be supposed by a jury to have been influenced by the fact that the gate was open. When inside the gates, the boy who as stated in the case was injured saw one train blocking up the line, so as to make it impossible to cross in spite of the open gate; and he may easily be supposed to have been embarrassed thereby, so that having his attention fixed upon that train, when he attempted to proceed after it had passed he failed to see the other train, and, in consequence, was knocked down by it and was injured. To say that he might have seen the other train only comes to this, that being brought on to the line by the fact that the gate was open, and finding himself stopped by a train, he became embarrassed and did not use his faculties as clearly as he might have done. The question is, might not a jury well consider that he was on the line through the negligence of the company? All that we have now to determine is, whether it was rightly left to the jury; to say whether there was or was not evidence to go to the jury of negligence on the part of the company of such a nature as that the jury might conclude that in consequence of that negligence the accident occurred. And as it appears that there was evidence that the respondent was on the line in consequence of the gate being open, I am of opinion that the question of negligence was rightly left to the jury.

LORD CHELMSFORD and LORD SELBORNE concurred.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Solicitors—Williamson, Hill & Co., agents for Richardson, Gutch & Co., York, for appellants; John Scott, agent for Graham & Graham, Sunderland, for respondent.

IN THE HOUSE OF LORDS.]

1874. May 5. } LAKEMAN (*appellant*) *v.* MOUNT-STEPHEN (*respondent*).

Statute of Frauds (29 *Car.* 2. *c.* 3. *s.* 4) —*Promise by Chairman of a Local Board* —"*I will see you paid*"—*Primary or Collateral Liability—Evidence.*

The chairman of a Local Board of Health verbally promised a contractor that if he would do certain work connected with the sewers he would see him paid. The contractor did the work and made his claim against the board, and afterwards, finding that the chairman in fact had no authority to pledge the credit of the board, and that the board refused and were not legally compellable to make the payment, he sued the chairman :—Held, *that whether or not the parties, or either of them, intended only a contract of suretyship, there was a personal contract by the chairman on which he was primarily liable, and not merely a promise to answer for the debt, default or miscarriage of another, such as would require a memorandum thereof in writing under section 4 of the Statute of Frauds.*

And by LORD SELBORNE, *there can be no suretyship unless there be a principal debtor constituted by matters ex post facto, if not existing at the time of the transaction.*

Held, also, that the plaintiff's own evidence, that he said to the chairman—"I have no objection to do the work if you or the board will give me the order," and that the chairman replied, "Do the work and I will see you paid," was evidence which ought to have gone to the jury in support of a declaration to the effect that the chairman had promised, first, as if he were the authorised agent of the board, or secondly, that he would obtain a legal contract from the board, or thirdly, that he would pay for the work if the board refused.

The plaintiff below, respondent in this appeal, had been employed by a Local Board of Health to construct a main sewer between which and the houses along the line of street connections had yet to be made. The owners of the houses were, under section 69 *of* 11 *&* 12 *Vict. c.* 63, *liable to make these connections after the expiration of a twenty-one days' notice from the board calling on them to do so. The owners of the houses did not seem disposed t the connections, and the notices were on them. The plaintiff had, by di of the board, brought on the grou necessary pipes, and one day, as leaving the work, which he had com and before the expiration of the the surveyor asked him not to go a there was more work to be done. The tiff asked him who was to be resp for the payment, and the surveyor sa the defendant was waiting to se about it. The defendant was the ch of the Local Board of Health. The tiff then saw the defendant, and ac to his own evidence, the defendan and then asked him, "What objecti you to making the connections?" t the plaintiff said, "I have none, if the board will order the work, or responsible for the payment." The ant in reply, said, "Go and do th and I will see you paid." Acco the plaintiff did the work, and app the board for payment. The boa claimed all liability. The plaint sued the defendant on the ground had, when making the promise, ass be the duly authorised agent of the and also that he had promised that h obtain a legal contract from the boar him. To these counts a third count leave of the Judge added, that the ant had promised to pay for the wor board refused. The defendant enti nied that such a conversation as that to by the plaintiff took place. But found that it did take place, and turned a verdict for the amount c* —Held, *that a rule to enter a non that the verdict should be set asi new trial directed, was properly disc for that there was evidence of a liability on the part of the plaintif was properly left to the jury.*

This was an appeal, on a Case from a judgment of the Court chequer Chamber, which had rev judgment of the Court of Queen's which had made absolute a rule to s a verdict or enter a nonsuit, in a in which the respondent was plain the appellant was defendant, ground that there was no evid

original liability on the part of the defendant. The case before the Queen's Bench is reported in 39 Law J. Rep. (N.S.) Q.B. 275, and in the Court of Exchequer Chamber in 41 Law J. Rep. (N.S.) Q.B. 67. The case is printed at large in the latter volume, and the following is an epitome of the facts therein mentioned.

The appellant, Lakeman, defendant in the action, was the chairman of the Local Board of Health at Brixham, in Devonshire, and the respondent was a contractor and builder, who had been employed by the board to construct a main sewer within the town of Brixham. That work being completed, the board had, on the 19th of March, 1866, caused notices under the Public Health Act, 1848 (11 & 12 Vict. c. 63. s. 69), to be served on the owners of certain houses to connect their houses with the sewer. On the same day the board passed a resolution that the respondent should be requested to procure certain pipes for the junctions between the houses and the sewer, and the respondent having received a written order to that effect in the handwriting of the clerk of the board, bought the pipes and delivered them. In the meantime one Adams, the surveyor to the board, had suggested to the respondent that he should make the connections, and the latter replied that he was willing to do the work if the board would see him paid.

On the 5th of April, that is to say, before the expiration of the twenty-one days specified in the notices above mentioned, the respondent having delivered the pipes, was leaving, when the surveyor again met him and asked him not to go, as there was more work to be done, and in reply to the respondent's question as to who would be responsible for the payment, the surveyor told him that the appellant was waiting to see him. At the trial the respondent, who was called as a witness, said that at the interview which he then had with the appellant, the following conversation took place, namely, the appellant asked him, "What objection he had to make the connections?" The respondent said, "I have no objection if you or the board will order the work, or become responsible for the payment." The appellant said, "Go on, Mountstephen, and do the work, and I will see you paid."

The respondent knew that the owners of the houses were liable to make the connections after notice. He knew also that notices had been served, and that the twenty-one days mentioned in the notices had not expired.

The appellant, on the trial, being also called as a witness, denied that he had spoken as Mountstephen said he had, but that according to his recollection, he advised, at the interview above mentioned, that Mountstephen should go with Adams, the surveyor, to the owners of the houses, and that they two should try to persuade the owners to employ Mountstephen to do the work. The respondent in fact did, without more being said, proceed to do the work under the superintendence of Adams, the surveyor, and the appellant knew that the respondent was making the connections, and that Adams was superintending.

After the connections were completed, the respondent sent in an account for the whole work to the Local Board of Health of Brixham. Subsequently, at the request of the board, he supplied separate bills for the work of the main sewer and for the work of the connections.

The board refused to pay for the latter, on the ground that they had never entered into any agreement with the respondent, nor by any resolution or order authorised any officer of the board to agree with him for the performance of that work.

The respondent then, for the first time, applied through his solicitor to the appellant for payment for the work, and the appellant having refused, the respondent brought the action out of which this appeal arose.

The amount claimed was for work done and materials provided in connection with the junctions between the houses and the main sewer, the sum being 286*l.* 7*s.* 7*d.* As to a portion of this sum, namely, the price and carriage of the pipes, the board had authorised the respondent to obtain and bring the pipes, and it would therefore seem that the cost of the pipes ought to have been recovered from the board. But at the trial the amount claimed was admitted to be cor-

rect, and the only question raised on the part of the appellant was whether or not there was evidence of any liability on the part of the respondent. The counts in the respondent's declaration were, besides a money count, a count to the effect that the appellant had assumed to act as the authorised agent of the board, and in that character promised to pay on behalf of the board if respondent would do the work, and secondly, that he had induced him to do the work by promising that he would obtain from the board a legal contract to pay him for his work and materials. To these counts, Kelly, C.B., who tried the case, allowed the respondent at the trial to add a third count, that the appellant promised to pay for the work if the board should refuse to do so. The learned Judge left it to the jury whether they believed the plaintiff or defendant, and whether the conversation between them deposed to by the plaintiff took place. The jury returned a verdict for the plaintiff for the amount claimed, leave being reserved for the defendant to move to enter a nonsuit if it should appear that there was no evidence which ought to have been left to the jury.

The defendant having obtained a rule to shew cause why the verdict should not be set aside or a nonsuit entered, or a new trial be had, the Court of Queen's Bench made the first part of the rule absolute on the ground that a promise to answer for the debt, default or miscarriage of another who is supposed to be, but is not in reality liable to the promisee, must be in writing to satisfy section 4 of the Statute of Frauds if at the time of the making the promise it was the intention of the parties that a contract of suretyship should be created.

This judgment was reversed on appeal by the Court of Exchequer Chamber on the ground that there was evidence to go to the jury of an original liability on the part of the defendant if he promised to pay in case the board should refuse to do so.

From this judgment the defendant in the action below brought this appeal.

Cole and *Pinder*, for the appellant.—There is no evidence of primary liability on the part of the appellant. He had no interest in the work. It is evident that the respondent looked to being pa the board, and the promise of the a lant was only regarded by each of as a guarantee for the board's makin payment. If it had not been so respondent would not in the first ins have made his claim against the l that he did so is proof that he regard board as his principal debtor, and th pellant only as a surety, and in such the promise not being in writing void under the Statute of Frauds. that the respondent wanted was the difficulty of contracting with a body should be removed; he had no about the legal capacity of the bo contract. If indeed it had turne that the board could not contrac guarantee by the appellant would fallen to the ground even if it had in writing. But it was assumed on sides that a legal liability could b gaged for by the board, and whi passed between them had referen and was solely in contemplation of liability. The respondent had act two instances on the written order board. But a written order wa necessary for the connections section 85 of the Public Health Ac cause each connection was to cos than 10*l*. It was sufficient for the pose of establishing a liability on th of the board to shew that the wor being done under their superinten In this case the materials had be dered by the board, and their sur superintended the work. There therefore, some liability, and in r of this liability the promise was and not being in writing it is void. if this House should be against th pellant on the question of prima collateral liability the verdict is wro including the price of the pipes, section 41 of the Common Law P dure Act, 1854, enacts that the Co Appeal shall give such order as the below ought to have given.

Lopes and *A. Charles*, for the res ent, were not called on to argue.

THE LORD CHANCELLOR (LORD CA —My Lords, the question, and the question, which your Lordships are

upon in this appeal to decide is, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff in the action for the work to be done. That is the only question in this appeal, and we are not embarrassed here by any consideration as to whether the precise sum for which the verdict of the jury was returned, is the sum which ought to have been assessed as the amount to be paid in the action. Whatever questions might have been raised, whatever distinctions might have been made as to different items of the demand, this is not the time or the place for making them. If it was desired to make them, and if there was room for making them (which I am far from saying there was not), it ought to have been done at an earlier stage in these proceedings. The question raised by the rule which was obtained in the first instance, namely, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff for the work to be done, falls to be determined really upon the consideration of the evidence of the plaintiff in the action himself. It is true that another witness was called on behalf of the plaintiff, but his evidence on this subject is quite immaterial, and we have the evidence of the plaintiff only to deal with. That evidence might have been accepted by the jurymen or it might have been rejected: the evidence adduced on the other side might have been so satisfactory as to lead them to disbelieve the evidence of the plaintiff, but the question, I repeat, is whether or not in this case the learned Judge would have been right in directing a nonsuit on the ground that there was no substantial evidence to go to the jury.

There are portions of the plaintiff's evidence which at first sight appear rather disconnected, but I think if attention is given to what he really did say, and the two portions of his evidence which appear disconnected are brought into their proper order, a very clear and intelligible account of the origin of this contract will be given. The plaintiff says in his cross-examination, referring to the 19th of March and to the resolution of the Board of that date, "that notices should be served by the board," that is, notices upon the owners of houses who were to be required to connect their drainage with the main drainage of the town, "I knew nothing of this." And then, at another part, "Adams asked me if I could procure 1,300 feet of pipes, and if I would do the work." He was asked two things—if he would procure the materials, and if he would do the work. "I said, 'not unless the board would be responsible for the payment, for I would not take orders from the owners of the property.' I knew they must have notices before they are liable. I think it is twenty-one days' notice." Then a resolution of the board was put in "for notice to owners and occupiers," and that Mountstephen procure 1,300 feet of pipes. That appears to have been communicated to him, as I gather from the next portion of his evidence, for he continues, "I proceeded then according to that order, but I refused to do the work unless the board would make themselves responsible."

I understand that as being a very clear statement—it may be accurate or inaccurate, that is another question—but it is a very clear statement by the plaintiff that he had his attention called to the danger of proceeding in these cases without a distinct formal authority from a board like the local board in this case, and that in the first instance he would neither procure materials nor do the work without the order of the board, and that he got from the board a proper order with which he was satisfied with regard to the materials. He might have been right or wrong in thinking it a proper order, but he was satisfied with it; but he had no order of the board with regard to the work to be done, and he refused therefore to do that work.

Then, turning to another part of the evidence, we have from him an account of a conversation which took place between him and Mr. Lakeman, the appellant, which must have been some days afterwards. He had finished some works connected with the main drainage as he says—"We had just finished everything." Lakeman (the defendant) said, what objection have you to make these connections?"

From which I should infer that Adams had told Lakeman that although the materials had been supplied, there was an objection to doing the work, "meaning the laying down of the junction pipes. I said, I have no objection to do the work, if you or the local board will give me the order.' He" (that is Mr. Lakeman) "was chairman of the Local Board of Health for Brixham. He said, 'Mountstephen, you go on and do the work and I will see you paid.'"

We have had very ingenious arguments addressed to us, putting various constructions upon these few words. It has been suggested that the effect of these words was that Mountstephen must be taken to have asked Mr. Lakeman first for an order from the board, and to have been satisfied that he as chairman of the board could then and there give the order, and to have had from him then and there an order from the board, and yet that, not being satisfied with the order then and there thus obtained, he desired to superadd, and he had superadded to it a virtual guarantee by Lakeman that he, personally, would guarantee that the board would pay the money. My Lords, I must say that does appear to me to be a strange and violent construction placed upon a few simple words. As it appears to me a very natural meaning (and it is quite sufficient for the present purpose) of these words is this: Mountstephen, following up that course of action which he had previously pursued with Adams, stated to Lakeman that the reason why he refused to do the work was, that he had got no order from the board to do it, that he would do the work if he had a formal order from the board, or if he had a personal order from Lakeman himself, and that thereupon Mr. Lakeman, who for some reason, the stringency of which it is not for your Lordships now to enquire into, wished the work to be immediately done, that thereupon Mr. Lakeman said, "You go on and do the work; do not concern yourself upon the subject of whether you have an order from the board or not. You go and do the work and I will be your paymaster. I will see you paid." Now, my Lords, if that is the meaning of these words, and it appears to me certainly to be the *prima facie* and natural meaning of the I think there was ample and stro dence to go to the jury that the go- entirely given to the question of a of the local board, and that Mr. L stepped in and undertook himse matter of primary liability, to pay work that would be done. Again primary liability he might afterw chairman of the board, have sh himself by obtaining from the bo consent to make a formal order, and upon and paying under that formal But that was for him to consider; that which the contractor required done, he put the contractor in the p of having then and there an absolu tract made, and the only contract then and there absolutely could be would be a personal and primary c by him to pay the contractor for th to be done. It appears to me that was clearly substantial evidence case to go to the jury, and that any who had to try this case would ha carried, if upon this evidence he h that there was no case to go to the

I shall therefore submit to your ships that the decision of the C Exchequer Chamber is correct, an this appeal should be dismissed.

LORD HATHERLEY concurred, a the same reasons.

LORD O'HAGAN.—I also concur judgment proposed, and substanti the same reasons. For in my min was ample evidence to go to the upon which the verdict of the jur properly be pronounced. I think i to say that our judgment does not slightest degree go to fritter aw Statute of Frauds, or weaken a stantial principle of law. It p merely upon the ground that the evidence to go to the jury. It i that ground that I understand the to say that this appeal must be dis

LORD SELBORNE.—There are so servations in the opinions of the Judges in the Court of Queen's which certainly do look at first sig some of those learned Judges thoug

there might be a valid contract of suretyship, or a secondary liability upon the principle of a guarantee for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned Judges, with all respect to them I must confess myself unable to follow it. There can be no suretyship unless there is a principal debtor, who of course may be constituted in the course of the transaction or by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed. The tendency, therefore, of any view of this contract which would place it in the position of a guarantee for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor as to whether or not he had sufficient authority from anyone to go on with the work, and the answer was given in terms *de præsenti*, for the express purpose of inducing him at once to go on.

The next construction suggested was one which would make it fulfil, as has been said by my noble and learned friend on the woolsack, the double office of an order given by the chairman on behalf of the board to do the work, and a personal guarantee for the liability of the board so engaged in by the chairman on their behalf. Upon that view, which is certainly put forward as a possible construction of this conversation by Mr. Justice Blackburn, I cannot but observe that the argument founded upon it seems to me to be *felo de se*, because if I rightly understand the law laid down in the case of *Cherry* v. *The Colonial Bank of Australasia* (1) the necessary result of such a construction of the words would be to make the defendant liable upon the first count in this declaration. The words so used, if that was the sense in which they were understood and intended by both parties, would have been in no degree less strong for that purpose than the words which were held to be a warranty of authority in the case of *Cherry* v. *The Colonial Bank of Australasia* (1). There, two directors signed a paper in these words: "Sir, we have to inform you that we, as directors of the company," naming it, "have appointed Mr. Clarke to be legal manager of the company, and have authorised him to draw cheques upon the account of the company." They had not, *per se*, by the constitution of the company, power to give that authority, and they did not take the necessary steps to get it from the company. Those words, though expressly saying that they had done this as directors, were held to be a representation, making themselves personally liable, that they possessed the authority which they did not possess. And if the first words of this conversation could properly have been held to bear the construction suggested by Mr. Justice Blackburn, then, unless the board had been really and truly liable, which I do not collect to have been the view of any one of the learned Judges in the Court of Queen's Bench, I apprehend that the verdict of the jury would still have been right, and the case could not have been withdrawn from the jury, because, in that view, the evidence would have been strong in support of the first count of the declaration.

It has been argued at your Lordships' bar by Mr. Pinder, feeling no doubt the force of that view, that there is matter upon this evidence, and I suppose it must be upon the plaintiff's evidence, from which your Lordships ought to conclude that the board was actually liable. My Lords, I must say I cannot see a particle of evidence which justifies any such argument, and it does not appear to me that in either of the Courts below any learned Judge thought that there was any such evidence.

Judgment of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Attorneys—Church, Sons, & Clarke, agents for Francis & Baker, Newton Abbot, for the appellant; G. E. Philbrick, agent for Kitson & Son, Torquay, for the respondent.

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(1) 38 Law J. Rep. (N.S.) P.C. 49; s. c. Law Rep. 3 P.C. 24.

1874. July 6. } ASHCROFT *v.* THE CROW ORCHARD COLLIERY COMPANY.

Ship and Shipping — Charter-party — Demurrage—"To be loaded with the usual Dispatch of the Port."

By a charter-party, the master of the plaintiff's ship engaged to receive on board a full cargo of coal and deliver the same as per bill of lading, "to be loaded with the usual dispatch of the port, . . . or if longer detained to be paid 40s. per day demurrage." The defendants engaged to load her "on the above terms." By a memorandum at the foot of the charter-party she was to load in the B. or W. Docks, by a regulation of which, coal agents were not to have more than three vessels loading and to load at the same time. The plaintiff's ship would have been loaded without delay had it not been for the fact, which was unknown to the plaintiff at the time he entered into the charter-party, that the defendants acted as their own coal agents, and that they had at the time three ships loading in the docks, and ten other charters in their books which had priority over the plaintiff's ship. By reason of the incapacity under which the defendants had so placed themselves, the loading could not be commenced until thirty days after the ship was ready :—Held, *in an action for demurrage, that the defendants had contracted that they would load with the usual dispatch, and that it was no answer that they were unable to do so, or that the plaintiff knew it.*

The first count of the declaration was for demurrage in respect of the defendants not loading the plaintiff's ship, *Christina Davies*, "with the usual dispatch," of the port of Liverpool. The second count was for not giving or procuring within a reasonable time a dock-note to enter the dock.

There was also a common count for demurrage.

Pleas, first—To the first two counts, that the defendants did not promise as alleged.

Second—To the same two counts, a denial of the breaches.

Third—To the last count, never indebted.

At the trial, which took place before Quain, J., at the Liverpool summer assizes, 1873, it appeared that by a charter-party, dated Liverpool the 22nd of January, 1873, the master engaged to "receive and load on board his vessel, the *Christina Davies*, of Barrow, a full and complete cargo of coal, about 140 tons, and proceed to Belfast, and deliver the same as per bills of lading," at certain specified freight, &c., "to be loaded with the usual dispatch of the port, and discharged twenty-five tons working days; or if longer detained, to be paid 40*s*. per day demurrage." The defendants thereby engaged to load the vessel "on the above terms." By a memorandum at the foot the vessel was to "load in the Bramley Moore or Wellington Docks High Level Railway."

By the published Dock Regulations, which, it must be taken, were known to both parties, it is ordered, amongst other things, that "no vessel is to be allowed to enter the Bramley Moore or Wellington Docks to load coal from the High Level Railway, except upon the production of a jerque note or a certificate from the master of the dock in which the vessel is lying at the time, shewing that she is ready to commence loading, and also a certificate from the coal agent that she is to load coal at the High Level. No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels in the Bramley Moore or Wellington Docks (both inclusive) loading and to load coal at the cranes at one time." "No vessel to be entered in the application or berthing book before she is in either the Bramley Moore Dock or the Wellington Dock; each vessel to be berthed in regular turn as entered, if the specified quantity of coal is at the Sandhills Station; if not, the next vessel on turn, having sufficient coal ready, to take the berth; any vessel losing her turn in consequence of coal for her not being at the Sandhills Station to be considered first on turn when the coal is ready. Flats and vessels to follow the same order as to turn for loading whether entered for the cranes or the shoot."

It was admitted that the master ob-

tained in proper time the requisite certificate from the dock master in which the vessel was lying, and that the defendants gave the certificate in proper time, also that the vessel was regularly put on the dock books, and would have been loaded without delay had it not been for the fact, which fact was unknown to the master at the time he entered into the charter-party, that the defendants acted as their own coal agents, and that they had at the time three ships loading in the docks, and ten other charters in their books which had priority over the plaintiff's. In consequence of these engagements, the vessel was not allowed to go into the docks till the 5th of March, a period of thirty days after she was ready to do so. The loading was commenced and completed on the following day.

It was conceded that thirty days was an unusual period of detention, and that the delay was caused not by the pressure of business in the docks, or any inability on the part of the dock company to facilitate the dispatch of the vessel, for vessels booked after the *Christina Davies* by other coal agents were loaded and despatched before her, but solely by the incapacity which the defendants had placed themselves under, by their previous engagements, of getting a berth for her at an earlier period. On the other hand, it was conceded that the defendants were guilty of no delay which it was in their power to avoid consistently with their previous engagements (1).

The verdict was entered for the plaintiff for 62*l.*, leave being given to move to enter the verdict for the defendants instead thereof.

Subsequently a rule *nisi* was granted, pursuant to such leave, on the ground that the facts proved did not, on the true construction of the charter-party, disclose any liability on the part of the defendants.

Aspinall and *Bremner* (on June 11) shewed cause against the rule.—If there was anything unusual in the course of loading in the particular dock, it was the duty of the charterer to disclose it. If he did not, the plaintiff had a right to suppose that the loading would be commenced in a reasonable time—See *Tapscott* v. *Balfour* (2). The defendants had all the knowledge in their own breasts, and the delay was caused by the fact of their acting as their own coal agents and having a number of ships which had a priority over the plaintiff's. The delay was unreasonable. The plaintiff was prevented from getting his ship loaded. He did not know that the defendants acted as their own coal agents. With a small vessel of 140 tons, as the plaintiff's was, the loading would be performed in a short time, and he had a right to suppose that it would be so—See *Ford* v. *Cotesworth* (3), in which *Kearon* v. *Pearson* (4) was referred to. "Usual dispatch" must be construed to mean the usual dispatch of a person who has a cargo in the port ready to dispatch. Before entering into the charter-party the defendants ought to have told the plaintiff what their position was with respect to the number of ships to be loaded. The verdict was rightly entered for the plaintiff. They referred to *Harris* v. *Dreesman* (5).

C. Russell and *Lupton* supported the rule.—There is no doubt that the charterer is bound to do with reasonable diligence all that he binds himself to do. But if the contract was to load within the regulations of the port, that has been done—See *Robertson* v. *Jackson* (6). These regulations are notorious, and known to the brokers. The defendants are not bound to tell each shipowner of the other charters which he might have entered into. Charters are often entered into before the ships arrive. Without enquiring from the dock superintendent, the charterer could not know how many ships he would have in the docks. The

(1) The above statement of facts and admissions, made on behalf of the plaintiff and defendants respectively, is taken from the judgment of the Court.

(2) 42 Law J. Rep. (N.S.) C.P. 16.

(3) 9 B. & S. 559; s. c. 38 Law J. Rep. (N.S.) Q.B. 52.

(4) 7 Hurl. & N. 386; s. c. 31 Law J. Rep. (N.S.) Exch. 1.

(5) 9 Exch. Rep. 485; s. c. 23 Law J. Rep. (N.S.) Exch. 210.

(6) 2 Com. B. Rep. 412; s. c. 15 Law J. Rep. (N.S.) C.P. 28.

shipowner could get that information by asking the question. Nothing wrong has been done by the defendants. They did all they were bound to do by obtaining the certificate to admit into the dock. *Ford* v. *Cotesworth* (3) is a direct authority to shew that it is sufficient if reasonable diligence is used. The words "usual dispatch" only apply to a delay in the process of loading after the ship has arrived at her berth—See *Kearon* v. *Pearson* (4). After that time there was no delay by the defendants, the charterers; and the plaintiff was bound to find his way into the dock, and get into the berth —See *Tapscott* v. *Balfour* (2). They also referred to *Shadforth* v. *Cory* (7); *Robertson* v. *Jackson* (6); *Kell* v. *Anderson* (8).

Cur. adv. vult.

The judgment of the Court (9) was now (July 6) delivered by

LUSH, J.—This was an action for demurrage, tried before my brother Quain at Liverpool, when a verdict was entered for the plaintiff for 60*l.*, being for thirty days' demurrage, with leave to the defendants to move to enter a nonsuit, the Court being empowered to draw all inferences of fact, and to amend the pleadings if necessary. All questions of reasonableness were to be for the Court.

[The learned Judge stated the facts as they are above set out, and continued as follows.]

The question is, then, what is the contract which the defendants entered into by the charter-party? The words are, not that the vessel is to be "loaded in turn according to the charterer's books or engagements," or to be loaded "next after a particular vessel," or in any other prescribed order, but "to be loaded with the usual despatch of the port." The defendants' counsel contended that these words apply only to a delay in the process of loading, when the vessel has arrived at the berth, and that they have no reference to a detention outside the loading place, though caused by the act or default of the charterer, and he relied upon the case of *Kearon* v. *Pearson* (4) in support of that position. That case, however, by no means justifies the argument based upon it. The words of the charter there were in substance the same as here, namely, "to be loaded with usual despatch." The facts were, that the loading was, after it had commenced, intercepted by a severe frost, which closed the canal through which the coals were to be brought from the pit, and thus prevented the charterer from getting them to the loading place; and the Court held the meaning of the clause to be that the vessel should be loaded with the usual despatch of persons who had a cargo in readiness at the dock for the purpose of loading, and therefore that the charterer was responsible for the delay occasioned by the frost. So far from supporting the argument that the charterer is not liable for delay occasioned by his own act or default, that case establishes that the engagement "to load with the usual despatch" is absolute, and admits of no qualification, so as to dispense with performance, even where the performance is hindered by a casualty which the charterer could not prevent. It is true the delay in that case occurred during the process of loading, and the Court had not to consider what would have been the effect of a detention at the dock's mouth; but we see no reason for limiting the obligation to the mere process of loading. It undoubtedly includes that process, and requires it to be done with the usual despatch; but we are of opinion that it goes further, and covers the whole period from the time when the vessel is at the port, and is placed at the disposal of the charterer there, in a condition to receive her cargo. The object is to provide against unusual delay on the part of the charterer in putting the cargo on board, and whether the delay occurs in the course of loading or before the loading commences, whether it consists in keeping the vessel outside or inside the dock, is obviously immaterial. The question is, whether the vessel is at his disposal, and whether the detention

(7) 32 Law J. Rep. (N.S.) Q.B. 79; in error, 379.
(8) 10 Mee. & W. 498; s. c. 12 Law J. Rep. (N.S.) Exch. 101.
(9) Mellor, J.; Lush, J.; Quain, J.; and Archibald, J.

is his act. If so, the contract is broken as much in the one case as in the other.

It was further contended that the vessel could not be said to have been ready to receive cargo so long as she lay outside the dock; that it is the duty of the shipowner to find his way into the dock, and that he takes the risk of any obstacles which occur to prevent his getting there, and *Tapscott* v. *Balfour* (3) was relied on in support of this argument. That was a charter under which the ship was ordered to load in one of the docks mentioned in this charter. The Wellington Dock was governed by the same regulations as the Bramley Moore Dock. The vessel was detained there, as in this case, outside the dock, and for a similar reason, namely, because the coal agent who had the loading for the charterer had not only three vessels in the dock at the time, but two others booked to come in before the plaintiff's. The Court held that the lay days commenced only from the time when the vessel was admitted into the dock, the loss arising from being kept outside by virtue of the dock regulations being a loss the risk of which was undertaken by the shipowner.

At first sight that case appears to bear a close resemblance to the present case, and it is not to be wondered at that the defendants' counsel strongly relied upon it as an authority in their favour. But when examined, the supposed resemblance disappears. The words of that charter were, "The vessel shall proceed direct to any Liverpool or Birkenhead dock, as ordered by charterer, and there load in the usual and customary manner a full and complete cargo of coals." The Court held that this stipulation applied to the mode, and not to the time of loading. "There is," says Bovill, C.J., "no express stipulation with respect to the time at which the loading is to commence, except that it is not to commence before the 1st of July. Then what is the ordinary rule under such circumstances, where the port, but no particular place in the port to which the vessel is to proceed, is named? It means that the time is to commence from the arrival of the vessel at the usual place of loading in that port. The stipulation is in effect that the vessel shall proceed to the Wellington Dock, and there load her cargo. Therefore the lay days do not commence till she has got into the Wellington Dock. If, by reason of the dock regulations, she cannot enter into that dock before a certain time, the loss by such delay must fall on the shipowners."

Assuming this construction of the clause in that charter to be the correct one, the grounds of the judgment are inapplicable to the present case. The intention of the parties here was evidently that the charterer should not, and the words bind him that he did not, detain the vessel for want of cargo beyond the usual and ordinary period of delay at the dock.

Evidence was given to shew that the plaintiff might, if he had chosen, have obtained information from the dock-master before he entered into the contract as to the number of vessels which the defendants had in the dock and on their books, but he was under no obligation to do so, and it would have been immaterial if he had; and if it were shewn that he knew these facts, we construe the stipulation as a contract by the charterer that he will load with the usual despatch, and it is no answer to say that he was unable to do so, nor would it be the more an answer to say that the plaintiff knew it. The ground on which leave was reserved having failed, the verdict stands for the amount agreed on at the trial.

Rule discharged.

Attorneys—Gregory & Co., agents for Bremner & Son, Liverpool, for plaintiff; F. Venn & Son, for defendants.

1874. June 3. } CUTLER (*appellant*) *v.* TURNER (*respondent*).

Master and Servant—Absence without lawful Excuse—Successive Imprisonments —30 & 31 *Vict. c.* 141. *s.* 9.

The appellant, a fireiron forger in the employ of fire-iron manufacturers at Sheffield, was summoned, on 28th October, 1873,

before a magistrate for having absented himself from their service without just cause or lawful excuse, under the Master and Servant Act, 1867, 30 *&* 31 *Vict. c.* 141. *s.* 9. *An order was made directing the defendant to pay* 11*l.* 14*s. as compensation to the complainants. It appeared that on February* 25*th,* 1871, *the appellant agreed to work for his employers for the term of five years. On April* 1*st,* 1873, *he was summoned for absenting himself, and ordered to pay* 11*l.* 8*s., with costs, and the money not being paid he was ordered to be imprisoned in the House of Correction for three months, but the order was not executed owing to the payment of the money before any actual imprisonment. On June* 6*th,* 1873, *he was again summoned for not returning to his work, and was ordered to find security to fulfil his contract, and on default was sentenced to, and underwent, three months' imprisonment. After his liberation he continued to absent himself, and a fresh summons was taken out, and the order (for compensation) appealed against was made:*—Held, *that the previous orders were not a bar to the subsequent complaint, and the order made upon it.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 124.]

1874. May 8. } OLIVER *v.* THE NORTH EASTERN RAILWAY COMPANY.

Railway Company—Negligence—Omission to repair Level Crossing.

Where a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic.

Declaration—That defendants were possessed of a railway which crossed a highway on the level, and that the defendants had the management and control of the railway at such level crossing, and that it was the duty of the defendants to keep the rails in such a state that all persons lawfully using the highway might do so with safety to themselves and their car Breach—That the defendants so i perly and unskilfully conducted selves, that the rails became in a condition and dangerous to persons the highway with carriages, and the tiff's carriage, which he was driv the highway and across the railwa damaged.

Pleas — Not guilty. Secondly, the acts complained of were la done by the defendants under the p of the special Acts—5 Vict. sess. xxviii.; 21 & 22 Vict. c. cxvi.; and 27 Vict. c. cxxii. Joinder of issue.

At the trial before Pollock, B., Durham Spring Assizes, 1873, it ap that the plaintiff was driving his do over the defendants' railway, at where it crossed the highway on the when, in consequence of the soil way used by the public having be lowed to get out of repair, and t below the level of the rails, the wh the cart were caught, and it was b The learned Judge told the jury assuming that the company had po put down their rails across the hig they must be laid and maintained s cause as little injury as possible. jury found a verdict for the plaintif 20*l.* damages.

A rule for a new trial having be tained on the ground of misdirectio

C. Russell and *J. Edge* shewed ca The direction was right. Assuming the defendants were authorised to the highway, which, having rega the special Acts, is not free from it was an implied condition of their lege that they should keep the hig in repair.

[BLACKBURN, J., referred to *The K Kerrison* (1).]

The effect of that decision is that persons are empowered by Act of P ment to interfere with a highway, th impliedly directed to secure the p by providing a substitute for the hig *The Queen* v. *Ely* (2) is to the same

(1) 3 M. & S. 526.
(2) 15 Q.B. Rep. 827; s. c. 19 Law J (N.S.) M.C, 223,

The Solicitor-General (*Sir John Holker*) and *Waddy*, in support of the rule.—There are express provisions in the Railway Clauses Consolidation Acts, 8 Vict. c. 20. s. 47, and 26 & 27 Vict. c. 92, ss. 5, 6 and 7, with regard to railways crossing public highways, under which the companies are bound to erect gates and lodges, and to keep the gates closed at certain times. But there is no express provision as to the repair by the company of that part of the way used by the public, and, in the absence of any such provision, the duty of repairing it is upon the surveyor of highways.

PER CURIAM (3).—The principle laid down in *The King* v. *Kerrison* (1) applies, and the company are liable.

Rule discharged.

Attorneys—J. Tucker, for plaintiff; Doyle & Edwards, agents for Nixon, Barnard Castle, for defendants.

1874. May 29. June 5. } SCHMIDT *v.* TIDEN AND ANOTHER.

Ship and Shipping—Payment of Freight—Liability of Shipper—Contract.

The plaintiff, as master of a ship lying in London, entered into a charter-party with L., a ship-broker, to carry a quantity of iron at a tonnage freight. By the terms of the charter-party, freight was to be paid in London on signing bills of lading, the owner to have an absolute lien for freight. On the same day L. re-chartered the ship to the defendants to carry the same quantity of iron at an increased freight, with similar provisions as to the payment of and lien for freight, and with the following clause—"The brokerage of five per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." L. had, however, no authority to act as broker for the plaintiff, or to receive the freight. Neither the plaintiff nor the defendants knew of the charter-party entered into by the other. The iron was shipped by the defendants, and the master signed and the defendants received bills of lading, by which the iron (stated to be shipped by the defendants) was to be delivered to consignees or assigns, "paying freight for the said goods as per charter-party." The plaintiff did not claim the freight on signing the bills of lading, and delivered the cargo without insisting upon his lien. L. in the meantime obtained the freight due from the defendants, and, having stopped payment, the freight due under his charter was not paid to the plaintiff:—Held, *that the plaintiff was not entitled to recover freight from the defendants as shippers of the iron, inasmuch as both parties made a mistake as to the charter-party referred to in the bills of lading, and were consequently never ad idem. No contract could therefore be implied on the part of the defendants to pay freight to the plaintiff.*

CASE stated by consent, without pleadings.

The facts, and the argument on both sides, so far as they are material, are stated in the judgment of the Court.

The case was argued on May 29, by—

Cohen (*Hollams* with him), for the plaintiff.

R. G. Williams (*Lanyon* with him), for the defendants.

The following cases were referred to—

Domett v. *Beckford* (1); *Sandeman* v. *Scurr* (2); *Major* v. *White* (3); *Newberry* v. *Colvin* (4); *Marquand* v. *Banner* (5); *Gilkison* v. *Middleton* (6); *How* v. *Kirch-*

(3) Cockburn, C.J.; Blackburn, J.; Lush, J.; and Quain, J.

(1) 5 B. & Ad. 521.

(2) 8 B. & S. 50; s. c. 36 Law J. Rep. (N.S.) Q.B. 58.

(3) 7 Car. & P. 41.

(4) 1 Cl. & F. 283, 297.

(5) 6 E. & B. 232; s. c. 25 Law J. Rep. (N.S.) Q.B. 313.

(6) 2 Com. B. Rep. N.S. 134; s. c. 26 Law J. Rep. (N.S.) C.P. 209.

ner (7); *Kirchner* v. *Venus* (8); *The Teutonia* (9); *The Mercantile Bank* v. *Gladstone* (10).

Cur. adv. vult.

The judgment of the Court (11) was delivered (on June 5) by

LUSH, J.—This is an action to recover freight for the carriage of railway iron from Hartlepool to Gothenburg, under the following circumstances:—

On the 17th of June, 1871, a charter-party was entered into in London between the plaintiff, as master of the ship *Gothenburg*, then lying in the port of London, and one R. B. Lyth, a shipbroker, whereby the plaintiff agreed to proceed forthwith to Hartlepool, and there take on board 407 tons of railway iron, and carry the same to Gothenburg, on being paid freight at the rate of 7*s*. 3*d*. per ton. The freight to be paid in London on signing bills of lading. The owner and master to have an absolute lien for all freight, dead freight, demurrage and all other charges. The master to sign bills of lading as presented, without prejudice to the charter.

Having obtained this charter, Lyth on the following day, the 18th of June, chartered the *Gothenburg* to the defendants, to carry the same quantity of railway iron from Hartlepool to Gothenburg, at 8*s*. per ton freight, to be paid in London, less insurance, on signing bills of lading. This charter contained a similar clause of lien for freight, dead freight and demurrage, and a clause in the following terms—"The brokerage of five per cent. is due on the execution of this charter to R. B. Lyth, by whom (or his agents) the vessel is to be entered and cleared at the port of loading."

It was argued, and with reason, from this latter clause, that the defendants knew that they were dealing with a broker, and not with the owner, but it was found as a fact that Lyth had no authority to act as a broker for the plaintiff, to effect the charter, or to receive the freight.

(7) 11 Moore P.C. 21.
(8) 12 Moore P.C. 361.
(9) 41 Law J. Rep. (N.S.) Adm. 57.
(10) 37 Law J. Rep. (N.S.) Exch. 130; s. c. Law Rep. 2 Exch. 233.
(11) Mellor, J.; Lush, J.; and Archibald, J.

Neither the plaintiff nor the def
had any notice or knowledge of th
ter entered into by the other o
until after delivery of the cargo
master knew nothing of the charte
between Lyth and the defendants,
defendants knew nothing of the
party between the master and Lyt

The vessel proceeded to Har
and there took in from the defenda
407 tons of railway iron. Having
the cargo, the defendants presente
of lading, making the cargo deli
to "Order or assigns, he or they
freight for the said goods, as per c
party," which the master signe
gave out without requiring payn
the freight. At the port of di
the iron was delivered on the 2
August to the orders of defendants
out the lien being insisted on. Mea
on the 2nd of August, Lyth o
payment of the freight of 8*s*. per to
the defendants, pursuant to his
of the 18th of June, and shortly
wards stopped payment, leavi
freight of 7*s*. 3*d*. per ton unpaid.

It thus appears that each of the
to the action acted under a mistak
master supposed that the bill of
which he signed referred to his c
party with Lyth; the defendants,
other hand, supposed that it refe
the charter-party which they ha
with Lyth. Each of them was ig
of what was in the mind of the
Each acted in good faith, and ne
them did anything calculated
which did in any way mislead the
Under these circumstances, the
lading being ambiguous, and equ
pable of being applied to the one c
party as to the other, we cannot
to be a contract or evidence of a c
between the parties.

But it was contended that,
aside the bill of lading, the mere sh
of the goods raised an implied c
by the shipper to pay a reasonable
to the master for the carriage.
certain circumstances this may be
no such implication can exist in t
sent case. The diversity of mi
purpose which vitiates the bill of
and prevents that from being evid

the contract, existed at the time of the shipment. The goods were put on board in the supposed fulfilment of one charter-party, by which the shipper was to pay 8*s.* per ton to Lyth, and they were accepted in supposed fulfilment of another, by which Lyth was to pay 7*s.* 3*d.* per ton to the master. At no stage of the transaction were the parties *ad idem.* It follows that there was no contract, express or implied, upon which the plaintiff can recover against the defendants. Had he insisted on payment on signing the bill of lading, as he might have done, or had he enforced his lien at the port of delivery, he might have protected himself from loss. Not having done so, he has no means of obtaining payment from the defendants.

We therefore give judgment for the defendants.

Judgment for the defendants.

Attorneys—Hollams, Son & Coward, for plaintiff; H. P. Sharp, for defendants.

1874. May 22. } HOWELL *v.* COUPLAND.

Contract of Sale—"Two Hundred Tons of Potatoes growing on Land belonging to Seller"—Failure of Crop—Liability of Seller.

The defendant agreed to sell to the plaintiff, in March, 1872, *a quantity of potatoes upon the following terms, which were committed to writing—"Two hundred tons of Regent potatoes grown on land belonging to Coupland (the seller) in Whaplode, at the rate of* 3*l.* 12*s.* 6*d. a ton, to be delivered in September or October, and paid for as taken away." At the time of the contract the defendant had twenty-five acres actually sown with potatoes, and forty-three acres ready for sowing. The forty-three acres were afterwards sown, and the whole together were amply sufficient under ordinary circumstances to produce* 200 *tons. In August a great part of the crop was injured by disease, and the defendant could only deliver about eighty tons:*—Held, *in accordance with the rule laid down in* Taylor v. Caldwell, *that the contract was subject to an implied condition that the defendant's land should produce the stipulated quantity of potatoes; and, the crop having failed without any suggestion of negligence on the part of the defendant, he was not liable.*

Declaration for the non-delivery of potatoes under a contract between the plaintiff and the defendant, with the common counts for money paid and money due upon accounts stated.

Fourth plea, that it was a condition precedent to the performance of the defendant's promise, that the potatoes at the date of the promise growing on the defendant's land at Whaplode, should when taken up amount in quantity to 200 tons, and that when taken up they did not amount to that quantity.

Fifth plea, that it was a term of the contract that the defendant should not be bound to deliver two hundred tons of potatoes unless his crop growing at the time of the contract should produce that quantity, and that if the crop should not produce so much, then that the defendant should deliver all that it did produce, with the exception of such portion as was necessary for the use of the defendant himself and his labourers. Averment that the crop did not produce two hundred tons, and that the defendant delivered to the plaintiff all that it produced, with the exception aforesaid.

Joinder in issue.

At the trial, before Bovill, C.J., at the Lincoln Spring Assizes, 1873, it appeared that the plaintiff was a potatoe merchant at Holbeach, Lincolnshire, and the defendant a farmer at Whaplode, in the same county. In 1872, the defendant had appropriated between eighty and ninety acres of land for the growth of potatoes, sixty-eight acres in Whaplode and about twenty in Holbeach. In March of the same year the plaintiff and defendant met together, and the following memorandum was then drawn up—"Memorandum of agreement made this day of 1872. Between Robert Coupland of Whaplode, and John Howell of Hol-

beach, whereby Robert Coupland agrees to sell, and John Howell agrees to purchase 200 tons of Regent potatoes, grown on land belonging to Robert Coupland in Whaplode, at and after the rate of 3*l.* 12*s.* 6*d.* per ton, to be riddled on an inch and $\frac{5}{8}$ths riddle, and delivered at Holbeach Railway Station, good and marketable ware, during the months of September or October, as John Howell may direct and under his direction, the purchaser to find riddles. And it is further agreed between the said Robert Coupland and the said John Howell, that the said potatoes shall be paid for when and as they are taken away."

At the time of this contract, out of the sixty-eight acres in Whaplode, twenty-five were actually sown with potatoes and forty-three acres were ready for sowing. The forty-three acres were afterwards sown, and the whole together were amply sufficient, in the ordinary course of cultivation, to produce 200 tons. In July the plaintiff selected two of defendant's fields in Whaplode from which to take the 200 tons of potatoes. In August heavy falls of rain occurred, accompanied by thunder storms, which produced a disease among potatoes, and amongst others, the defendant's potatoes were attacked. The plaintiff took the whole of the marketable potatoes produced upon the defendant's land in Whaplode, and the defendant also allowed him to take the potatoes produced on his land in Holbeach with some exceptions, but the whole of the potatoes received did not exceed 79 tons 8 cwt. The present action was then commenced.

A verdict was entered for the plaintiff for 432*l.* 5*s.*, with leave for the defendant to move. A rule *nisi* having been obtained to enter the verdict for the defendant on the ground that he was not liable to deliver the ungrown potatoes—

Digby Seymour and *Waddy* shewed cause.—The defendant was bound under the terms of his contract to supply the plaintiff with 200 tons of potatoes, and having failed to do so, he is liable in this action. The mention of an amount is material. The contract is to supply 200 tons of potatoes, not the crop of potatoes to be grown on the plaintiff's land. only difference between this and dinary undertaking to supply a quantity of produce, is that here th chaser deals with the occupier of th on which the produce is to be raise

[BLACKBURN, J.—The case of *Ta Caldwell* (1), goes to shew that had been a sale of the whole would have been impliedly subject result of the crop.]

In *Taylor* v. *Caldwell* (1), it w down that where from the nature contract, the parties must have that it could not be fulfilled, when the time for the fulfilment contract arrived, some particular sp thing continued to exist, that then absence of a warranty that the should exist, the contract is subject implied condition that the parties be excused if performance became i sible from the perishing of the without default on the part of th tractor. That case is, therefore, guishable. The potato blight was thing which would ordinarily hav in the contemplation of the partie could only be provided for by an e provision in the contract.

[QUAIN, J.—Is not this a contr a specific thing? No other potatoes have satisfied this contract.]

They cited—*Benjamin on Sales* ed.), p. 455; *Barker* v. *Hodgson* *Walton* v. *Waterhouse* (3); *Hi Sughrue* (4); *Kearon* v. *Pearson* (5

Field (*Beasley* with him), in supp the rule cited—*Dexter* v. *Norton* where it was held, that in an exe agreement for the sale and deliv specified goods, the vendor is ex from performance if the goods without his fault, so as to render de impossible.

[He was then stopped.]

(1) 3 B. & S. 826; s. c. 32 Law J. Rep Q.B. 164.
(2) 3 M. & S. 267.
(3) 2 Wms. Saund. 422.
(4) 15 Mee. & W. 253.
(5) 7 Hurl. & N. 386; s. c. 31 Law J. (N.S.) Exch. 1.
(6) 47 N. Y. Rep. 62, cited in *Benjam Sales*, 2nd edit. p. 456.

BLACKBURN, J.—I don't think we need trouble the counsel for the defendants any further. The rule to enter the verdict for the defendant must be made absolute. The action is brought for breach of a contract which was made and committed to writing in March, 1872, and is to the effect that the defendant agrees to sell, and the plaintiff agrees to purchase "200 tons of Regent potatoes grown on land belonging to the defendant in Whaplode, at the rate of 3*l.* 12*s.* 6*d.* per ton, to be riddled on an inch and five-eighths riddle, and delivered at Holbeach Railway Station, good and marketable ware, during the months of September or October, as the plaintiff may direct and under his direction," &c. Now looking at this contract and the circumstances under which it was made, we think that inasmuch as the defendant had in Whaplode sixty-eight acres of land planted or intended to be planted with potatoes in the ordinary course of husbandry, that what he must be taken to have meant was that he would deliver 200 tons of potatoes out of the crop which this land was expected to produce. Now this would be an undertaking to deliver a specific thing in this sense, that it would be an undertaking to deliver a particular portion out of a specific thing. So far, it would be a contract for the delivery of a specific thing. I don't think that there is any distinction from the fact that the precise number of acres to be sown had not been ascertained, or from the fact that part of the land had been already sown with potatoes and part had not; the description, "land belonging to the plaintiff in Whaplode," is quite sufficient, and binds the defendant to deliver 200 tons of potatoes out of the crop to be produced on this land. Now the cases of *Taylor* v. *Caldwell* (1), and *Appleby* v. *Myers*, in the Exchequer Chamber (7), shew that where there is a contract for a specific thing which cannot be fulfilled if in the interval that particular thing perishes, and in the interval it does perish, that then the bargain is off. So here, if it were possible to shew any default on the part of the defendant, he would be liable on his contract, but I take it that here the crop of potatoes failed, because of a disease which no skill or care on the part of the defendant could have prevented. The question is, did this accident excuse him from the performance of his contract? We all think that it did. The contract in the present case only differs from a contract to deliver a specific thing in this respect, that it is for the delivery of a portion out of a specific thing. The reasoning upon which the case of *Taylor* v. *Caldwell* (1) was founded, was that in a contract for the delivery of a specific thing, the law makes it part of the contract, that the thing shall be in existence when the time comes for the fulfilment of the contract. The same reason applies where it is for the delivery of a portion out of a specific thing, for example, a contract to deliver so many tons of sugar out of a particular cargo. There the sugar contracted for would be part of a particular quantity, but if when the time arrived for the completion of the contract, the ship were lost, I take it that it would be implied from the terms of the bargain, that it should be at an end if the whole quantity of the sugar had perished without default on either side. Applying this illustration to the present case, I think that there can be no doubt that the defendant is not liable.

QUAIN, J.—I am of the same opinion. The contract is for the delivery of 200 tons of potatoes grown on a particular farm in possession of the defendant. Therefore no potatoes can be delivered under the contract unless potatoes are actually grown on that farm. It appears to me therefore that it is an essential condition of the contract that potatoes should be grown on the farm, out of which the 200 tons can be delivered. Now it has been admitted during the argument that if the contract had been for the whole of the crop of potatoes to be grown on the particular farm, and from no default on the part of the seller, but owing to a potato blight, no potatoes had been grown, the usual rule would have applied, and the defendant would not have been liable. But it is said that there is a distinction where the contract is to supply 200 tons

(7) 36 Law J. Rep. (N.S.) C.P. 331; s. c. Law Rep. 2 C.P. 651.

out of a larger quantity. But it seems to me that there is no such distinction. Where, as here, the contract is one *certi corporis*, as in *Taylor* v. *Caldwell* (1), if 200 tons out of the whole are contracted for, and only eighty tons are produced, it seems to me to follow as a matter of course that the seller is equally excused from delivering the balance of the potatoes as he would be if he were under contract to deliver the whole of the crop. The contract is subject to the condition that a sufficient quantity of potatoes shall be produced on the land, and if from some cause which comes within the description of *vis major*, or the act of God, the potatoes are not produced in time to satisfy the contract, the defendant is not liable. It is like the case mentioned in *Shepherd's Touchstone*, p. 382—"When the condition of an obligation is to do two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself, in this case the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. . . . When the condition of an obligation is to do one single thing which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be." Here the defendant, by delivering what potatoes were actually grown, did all in his power to fulfil the contract. There does not appear to have been any suggestion of negligence on the part of the defendant. If there had been any intention to suggest it, the question ought to have been left to the jury at the trial, which was not done.

ARCHIBALD, J.—I am of the same opinion. If this contract had contained words amounting to a warranty that the land of the defendant sown with potatoes, should produce 200 tons, it would be governed by the cases which have been cited on behalf of the plaintiff. But the words only amount to a contract for the delivery of 200 tons out of the c be grown on the defendant's land. therefore, a contract for the sale of potatoes, and, consequently, the governed by the principle laid d *Taylor* v. *Caldwell* (1), that it is plied condition of the contract t subject-matter of the contract sho in existence at the time when the c is to be performed; and I think t no distinction between the case of tract for the sale of an entire crop, contract for the sale of a pa quantity out of the crop. I am of that the defendant is excused fr performance of his contract by cident which has caused the failure crop, and that the rule to enter t dict for him should be made absolu

Rule abs

Attorneys—Monckton & Co., agents fo Holbeach, for plaintiff; Wright, Bo Wright, agents for Bonner & Calthrop ing, for defendant.

1874. May 27. } BATESON (*appellant*) v (*respondent*).

Hackney Carriage—Definition o licensed Driver — Carriage stand Private Yard.

By 4 Vict. c. xvi. s. 145, if the d any hackney carriage . . . . shall b standing or plying for hire within th of the Act without a license, &c., he s liable to a penalty. There is no de of a hackney carriage in the Act:— that the words "hackney carriage" taken to mean a carriage exposed to the public, whether standing in the street or in a private yard.

[For the report of the above ca 43 Law J. Rep. (N.S.) M.C. 131.]

1874. June 5. { TAYLOR AND OTHERS *v.* THE LIVERPOOL & GREAT WESTERN STEAM COMPANY AND ANOTHER.

Ship and Shipping—Bill of Lading—Exception, "Thieves, Barratry of Master and Mariners"—"Damage to any Goods."

The plaintiffs shipped diamonds on board the defendants' vessel under bills of lading, containing the exceptions "thieves, barratry of master and mariners. . . . The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance." One box of the diamonds was stolen during the voyage; but there was no evidence to shew whether it was stolen by one of the crew, or by a passenger, or by some person from the shore after the vessel's arrival in port. At the time of the shipment the diamonds were insured, and the underwriters paid for the loss :—Held, *first, that the term "thieves" in the exception applied to strangers, and not to persons belonging to the vessel; secondly, that assuming theft by one of the crew to be "barratry," the defendants must bring the case within the exception by positive proof, which they had failed to do; thirdly, that the words "damage to any goods" were confined to cases where the goods receive damage from a peril insured against, but not to cases where there has been not damage to the goods but a total abstraction of them.*

CASE stated by consent without pleadings.

1. The plaintiffs are merchants carrying on business in New York. The defendants are the owners of the ship *Nevada*, one of a line of passenger ships running between Liverpool and New York.

2. On or about the 25th of July, 1871, the plaintiffs caused to be shipped at Liverpool on board the defendants' steam ship *Nevada* for New York, five boxes of diamonds, and the defendants accepted and received the same from the plaintiffs to be carried on board the ship from Liverpool to New York, on the terms of five bills of lading respectively, which are all in the same form. The exceptions contained in the bills of lading were—"The act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of masters and mariners, restraints of princes and rulers or people, sweating, insufficiency of package in size, strength or otherwise, leakage, breakage, pilferage, wastage, rain, &c., and all damage, loss, or injury arising from the perils or things above mentioned, and whether such perils or things arise from the negligence, default, or error in judgment of the pilot, master, the mariners, engineers, stevedores, or other persons in the service of the shipowners, always excepted." The bills of lading contained also the following clause—"The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods; nor for claims for damage or detention to goods under through bills of lading, where the damage is done or detention occurs whilst the goods are not in the possession of the shipowner; nor in any case for more than the invoice or declared value of the goods, whichever shall be the least." The memorandum in the margin, "Insurance in London by A. S. Petrie & Co.," was upon the bills of lading when they were delivered to the shippers.

3. Four of the boxes of diamonds were duly delivered by the defendants to the plaintiffs at New York, but the remaining box was stolen during the voyage and has never been delivered to the plaintiffs. The diamonds were stolen when on board the ship either on the voyage or after her arrival in port before the time for delivery arrived, but there is no evidence to shew whether they were stolen by one of the crew or by a passenger, or after her arrival by some person from the shore.

4. At the time of the shipment the diamonds were insured for the voyage by two policies effected at Lloyds. A claim for the loss in question was made upon the underwriters upon the policies and was paid.

The question for the opinion of the Court is whether the plaintiffs are entitled to recover from the defendants the value of the box of diamonds.

Cohen (*Hollams* with him), for the plaintiffs.—The defendants are liable, for

the loss of the diamonds is not a loss by "thieves" within the exception in the bill of lading. The word "thieves" in a shipping document like the present, should be construed as it would be in a policy of insurance where it has always been held to apply to pirates, or thieves outside the ship, and not to ordinary larceny on board the vessel. "The theft that is insured against by name in the policy means that which is accompanied by violence (*latrocinium*) and not simple theft (*furtum*); it being an old and elementary rule that *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes might have been prevented by the exercise of due vigilance" —*Arnould, Marine Insurance*, vol. 2, p. 704 (4th ed.). Here there can be no presumption as to whether the goods were stolen by the inmates of the ship or by strangers; if any inference can be drawn it is more likely that they were stolen by some person who had embarked in the vessel. Secondly, the loss of the diamonds by theft does not come under the description "damage which is capable of being covered by insurance." "Damage" does not apply to a total loss and disappearance of the goods, but to some injury to them, reducing their value.

Herschell, for the defendants.—The word "damage" must include a total loss of goods. It was meant as a general term and the shipowner wished to exclude any liability on his part where the goods were capable of being insured. It could not matter, for this purpose, whether a diamond was injured or lost altogether. Secondly, the word "thieves" in the exception ought to bear its ordinary meaning, and it was meant to extend to all classes of thieves. The word "robbers" has been already used in the exception, and this is the proper description for marauders outside the vessel—*De Rothschild* v. *The Royal Mail Steam Packet Company* (1). But assuming that the Court prefer the plaintiffs' construction, the loss at any rate comes within the exception "barratry of master and riners," according to the definiti barratry in *Phillips on Insurance*, s. —"Theft, embezzlement and wilf struction of the property insured their nature barratrous acts." Las the absence of positive evidenc plaintiffs are bound to shew affirma that the diamonds were lost in s manner as to make the defendants and this they have failed to do. *P* v. *Clark* (2), *Czech* v. *The General Navigation Company* (3).

Cohen, in reply.—If the defen construction is right, the shipown the present case will receive his f without any consideration.

LUSH, J.—This case is one certai considerable difficulty, and I have lis to the argument of the learned c on both sides with a great deal of as to the construction of the doc before us. I have, however, arrived conclusion, which is satisfactory t own mind, that the loss is not withi of the exceptions contained in the lading, and that therefore the pla are entitled to our judgment.

Now the finding is—"The dia were stolen when on board the ship on the voyage or after her arrival i before the time for delivery arrive there is no evidence to shew whethe were stolen by one of the crew or a senger or after her arrival by some p from the shore." We must take it th is equivalent to an admission that were passengers on board. The n is left in doubt whether the bo stolen by a passenger or one of the or by a person not belonging to th after the vessel arrived at her destin Is that a case within the meaning o exception? The exception is "the God, the Queen's enemies, pirates, ro thieves, vermin, barratry of maste mariners." Now the important qu here is, does the word "thieves" co

(1) 7 Exch. Rep. 734; s. c. 21 Law J. Rep. (N.S.) Exch. 273.

(2) 2 Com. B. Rep. N.S. 156; s. c. 2 J. Rep. (N.S.) C.P. 168.

(3) 37 Law J. Rep. (N.S.) C.P. 3; s. Rep. 3 C.P. 14.

hend all persons on board, or is the word used in the more limited sense as denoting persons outside the ship and not those belonging to the ship? It is certainly a word of ambiguous meaning, and where this is the case, I think we must put such a construction upon the word as is most in favour of the shipper, and not most in favour of the shipowner. It is an exception framed by him for his benefit, and it behoves him to use such language as to make clear what he holds to be an exception under it. I think therefore that the word "thieves" here must receive such a construction. It is not reasonable to suppose, where nothing is added to the word to qualify or limit or define its meaning, that the shipper of the goods intended that he should be unprotected against thefts by the crew or persons on board the ship. Those are matters which the shipowner could much better protect himself against than the shipper, therefore I think we must take the word to be used here in the same sense in which it has been used hitherto in policies of insurance, and hold it as not comprehending thefts by passengers or by members of the crew. I say nothing as to whether barratry by masters or mariners would comprehend a theft by the crew, because inasmuch as there were passengers on board, and it does not appear whether the theft was by one of the crew or by a passenger, it is enough for the purpose of our judgment that the theft may have been committed by a passenger.

Then comes the next question, is the loss included within the insurance clause? Now that clause is—"The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance." Now I do not agree that the word "damage" is so limited in its meaning as Mr. Cohen suggested. I think that damage by the perils of the sea or by any other perils might extend to the utter destruction of the goods, and that it would still be damage within the meaning of this clause. But I do not think the words used could reasonably comprehend this case which was not damage at all, but the entire abstraction of the thing. Therefore though "damage" would comprehend destruction, and in that sense total loss, I think it is confined to cases where the goods receive damage by one of the perils insured against, whether it amounts to total destruction or not, and that it does not comprehend a case where the goods have been taken bodily away.

Then comes the remaining question on this finding—is it for the plaintiffs or the defendants to shew whether the case is or is not within the exception in the bill of lading? Now I am of opinion that it is for the defendants to bring themselves within the exception, and therefore it lies upon them to shew that the act of theft here was committed by some person outside the ship, that being the meaning which I attach to the word "thieves," and the *onus* is not upon the plaintiffs to shew the contrary.

The case cited of *Czech* v. *The General Steam Navigation Company* (3) does not appear to have any bearing on this case. There the shipowner stipulated that he would not be liable for breakage, leakage and damage. That meant that he would not be liable for breakage, &c., not occasioned by any negligence of his own. If it was occasioned by the negligence of the master or crew, it was not within the exception. What the Court held there was, that if the breakage or damage was of such a character as to have been *prima facie* occasioned by one of the perils insured against, damage by salt water, that would not be enough, because the shipper must go on and shew that it was caused by the negligence of the master, but on the other hand if the damage had been such as must have been occasioned by negligence, then that would be enough, that is, if the nature of the damage was such as led to the presumption that it must have been occasioned by negligence. The Court held that the merchant must shew that the damage was occasioned by negligence, and that it was occasioned in such a way as led to the presumption that it arose from negligence. That does not touch this case. The shipowner here is responsible for the non-delivery of this box unless he can bring himself within one of the protecting clauses. He says, I will not be responsible if the box is stolen by some person not connected with the ship. Does he shew

that it was not stolen by some person belonging to the ship? He leaves it in doubt as to who stole it, whether one of the crew, or passenger, or some one from shore. I think, therefore, that he does not bring himself within the exception, and our judgment must be for the plaintiffs.

ARCHIBALD, J.—I am of the same opinion. The first question is what is the proper construction of this contract. The goods are shipped to be carried under the terms of the bill of lading, and the shipowner is liable unless he comes within one of the exceptions. Now the exigencies of claim and liability have led to the gradual development of a document which has come at last to be a considerable puzzle, and I own that during the argument I felt considerable doubt as to the construction of this instrument, but I have come to the same conclusion as my brother Lush, that the defendants have not brought themselves within any one of these exceptions.

Now it was argued on the part of the shipowner that the clause by which the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance, was so extensive as to exempt him from every sort of risk that might be incurred, and that the word "damage" must be understood to extend, not only to actual loss by destruction, but also to abstraction and theft. If that had been so it would have been an exception so large as to exempt him altogether from liability in regard to these goods, in respect of anything capable of being insured against, and inasmuch as theft might have been insured against, it would have come within the meaning of that clause. But when we look at the clause itself, it is clear damage cannot be taken in that extensive sense. As Mr. Cohen has said, there may be damage without loss and there may be loss without damage, but this is a case of abstraction, and I do not think that is a case to which these words apply. The words are, "damage to any goods which is capable of being covered by insurance," &c. [The learned Judge read the clause down to the words "possession of the shipowner."] That all seems to me to point clearly to some injury to the goods or to receiving such damage as to le their destruction and not to the theft and abstraction. Therefore I that is not an exception which ava defendants and on which they can

Then the next question is—hav brought themselves within the m of the exception which exempts from loss by thieves? Now there it depends on what is the constr of certain words. No doubt these "pirates, robbers, thieves," were originally from the ordinary policy surance, and in that policy of ins the word "thieves" refers only to with violence, and as it is capable meaning so also it is capable of a meaning, that is, as meaning a merely, a furtive theft, but it is f shipowner to make it clear that th is within the exception. If it ha ambiguous meaning we must co the meaning it has finally acqui the ordinary policy of insuranc the defendants not having made i that this is an exception for their l we must hold that it has the restrictive meaning as in the policy surance, and consequently the defe have not brought themselves withi exception, because it is quite con with the finding that this theft ma been by a passenger and not by one crew. So that the question of w it is barratry does not arise. If a theft by a passenger, then it was theft of the kind which comes the meaning of this exception, a shipowner would be liable on the lading. For these reasons I agre my brother Lush that our jud should be for the plaintiffs.

Judgment for the plain

Attorneys—Hollams, Son & Coward, for p Gregory, Rowcliffes & Co., agents for Hill & Co., Liverpool, for defendants.

1874.
May 6.
July 6.

BURNABY *v.* EARLE.

Bond — Condition — Payment by Defendant of Sum recovered, if "Determination of Action" in favour of Plaintiff—Notice of Appeal—No Bail put in.

The plaintiff obtained a verdict in an action against E., who thereupon, in consideration of a stay of proceedings until the following term, executed a bond, the condition of which was, that if the determination of the action should be in favour of the plaintiff, and E. should pay the amount for which the verdict was given, the bond should be void. A rule to set aside the verdict upon a point reserved at the trial was afterwards discharged, and E. gave notice of appeal under section 37 of the Common Law Procedure Act, 1854, *but, no bail having been put in under section* 38, *and more than two years having passed without any step being taken to prosecute the appeal, the plaintiff brought an action on the bond:*—Held, *that the time for putting in bail having elapsed, and no bail having been put in, the action against E. must be considered as determined in favour of the plaintiff, and that the bond might therefore be enforced.*

This was an action upon a bond. A verdict was entered for the defendant with leave for the plaintiff to move. A rule having been obtained—

Garth and *Pearce* (on May 6) shewed cause.

Huddleston and *Philbrick* supported the rule.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

The judgment of the Court (1), was (on July 6) read as follows by

LUSH, J. (2)—This was an action on a bond. The bond recited that an action had been commenced in the Court of Exchequer by the present plaintiff against one Henry Earle. That in that action the plaintiff recovered a verdict against Henry Earle for 545*l.* and costs. That afterwards an order was made by Pigott, B., staying the proceedings in the action until the fifth day of the following term, on the defendant giving security for the amount of such verdict to the satisfaction of the Master, and that the present bond was entered into for the purpose of giving such security. The condition of the bond was, that if the determination of the said action should be in favour of the present plaintiff, the said defendant Henry Earle, and two sureties (of whom the present defendant Robert Earle was one), or one of them, should pay to the plaintiff the sum of 545*l.*, then the obligation should be void. The declaration, after setting out the bond as above, alleged that a rule was afterwards obtained in the Court of Exchequer calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, which rule was afterwards discharged, and that thereby the said action was determined in favour of the present plaintiff, but that neither the defendant Robert Earle, nor any of the other obligors have paid to the plaintiff the said sum of 545*l.* according to the said condition, whereby the bond was forfeited. To this declaration the defendant pleaded that the rule discharged was a rule on a point reserved at the trial, and that after it was discharged the defendant Henry Earle gave notice of appeal, according to the 37th section of the Common Law Procedure Act, 1854, and that a case was stated and sent to the plaintiff's attorney, but was never settled or returned through the default of the plaintiff, and that the said action and appeal were pending and undetermined in favour of the plaintiff at the commencement of this suit.

At the trial of the action before the Lord Chief Justice it appeared that the rule in the Exchequer was discharged on the 14th of November, 1870, and that on the 16th of the same month a notice of appeal was given according to the 37th section of the Common Law Procedure Act, 1854, but that no bail was put in under section 38 of the

(1) Cockburn, C.J.; Blackburn, J.; Lush, J.; and Quain, J.

(2) The judgment was prepared by Quain, J.

same Act, nor were any further steps whatever taken by the defendant Henry Earle to prosecute the appeal down to the 9th of April, 1872, when this action was commenced. It was not proved that any case on appeal had been sent to the plaintiff's attorney, or that the plaintiff or his attorney had impeded the prosecution of the appeal in any way. On this evidence the verdict was entered for the defendant on the plea, and leave was given to the plaintiff to move this Court to enter the verdict for him in case we should be of opinion that the plea was not proved, and a rule having been granted for that purpose was argued before us in the last term.

We are of opinion that the substantial averment in the plea was not proved, and that the verdict should be entered for the plaintiff. The substantial averment in the plea is that the action was undetermined in favour of the plaintiff at the commencement of the suit, and that averment in our opinion was not proved unless the fact that a notice of appeal was duly given under section 37, without more, proves it. We are of opinion that after the time for putting in bail, under section 38, has elapsed, no bail having been put in, a notice given under section 37 has no effect on the judgment or execution, and that the judgment in favour of the plaintiff in this case has, therefore, the same force and effect as if no such notice had been given. The proceedings on appeal under the Common Law Procedure Act, 1854, are similar to those in error under the Common Law Procedure Act, 1852. At common law the sueing out of a writ of error was a supersedeas of execution on the judgment, but did not affect the judgment in any other way. Hence it was held that the pendency of proceedings in error was no answer to an action on the judgment, though in general the Courts were in the habit of staying the second action pending such proceedings when bail in error had been given. *Snook* v. *Mattock* (3), *Doe* v. *Wright* (4). Afterwards various sta-

(3) 5 Ad. & E. 239; s. c. 5 Law J. Rep. (N.S.) K.B. 206.

(4) 10 Ad. & E. 763.

tutes were passed to prevent a
error operating as a supersedeas
ecution unless bail was given, a
practice in this respect is now re
by sections 150 and 151 of the C
Law Procedure Act, 1852. As
ceeding on appeal, section 38 of th
mon Law Procedure Act, 1854,
that notice of appeal shall be a
execution provided bail to pay t
recovered and costs be given withi
days in like manner, and to th
amount as bail in error. It is
therefore, that after the time for
bail has elapsed, and no bail ha
given, the notice of appeal does n
execution on the judgment nor aff
judgment in any way. Such be
practice in error and on appeal, it r
to consider the language of the b
this case. The words of the condit
—"If the determination of the s
tion shall be in favour of the pla
&c., &c. We are of opinion that a
was at the commencement of this
a judgment in favour of the plain
there was no stay of execution o
judgment, such a state of things a
to "a determination" of the ac
favour of the plaintiff within the m
of the condition. Had the def
by putting in bail or otherwise, o
a stay of execution on the judgm
are disposed to think that then,
there would still have been a vali
ment in favour of the plaintiff, there
not have been such a "determin
of the action in his favour as is c
plated by the condition of this bon
where, as in this case, the plaint
obtained a judgment in his favour,
in a condition to enforce it by exe
the action, as far as he is concerne
be properly said to be determined
favour, and unless the amount men
in the condition is paid the bond
feited. For these reasons we thin
the main averment in the plea, n
"that the said action was undetermi
favour of the plaintiff at the com
ment of this suit," was not prove
the rule obtained to enter a verd
the plaintiff on that plea must be
absolute. It was contended by the
sel for the plaintiff, that a notice of

not followed up by a case, did not constitute an appeal under the provisions of the Common Law Procedure Act. We do not think it necessary to decide this point, as we are clearly of opinion that if the notice *per se* did constitute an appeal, the notice was waived and the appeal abandoned by the unreasonable delay in proceeding upon it.

Rule absolute.

Attorneys—F. & T. Smith & Sons, agents for S. Harris, Barnet, for plaintiff; Hughes, Hooker & Co., for defendant.

1874. July 6. { DIE ELBINGER ACTIEN-GESELLSCHAFT FÜR FABRICATION VON EISENBAHN MATERIEL *v.* ARMSTRONG.

Damages, Measure of—Breach of Contract—Non-delivery of Article to be manufactured.

The defendant, in January, 1872, *agreed to furnish plaintiffs with* 666 *sets of wheels and axles, according to tracings,* 100 *of which were to be delivered—ten on the* 15*th of February, ten on the* 1*st of March, twenty on the* 15*th of March, twenty on the* 1*st of April, and forty on the* 15*th of April, to be delivered free on board at Hull, guarantee three years and three months from time of shipments from Hull, as customary. The plaintiffs were under a contract with a Russian railway company to deliver them* 1,000 *covered waggons,* 500 *on the* 1*st of May,* 1872, *and* 500 *on the* 31*st of May,* 1873, *under a penalty of two roubles per waggon for each day's delay in delivery. In the course of the negotiations between plaintiffs and defendant, defendant was told by the plaintiffs that they wanted the wheels and axles to complete waggons which they were bound to deliver under penalties, but neither the precise day for the delivery nor the amount of the penalties was mentioned. The defendant did not deliver the* 100 *sets of wheels in time, and the plaintiffs in consequence had to pay certain penalties, but the Russian company consented to take one rouble a day, amounting in the whole to* 100*l.*:—Held, *that though the plaintiffs were not entitled in an action for breach of contract to recover, as a matter of right, the amount of the penalties, yet the jury might reasonably assess the damages at that amount.*

Declaration—For breach of an agreement to supply wheels and axles, according to tracings.

Plea—denying the agreement. Joinder of issue.

At the trial before Lush, J., at the London Sittings after Hilary Term, 1873, a verdict was taken for the plaintiffs for 100*l.* 13*s.*, with leave to move for a rule to reduce it to nominal damages. A rule having been obtained accordingly—

Watkin Williams and *Cohen* (on May 7, 8) shewed cause.

Sir Henry James and *Waddy* supported the rule.

The facts and arguments appear in the judgment.

Cur. adv. vult.

The judgment of the Court (1) was delivered (on July 6) by

BLACKBURN, J.—This was an action by a foreign corporation on a contract, by which the defendant, on the 20th of January, 1872, agreed to furnish the plaintiffs' agents with 666 sets of wheels and axles, according to tracings, at the following prices and times of delivery, viz., 100 sets of tracing, No. 1, at 32*l.* per set, of which were to be delivered in that year in Hull, ten sets up to the 15th of February, ten sets up to the 1st of March, twenty sets up to the 15th of March, twenty sets up to the 1st of April, and forty sets up to the 15th of April. The contract specified the prices and times of delivery of the remaining 566 sets, on which nothing turned, and proceeded as follows: "All the foregoing prices are understood of four wheels and two axles, for deliveries free on board in Hull. Payment at buyers' option, either in three months' approved bills at par or less 1½ discount for cash, fourteen days after date of bills of lading and shipment from

(1) Cockburn, C.J.; Blackburn, J.; Lush, J.; and Quain, J.

Hull. Guarantee three years and three months from time of shipments from Hull, as customary." The action was for delay in delivering the first 100 sets, and in the declaration damages were claimed in the following terms—"Whereby the plaintiffs sustained great loss by being deprived of the said several sets for a long term after the said several agreed times, and by being prevented from carrying out and fulfilling certain contracts entered into by the plaintiffs for the supply of the said sets by the plaintiffs to a certain railway company in Russia, and by losing great profits which the plaintiffs would have made by carrying out and fulfilling the said contracts, and by being compelled to pay damages for not fulfilling the said contracts." Various pleas were pleaded and issues joined on them; but at the trial before my brother Lush, it was admitted that none of them could be supported, and that there had been delay beyond the stipulated times in delivering the 100 sets, and the only question was as to damages. As to this, the plaintiffs called a witness, who gave evidence that the plaintiffs were under a contract with a Russian railway company to deliver to them 1,000 covered waggons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873, and by the contract they were bound to pay to the Russian company two roubles per waggon for each day's delay in delivering them. In the course of the negotiations between the plaintiffs and the defendant, which resulted in the written contract of the 20th of January, the defendant was informed that the plaintiffs wanted the wheels and axles to complete waggons which the plaintiffs were bound to deliver to a Russian company under penalties. Neither the amount of those penalties, nor the precise day by which the plaintiffs were to deliver the waggons, seems to have been mentioned; but, according to this evidence, the defendant was expressly told that he would be expected to deliver the sets on the days on which he agreed to deliver them; and before entering into the contract he said he must consult his foreman as to the state of his works, and to see within what time he could deliver them. After this the written contract was sent and accepted. The pla were unable to procure other se wheels, and consequently each day's in furnishing a set of wheels neces occasioned a day's delay in furni a waggon. The waggons were not pleted in time for the Russian com and penalties were incurred; but the pany consented to remit half the pen due to them, and the plaintiffs only one rouble a day for delay. The pla claimed as the measure of their da one rouble for each day's delay of set of wheels and axles, and this, agreed, would amount to 100*l.* 13*s.* counsel for the defendant contende there was no evidence here of any tract to pay penalties, and that th mages must be nominal. The Judg not asked by either side to leav question to the jury, but directe verdict to be entered for 100*l.* 13*s.*, leave to the defendant to move to r the damages to a nominal sum, "it taken that the jury have found damages, under my direction, t 100*l.* 13*s.*" Sir Henry James, in I Term, 1873, obtained a rule to shew why the verdict should not be redu a nominal sum, on the ground th the evidence given at the trial the tiffs were not entitled to recover a mages in relation to the penalties pa them to the Russian company. C to the unavoidable delay occasion the recent trial at bar, cause wa shewn till last term, when the cas argued before my Lord Chief Justic brothers Lush and Quain, and n when the Court took time to consid judgment.

We have no difficulty in saying the defendant is not entitled to e verdict for nominal damages. It doubt quite settled that on a contr supply goods of a particular sort, v at the time of the breach, can be obt in the market, the measure of th mages is the difference between the tract price and the market price a time of the breach. Where, fron nature of the article, there is no m in which it can be obtained, this r not applicable, but it would be very u if, in such cases, the damages mu

nominal, and there are several decisions shewing that such is not the law. In *Bridge* v. *Wain* (2), where the contract was to supply scarlet cuttings in China, and the articles supplied were not scarlet cuttings, Lord Ellenborough ruled that the plaintiffs were entitled to the value of scarlet cuttings in China. In *Borries* v. *Hutchinson* (3), where the action was to recover damages for delay in delivering caustic soda, which it was admitted was an article which is not kept in stock so as to be capable of being at any time bought in the market, and consequetly there was no ascertainable market price, Willes, J., in that case says: "In ordinary cases, where the article is one which can be bought in the market, the proper measure of damages for a breach of contract to deliver is the difference between the contract price and the market price on the day of the breach. . . . There was no market price to which resort could be had as a test of damage. We must therefore ascertain what was the value of the article contracted for, at the time when it ought to have been and at the time when it actually was delivered." In the case now at bar, without travelling out of the written contract, it is obvious from its terms that the sets of wheels and axletrees being made according to tracings, could not be obtained in any market; but that if they were not delivered according to the contract, the plaintiffs must wait till they could get them made elsewhere; and from the stipulation at the conclusion of the contract that there was to be a guarantee for three years and three months from time of delivery, it is equally obvious that both parties contemplated that the wheels and axles were to be put into immediate use. Under such circumstances the natural and almost inevitable consequence of a delay in delivering a set of wheels would be that the plaintiffs, if they meant the waggon for their own use, or their customers, if the waggon was bespoke, would be deprived of the use of a waggon for a period equal to that for which the set of wheels was delayed. At all events the plaintiffs were entitled to recover at a rate per day equal to whatever the jury should find to be reasonable compensation for the loss of the use of the waggons: [See *Cory* v. *Thames Iron Works Co.* (4)] We think therefore, that it would have been a misdirection if the jury had been directed to find no more than nominal damages.

We have more difficulty in determining whether the plaintiffs are entitled to keep the verdict for the amount as it stands. If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand. In *Hadley* v. *Baxendale* (5) it was decided that it was a misdirection in the Judge not to tell the jury that upon the facts before them, they ought not to take the loss of the profits into consideration at all in estimating the damages. That was because the Court thought that there was no evidence of any communication to the defendants of such facts as shewed that this unusual loss must ensue from the delay in sending on the broken shaft; and so far as the case decides that the defendant is not liable for any unusual consequences, arising from circumstances of which he has not notice, the case has often been acted upon. But an inference has been drawn from the language of the judgment, that whenever there has been notice at the time of the contract that some unusual consequence is likely to ensue if the contract is broken, the damages must include that consequence; but this is not, as yet at least, established law. In *Mayne on Damages*, p. 10 (2nd edition, by Lumley Smith), in commenting on *Hadley* v. *Baxendale* (5) it is said: "The principles laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the

(2) 1 Stark. 504.

(3) 18 Com. B. Rep. N. S. 445; s. c. 34 Law J. Rep. (N.S.) C.P. 169.

(4) 37 Law J. Rep. (N.S.) Q.B. 68; s. c. Law Rep. 3 Q.B. 181.

(5) 9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179.

time of making the contract, and that no consequence which is not the necessary result of a breach can be supposed to have been so contemplated, unless it was communicated to the other party, are of course clearly just. But it may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to shew that he was told that he would be answerable for them, and consented to undertake such liability? . . . The law says that every one who breaks a contract shall pay for its natural consequences, and in most cases states what these consequences are. Can the other party by merely acquainting him with a number of further consequences which the law would not have implied enlarge his responsibility to the full extent of all those consequences, without any contract to that effect?"

We are not aware of any case in which *Hadley* v. *Baxendale* (5) has been acted upon in such a way as to afford an answer to the learned author's doubts; and in *Horn* v. *The Midland Railway Company* (6), much that fell from the Judges in the Exchequer Chamber tends to confirm those doubts. But we do not think it necessary here to decide any such question.

As the plaintiffs did not actually lose more than a rouble a day, which they paid, that forms the extreme limit of the damage they can recover, for they are not entitled to make a profit out of the defendants' default. Had the amount of damages been actually left to the jury, the question would have been whether the defendant was liable for as much. If the Judge had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not at all eve been too unfavourable to the def

We think that if so directed, a all probability would, and certainly ably might, have assessed the at 100*l.* 13*s.*, which after all is n per centage, the contract pric 3,200*l.*

We think we must construe servation as meaning that the should stand if the jury properly might reasonably have found th The rule therefore must be discha

Rule disch

Attorneys—Johnson & Weatheralls, for p Learoyd, Learoyd & Peace, agents for & Taylor, Rotherham, for defendant.

1874. May 30. } HAMPTON (*appell* RICKARD (*respon*

Bastardy—Connection between in Ireland—Birth of Child in En Bastardy Laws Amendment Act, 1 & 36 *Vict. c.* 65), *s.* 3.

The appellant having been su before justices was adjudged to putative father of the bastard chil respondent, and ordered to provide maintenance, according to the B Laws Amendment Act, 1872 (3 *Vict. c.* 65), *s.* 3. *The child was Cornwall. The appellant was an Ir and the respondent an Englishwom the connection which resulted in t of the child took place in Ireland summons was duly served on the lant:*—Held, *that, the child having chargeable in England, the justic jurisdiction, and the order was good.*

[For the report of the above c 43 Law J. Rep. (N.S.) M. C. 133.]

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(6) 42 Law J. Rep. (N.S.) C.P. (Ex. Ch.) 59.

1874. July 6. } MORISON *v.* THOMPSON.

Principal and Agent—Agent to buy, receiving Money from Vendor—Money had and received.

The defendant having been authorised by the plaintiff to purchase on his behalf a particular ship as cheaply as she could be got, made an arrangement, without the plaintiff's knowledge, with the vendor's broker, who had a right to retain the excess of the purchase money over 8,500l., by which the defendant purchased the ship for 9,250l., and retained for his own use 225l., part of the excess:—Held, *that the plaintiff was entitled to the amount so retained by the defendant, inasmuch as it was a profit acquired by an agent in connection with his agency, without the sanction of his principal, and that it could be recovered in an action for money had and received.*

Declaration for money had and received for the use of the plaintiff. Plea never indebted. Joinder of issue.

At the trial a verdict was entered for the plaintiff, with leave for the defendant to move to enter it in his favour, if the Court should be of opinion that the plaintiff could not recover under a count for money had and received. A rule *nisi* having been obtained accordingly,

Field and *Lanyon* shewed cause.

Sir J. Karslake and *A. L. Smith* supported the rule.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

The judgment of the Court (1) was (on July 6th) delivered as follows, by

COCKBURN, C.J.—This was an action by the purchaser of a steamship called the *Atrato*, to recover from the defendant (who had been employed by him as his broker to purchase the ship as cheaply as he could) the sum of 225*l.*, which had been received by the defendant from the broker of the vendor by way of commission on the sale. It appeared at the trial, that after some preliminary negotiations, the plaintiff had authorised the defendant to negotiate for the purchase of the ship on the basis of an offer of 9,000*l.*; but eventually the ship was purchased through the defendant for 9,250*l.* Some time prior to the sale, an arrangement had been made between the vendor and a broker named Scott, through whom the ship was sold, that if Scott could sell the ship for more than 8,500*l.*, he might retain for himself whatever could be obtained in excess of that amount. The defendant was aware of this arrangement at the time when he was negotiating with Scott for the purchase of the vessel, but it was unknown to the plaintiff, and before the sale it was arranged between Scott and the defendant, without the knowledge or sanction of the plaintiff, that the defendant should receive from Scott a portion of such excess of purchase money. The vessel having been sold for more than the 8,500*l.*, the sum of 225*l.*, part of the excess (being the sum for which this action was brought) was, without the knowledge or sanction of the plaintiff, paid by Scott to, and retained by the defendant. It was found by the jury, first, that the defendant was the agent of the plaintiff for the purpose of purchasing the ship as cheaply as she could be got; and secondly, that the plaintiff could have got the vessel cheaper but for the arrangement between the vendor and Scott, and a verdict was thereupon entered for the plaintiff for 225*l.* on the count for money had and received, with leave to move to enter a verdict for the defendant. In Hilary Term, 1874, a rule was obtained to enter the verdict for the defendant, and the only question raised upon the rule is, whether the plaintiff is entitled to recover the money in question under the common count for money had and received.

It was contended, in support of the rule, that the only form of action maintainable, if at all, under the circumstances, against the defendant was an action to recover damages for breach of duty; that in such an action the amount received by the defendant from Scott would not necessarily be the true measure of damages, and that it could not be regarded as the money of the plaintiff, or as received for his use.

(1) Cockburn, C.J.; Blackburn, J.; and Archibald, J.

It was contended further that, at the utmost, the defendant could only be regarded as trustee for the plaintiff of the money in question, and that being only entitled to it in equity, the plaintiff could not maintain an action to recover it at law. The contention as to the form of action proceeded mainly upon the authority of a note of Messrs. Hargrave and Butler in their edition of *Coke upon Littleton* (Co. Litt. 117 a. note 161), in which the learned editors, after discussing the question as to the right of a master to the earnings of his apprentice or servant, proceed to say: "Some of the cases go so far as to give the master a right to the wages or earnings, whether the service (i. e., to a third person) is performed by the apprentice with or without the master's licence, and even though the earnings accrue in a trade or service different from that to which the apprentice is bound." They add, "Independently, too, of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service if he knew of the first retainer, or against the servant himself for breach of his contract, such a case rather importing the master's right to any damages for injury sustained by the consequences of the second retainer than a right to the profits from it." With great respect, however, to the learned editors, their doubt as to the right of the master, under the circumstances supposed, to the profits accruing from the service, is at variance with the cases cited by them in the note. The case which seems to have suggested their observation as to the form of action is a case of *Treswell* v. *Middleton* (2), in which, on error from the Common Pleas, it was held that a declaration for work and labour done by a servant must state it to have been done by the master or on his account. But this evidently proceeds on the ground merely that there is in such case no privity of contract between the master and the person employing his servant; and the case by no means justifies any doubt as to the right of the master, as between himself and his servant, earnings of the latter, and certainly authority that if the earnings have received by the servant the master not sue for them as money receiv his use. The remaining cases cited note directly support the conclusion whenever the earnings acquired i service of a third person have reache hands either of the servant or the m they must be regarded as belonging master. In the first of these, *Bar Dennis* (3), the widow of a wate who, by the usage of Waterman's had taken an apprentice, had ha apprentice impressed, taken from he put on board a Queen's ship, whe earned two tickets, which came t hands of the defendant; and it wa that the widow was entitled to mai trover against the defendant, on ground that the possession of the ap tice was that of the master, and whatever he earns shall go to his m In the next, an anonymous case (was said that trover lies by the n for the ticket or other writing ent his apprentice to money earned b during his apprenticeship, but in th ticular case inasmuch as the actio against the executor of the apprenti money earned by him during the ap ticeship, and it never was in the ap tice's possession, it was held tha action was not maintainable; but i said that after the executor receiv money the master may have *assump* so much money received to his use. are these principles confined to th of service by apprentices. They to all cases of employment as serva agents, the profits acquired by the se or agent in connection with his serv agency belonging to the master or cipal. In *Carter* v. *Boehm* (5), Kenyon ruled at Nisi Prius that in made by an agent by the use of his cipal's money belonged to the latte might be recovered by him in an for money had and received. In th

(2) Cro. Jac. 653.

(3) 6 Mod. 70.

(4) 12 Mod. 415.

(5) 2 Esp. 702.

of *Thompson* v. *Havelock* (6), the plaintiff, the captain of a ship, sought to recover from the shipowner money which, in letting the ship to Government for six months, the captain had stipulated with the Government officer, by whom the ship was taken up, should be paid to him for his own benefit, in addition to the freight, and which had come into the hands of the shipowner; and it was held that the plaintiff was not entitled to recover; in other words, that as between him and his employer, the shipowner, the money belonged to the latter. Lord Ellenborough in his summing-up is reported to have said, "Is it contended that a servant, who has engaged to devote the whole of his time and attention to my concerns, may hire out his services or a part of them to another? It would have been a different thing if the owner had been suing for this money, but I am clearly of opinion that, at all events, the present plaintiff has no right to it." He adds, "I don't know how far it might go if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty." This ruling was acquiesced in, and was subsequently followed by Lord Ellenborough, in the case of *Diplock* v. *Blackburn* (7), in which the master of a ship in a foreign port claimed to retain for his own benefit the premium received by him upon a bill drawn upon England on account of the ship, on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use. But Lord Ellenborough held that the money belonged to the owner and not to the captain, and stigmatised the usage set up as a usage of fraud and plunder. "What pretence," he says, "can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty." The cases in equity are to the same effect, viz., that the profits directly or indirectly made in the course of, or in connection with his employment by a servant or agent, without the sanction of the master or principal, belong absolutely to the master or principal—*Massey* v. *Davies* (8). It may be sufficient to refer particularly to the two most recent cases on the subject. In *Turnbull* v. *Garden* (9), an army agent and contractor was employed by the plaintiff to provide for her son (who was about to proceed to India) a reasonable outfit; and accordingly the articles composing such outfit were paid for through the defendant, who debited the plaintiff in account with the full amount of the service prices charged by the tradesmen supplying the outfit, though discount had been allowed him in each instance. This was done by him on the ground, as alleged, that it was the universal practice, as between tradesmen and army agents; but the plaintiff had no actual knowledge of such practice. An action was afterwards commenced by the defendant in the Mayor's Court against the plaintiff to recover the balance of his account, and certain moneys deposited by her in the London and Westminster Bank in the City were attached to answer the claim, and a bill was thereupon filed by the plaintiff praying a general account, and an injunction to restrain the further prosecution of the action. The Court directed the account to be rectified by disallowing, as against the plaintiff, the full amount of the discounts retained by the defendant; Lord Justice James (by whom the judgment of the Court was delivered) observing—"What appears in this case shews the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting." In the subsequent case of *Kimber* v. *Barber* (10), the plaintiff being desirous of procuring shares in a company, the defendant had represented to him that he could procure some at 3*l.* per share. Plaintiff agreed to purchase at that price, and certain shares were thereupon transferred,

(6) 1 Campb. 527.
(7) 3 Campb. 43.
(8) 2 Ves. jun. 317.
(9) 38 Law J. Rep. (N.S.) Chanc. 331.
(10) Law Rep. 8 Chanc. App. 56.

part to the plaintiff and part to his nominee, and were paid for at 3*l.* per share. The plaintiff subsequently discovered that the defendant was himself the owner of the shares, and had lately purchased them for 2*l.* per share. It was held, on appeal, reversing the decision of the Master of the Rolls, that the defendant was an agent for the plaintiff, and he was ordered to pay back the difference in the price of the shares. The law on the subject is well and compendiously stated in *Story on Agency*, in the following terms—"Indeed it may be laid down, as a general principle, that in all cases where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation, are to be for the benefit of his employer"—(*Story on Agency*, sec. 211, and see Id., sec. 207. In *Paley on Principal and Agent*, p. 51, it is said, "And not only interest, but every other sort of profit or advantage clandestinely derived by an agent from dealing or speculating with his principal's effects is the property of the latter, and must be accounted for. So that if an agent, who has purchased goods according to order, sell them again to advantage, with the view of appropriating the gain to himself, although he should have answered the loss, if any, yet his employer is entitled to the profit." In our judgment, the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compellable to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer. This was precisely the case in regard to the money in question acquired by the defendant in the course of his employment without the knowledge or sanction of the plaintiff. It was actually in his hands subject to an immediate duty to hand it over to the employer. Under such circumstances the money, being the property of the em only be regarded as held for the agent, and must conseque coverable in an action for mon received. We are clearly of opi is so recoverable under the com and that the rule, therefore discharged.

Rule di

Attorneys—Crosly & Burn, for plai
Crossman & Crossman, for def

1874. June 3. } EASTWOOD (*appe*
MILLAR (*respon*

Gaming—Betting Houses Ac Vict. c. 119), *s.* 3—*Pigeon Sho*

The Act 16 *&* 17 *Vict. c.* 11 *poses a penalty on the owner or any house, office, room, or pl kept, or used for the purposes of*

Police constables entered, at past two in the afternoon, a place called Borough Park Gr pied by the appellant. Peopl mitted to this ground after pa and receiving tickets. Among t inside the grounds were two makers, with books in their hands men were shouting out "Twenty match!" The match about t was a pigeon-shooting match for Two men came up to one of the b and one of them gave to one with the book a sovereign. A was getting some change back th said, "Hold on; that will do us." The book maker took a his book, gave it to one of the said, "That's on Wooler" (one ties to the match). Soon after was going to shoot at a pigeon other man shouted out, "Fou kills!" This bet was taken, a said, "Three to one he kills!" lant could hear what the book other persons said:—

Held, *that there was evidence the ground in question was within the meaning of the Act that although used for pigeon-*

was also used for the purposes of betting, and that the magistrates were therefore justified in convicting the appellant.

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 139.]

1874. April 29. } THE QUEEN *v.* THE GUARDIANS OF STEPNEY UNION.

Criminal Lunatic—Order of Maintenance—Power to make the Order—Grounds of Adjudication—9 Geo. 4. c. 40. s. 54; 3 & 4 Vict. c. 54. ss. 1, 2, 3, 4, 5, 7—Effect of Repealing Clause in 8 & 9 Vict. c. 126. s. 1—Limitation Clause, 22 & 23 Vict. c. 49. s. 1.

The Act 39 & 40 Geo. 3. c. 94. s. 1, provides for the detention of persons charged with treason, murder or felony, and acquitted on the ground of insanity at the time of the commission of the offence. By 9 Geo. 4. c. 40. s. 54, where any person is in custody as an insane person by order of any Court, or by his Majesty's order subsequent thereto, "it shall be lawful for two justices of the county where such person is in custody to enquire into and ascertain the place of the last legal settlement, and the circumstances of such person; and, if it shall not appear that he is possessed of sufficient property which can be applied to his maintenance, it shall be lawful for such two justices to make an order upon such parish of settlement to pay such weekly sum for his maintenance in such place of custody as the Secretary of State shall from time to time direct;" with a proviso that the overseers of the parish of adjudged settlement may appeal against such order to the Quarter Sessions, "in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace, who shall be respondent in such appeal." By 3 & 4 Vict. c. 54. s. 1, a criminal becoming insane during imprisonment may be detained. By section 2, justices of the peace may enquire into the settlement of such prisoner and make orders on the parish where he is settled for his maintenance; and by section 3, persons charged with misdemeanours and acquitted on the ground of insanity may be kept in custody. By section 5, an appeal to quarter sessions is given to the overseers of the parish or guardians against the decision of the justices as to the settlement with the like restrictions, &c., as in 9 Geo. 4. c. 40. s. 54. By section 7, so much of 9 Geo. 4. c. 40. s. 54, as relates to the direction to the Secretary of State is repealed, and power is given to two justices to "direct the overseers of the parish in which they shall adjudge such insane person to be settled, or the guardians, &c., to pay such weekly sum for the maintenance of such person as they or any such two justices shall direct." By 8 & 9 Vict. c. 126. s. 1, the Act 9 Geo. 4. c. 40. is entirely repealed.

A woman indicted for murder was acquitted on the ground of insanity, and ordered to be detained in custody during Her Majesty's pleasure. While she was in Newgate an order of justices was made, adjudging her settlement, and ordering the guardians of the union to pay 14s. a week while she remained in the Criminal Lunatic Asylum. The order was served on the guardians, but it was not accompanied by the grounds of the order or particulars of the settlement. On mandamus to the guardians of the union to pay the arrears of the 14s. weekly, the facts above mentioned were stated on the record, and with respect to 25l. part of the amount claimed, the defendants relied on the limitation clause in 22 & 23 Vict. c. 49. s. 1, which enacts that, "with respect to any debt, claim, or demand which may be lawfully incurred, or become due, from the guardians of any union or parish, such debt, claim, or demand shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards:"—

Held, *first, that, notwithstanding the repeal of 9 Geo. 4. c. 40, there was, under 3 & 4 Vict. c. 54, s. 7, power to make the order. Secondly, that it was not necessary to serve the grounds of adjudication with the order. Thirdly, with regard to the 25l., that the limitation clause applied, and the claim was barred.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 145.]

1874.
May 28, 29.
June 2.
July 6.

DUDGEON AND OTHERS *v.* PEMBROKE.

Marine Insurance—Time Policy—Representation as to Seaworthiness—Loss by Perils of the Sea—Ship without Passengers' Certificate—Ignorance of Shipowner.

In an action upon a time policy upon a steamer, "The Frances," it appeared that the vessel, which had not been classed in this country, was insured while lying at Millwall, and that at the time of effecting the insurance, the broker stated that she had been thoroughly repaired, and was going into the Gottenburgh trade. The Frances took out a cargo to Gottenburg, and on her return encountered a heavy rolling sea, and after beating about for some days became waterlogged, went ashore, and was lost. There was strong evidence that she did not behave at sea in the manner that a good vessel would, and that owing to a screw tunnel having being unrepaired and left in a decayed state the pumps became choked with oats which were on board:—Held, *first, that, inasmuch as it was a question for the jury whether the broker's representation involved a statement that the Frances had been actually made seaworthy, or only that her owners had bona fide done all that competent advisers thought necessary to put her in thorough repair, and reasonably believed that their outlay had been sufficient to make her fit for the service; the jury were justified in finding that the representation was substantially correct; secondly, that there being in a time policy no warranty of seaworthiness, and the jury having negatived any knowledge on the part of the assured that the ship was unseaworthy, there was nothing to shew that the loss was occasioned by a wrongful act on their part. Thirdly, that there was no sufficient evidence that the loss was occasioned by wear and tear, aggravated by the original bad state of the vessel, instead of by perils of the sea.*

In an action on a marine policy a plea that the ship was sent by the plaintiffs, the owners, with passengers on board on the voyage on which she was lost, without the plaintiffs having done what was necessary to entitle them to receive, or their having received a passenger's certificate from the Board of Trade, all which the p well knew, is good.

Declaration against an underwri time policy for twelve months, fr 24th of January, 1872, on a ste called the *Frances*, on ship val 8,000*l.*, machinery at 4,000*l.*; c for a total loss.

The issues and facts of this case a stated in the considered judgmen Court, and it will only be necess to state the seventh plea, which w the ship was before and at the tim alleged loss a passenger steamer, wi 318th section of the Merchant S Act, 1854 (1), and that after the of the policy of insurance, and be alleged loss, the ship was sent plaintiffs, being the owners of t with passengers on board, on a voyage, and proceeded to sea o voyage, being the voyage on wh ship, machinery and premises w as alleged, without the owners ship having transmitted to the B Trade the declarations required behalf by the provisions of the and without the owners or master ship having received from suc such a certificate as is provided fo provisions of the statute; and t

(1) By the Merchant Shipping Act, 18 18 Vict. c. 104), sect. 318, "It shall not for any passenger steamer to proceed t upon any voyage or excursion with any p on board unless the owner thereof has tra to the Board of Trade the declaration before required, nor unless the owner thereof has received from such board suc ficate as hereinbefore provided for, such being a certificate applicable to the voya cursion on which such ship is about to pro

By sect. 319, "If the owner or maste son in charge of any passenger steamer, on board thereof, or on or in any part t if such ship has on board thereof, or on part thereof, any number of passenger having regard to the time, occasion, and stances of the case, is greater than the n passengers allowed by the certificate, t or master shall incur a penalty not excee and also an additional penalty not exce for every passenger over and above th allowed by the certificate, or, if the fare the passengers on board exceeds 5s., not double the amount of the fares of all the p who are over and above the number so a aforesaid, such fares to be estimated at th rate of fare payable by any passenger on

plaintiffs, as the owners of the ship, had not nor had the master of the ship ever received any such certificate before the time of the alleged loss, up to which time the passengers had from the commencement of the voyage remained and continued on board the ship, all which several premises the plaintiffs always well knew; and that by reason of the premises the voyage became and was illegal, and that the plaintiffs caused the policy to be made for the express purpose of covering the ship, machinery and premises, and indemnifying themselves against the loss thereof, on the illegal voyage.

Demurrer and joinder in demurrer.

The findings of the jury in the issues are stated in the judgment.

A rule *nisi* for a new trial, generally, had been obtained on the defendant's behalf.

Milward, *Watkin Williams* and *A. L. Smith* (on May 28, 29, and June 2), for the plaintiffs, shewed cause, and cited *Gibson* v. *Small* (2), *Russell* v. *Thornton* (3), *Ionides* v. *The Universal Marine Association* (4), *Livie* v. *Janson* (5), *Dixon* v. *Sadler* (6), *Redmond* v. *Smith* (7), *Sewell* v. *The Royal Exchange Assurance Company* (8), *Wilson* v. *Rankin* (9), and *Cunard* v. *Hyde* (10).

Sir J. Karslake, *Butt* and *Cohen*, for the defendant, argued in support of the rule, and cited *Phillips on Insurance*, vol. 1, par. 1132, *Hagedorn* v. *Whitmore* (11), *Bell* v. *Carstairs* (12), *Thompson* v. *Hopper* (13), *Fawcus* v. *Sarsfield* (14), a short hand-writer's note of *The Merchants Trading Company* v. *The Universal Marine Company* (not reported), and *Farmer* v. *Legg* (15).

The Court (16) gave judgment on the demurrer, holding on the authority of *Cunard* v. *Hyde* (10), and *Duer on Insurance*, sect. iii. sub-sect. 50, that the plea on the face of it was good, and an answer to the action. The averment of knowledge on the part of the plaintiff was not however proved at the trial. Upon the other points

Cur. adv. vult.

The judgment of the Court was (on July 6) delivered, as follows, by

BLACKBURN, J.—This was an action against an underwriter on a time policy for twelve months from the 24th of January, 1872, on the *Frances* steamer, on ship valued at 8,000*l.*, machinery at 4,000*l.*, claiming for a total loss. The material pleas were the third, that the ship was not lost by the perils insured against; the fourth, misrepresentation; the fifth, concealment; the sixth, that after the making of the policy, the plaintiffs well knowing that the ship was unseaworthy, wrongfully, and without any justifiable cause, sent her to sea from the port of London on the voyage on which she was lost; and the ship remained, as the plaintiffs always well knew, in such unseaworthy condition from the time she left the port aforesaid until she was lost, and the ship was lost by reason of such unseaworthiness and not otherwise.

There was a seventh plea of an alleged illegality, the questions on which we disposed of at the time this rule was argued, and which need not further be noticed. Issue was taken on all the pleas.

The trial came on before me and a special jury at the Guildhall, where a very great deal of evidence was produced on both sides, the trial occupying seven days. The outline of the case, as far as is necessary to make the points of law intelligible, was as follows:—The ship at the time of the insurance called the *Frances* was an iron steamship. She was originally built at Amsterdam in 1858, and launched in 1859, for Spanish owners. She was not classed in this country, but

(2) 4 H.L. Cas. 353.
(3) 4 Hurl. & N. 778; s.c. 29 Law J. Rep. (N.S.) Exch. 9; Ex. Ch. 6 Hurl. & N. 140; s.c. 30 Law J. Rep. (N.S.) Exch. 69.
(4) 14 Com. B. Rep. N.S. 259; s.c. 32 Law J. Rep. (N.S.) C.P. 170.
(5) 12 East 648.
(6) 5 Mee. & W. 405; s. c. 9 Law J. Rep. (N.S.) Exch. 48.
(7) 7 Man. & G. 457; s. c. 13 Law J. Rep. (N.S.) C.P. 159.
(8) 4 Taunt. 856.
(9) 6 B. & S. 208; s. c. 34 Law J. Rep. (N.S.) Q.B. 87.
(10) E. B. & E. 670; s.c. 27 Law J. Rep. (N.S.) Q.B. 408.
(11) 1 Stark. 157.
(12) 14 East 374.
(13) 6 E. & B. 172; s.c. 25 Law J. Rep. (N.S.) Q.B. 246; E. B. & E. 1038; s. c. 27 Law J. Rep. (N.S.) Q.B. 441.
(14) 6 E. & B. 192; s.c. 25 Law J. Rep. (N.S.) Q.B. 249.
(15) 7 Term Rep. 186.
(16) Blackburn, J.; and Quain, J.

there was evidence from which the jury might fairly conclude she was then properly built of good iron. There was no direct evidence as to how the Spanish owners employed her. The defendant gave evidence that in 1868 the ship, which was then called the *Paris*, was lying at anchor in the harbour at Cadiz, and lay unemployed there for about eighteen months. In September, 1871, the *Paris* was lying at Birkenhead afloat, and offered for sale. Two witnesses were called by the defendant, who inspected her with a view to purchasing her. Neither made a regular survey, but both came to the conclusion that she was very dirty and had been much neglected, and was probably corroded, and they did not purchase. In that month of September, 1871, the plaintiffs, who are iron shipbuilders at Millwall, contracted with the Spanish owners to build them a new ship and to take the *Paris*, then lying at Birkenhead, in part payment, at about 4,000*l*. She was then brought round to Millwall from Birkenhead with her original boilers on board. They were not fit for use, and she was consequently towed round. The senior member of the plaintiffs' firm gave evidence that the original boilers being still on board, led him to conclude that she could not have been much used, and that led him to think well of her. The boilers were taken out, and the vessel was offered for sale to the agent of a firm at Hull, who after examining her afloat, but not making a regular survey, advised his principals not to buy her. He was called as one of the witnesses for the defendant. Messrs. Dudgeon were owners of two steamers running between London and Gottenburgh for goods and also carrying passengers. They were called the *Mary*, and the *Louisa and Fanny*. One of them, the *Louisa and Fanny*, met with a collision, and Messrs. Dudgeon resolved to repair the *Paris*, and run her on this line, and to change her name to the *Frances*, in compliment to the daughter of one of the partners. She was put in the dry dock and scraped perfectly clean. Messrs. Dudgeon, who were called as witnesses on their own behalf, swore distinctly that they believed her to be quite capable of being made fit for the service; that orders were given to Mr. Harrington, a marine surveyor and engineer, to see tha was properly repaired; and that people at Millwall were instructed t cute whatever repairs were require that there was no stint whatever as amount of the repairs, and that they and still believed she was made seaw Mr. Harrington confirmed this; and positive testimony that everything done that was required, and that opinion she was made a thoroughly strong ship. The old boilers being out, the boiler space was all open to but the ceiling was only partly rem and the cement was not removed so that the whole of the inside wa visible. There was contradictory evi amongst the skilled witnesses whether the removal of the ceilin the cement was necessary or not. Harrington swore positively that not at all required. There was s evidence on the part of the plai shipwrights and dock people that thing was done that was requisit was difficult to dissect the accounts to say how much was due to the p in of new boilers and how much repairs of the hull, and the work done by the plaintiffs' own workm was difficult to ascertain the money of what was done, but there was evi that a great deal had been done and expense incurred. It appeared, hov clearly, as a fact, that the screw tunn left untouched and was in a decayed The surveyor of the Board of Trad veyed the outside of the hull, but, it was said to want of time, she w surveyed inside, and consequently d obtain a passengers' certificate, and mately sailed for Gottenburgh on the February, 1872, without one. In the time the *Frances* had been insured. was a little, but very little, discre between the witnesses as to wha said at the time of making the insu The clerk to the broker said that th then of what he said to the defen representative was that the *Frances* steamer which Dudgeon had taken change; that he had thoroughly re her—was going to put her into hi tenburgh trade similar to the *Louis Fanny* and the *Mary*. On cross-ex ation he stated that he did say sh

"thoroughly repaired," but did not, he thought, say "practically rebuilt," and that if he said she was "new," he must have said it in the sense "new to that trade." The underwriter's representative said that several ships were laid before him for time policies on steamships, that he underwrote without remark those which he had previously known, and amongst others the *Louisa and Fanny*, which he knew as a first-class steamer engaged in the Gottenburgh trade, but that he did not know whether those steamers carried passengers or not. When he came to the *Frances* he asked what she was, and as nearly as he could recollect the answer was, "She is a new Gottenburgh steamer like the *Louisa and Fanny*. I do not mean to say she is a new vessel. She is an old boat bought by Dudgeon, who has spent a lot of money on her, and she has been thoroughly repaired and virtually rebuilt." On the 3rd of February, 1872, as already stated, the *Frances* sailed for Gottenburgh with some machinery on deck, but no other cargo, so that she was somewhat crank. As soon as she got out to sea she began to make water. There was no weather to justify this; and though there was some discrepancy between the witnesses as to the quantity of water she made, it was certainly more than could be accounted for by any weather she met with. She arrived safe at Gottenburgh. When she got into smooth water she ceased to leak, and though she was examined, the cause of her making water could not be discovered. She took on board a cargo of oats and iron, and a deck cargo of wood, and sailed on the 11th of February at 7 a.m. for London. All went well till the morning of the 12th of February when she had got out of Vigo Sound into the open sea. Then it began to blow. There was contradictory evidence as to the weather; but the evidence most favourable for the defendant admitted that it blew, that there was a heavy rolling sea, and that it was necessary to put a sail over the stoke-hole to prevent the sea from getting in. The evidence most favourable for the plaintiffs made the wind a gale, but not such as would make a good ship behave as the *Frances* did. All agreed that she began to labour and to make water so that the fires were put out. Part of the deck cargo was thrown overboard and the fires relighted with the rest. After twelve hours of pumping the pumps got choked with the oats. There was evidence that if the screw tunnel had been in proper order this would not have happened. All hands were engaged in baling to save the ship. On the night of the 14th of February, having ascertained whereabouts they were by the Spurm Light, they endeavoured to get to Hull. The ship being waterlogged did not readily answer her helm. Partly from this and partly from the thickness of the weather the ship went ashore on the morning of the 15th of February, about 5 a.m., having been in this state of distress since the morning of the 12th of February. One of the boats was swamped, but the crew were all saved by a fishing smack. Part of the cargo was afterwards saved, but the vessel could not be got off, and broke in two, and finally, after some months, went completely to pieces. There was very contradictory evidence from surveyors who had seen the wreck as to the state and condition of the plates, &c.

When the evidence was completed I stated to the counsel that I proposed to ask the jury, on the merits, seven questions, which I reduced to writing. These were, First, was the representation made by the broker at the time of the making of the insurance as to the condition of the vessel, and as to the extent of the examination, substantially correct? Secondly, did that representation involve in it a statement that the vessel was to carry passengers, and, consequently, had been surveyed by the Board of Trade? Thirdly, was there a concealment from the underwriter of anything materially affecting the insurance which the plaintiffs knew, and the underwriter did not? Fourthly, was the fact that the ship had not been surveyed and certified for passengers, under the circumstances, one which was material? Fifthly, was the vessel seaworthy when she started? if not, Sixthly, was this known to the plaintiffs? Seventhly, was that unseaworthiness the cause of the loss?

Neither side suggested any other question, and the counsel addressed the jury.

In summing up, I explained to the jury that though in a time policy there is

no implied warranty of seaworthiness, yet that any representation made to an underwriter is treated as the basis of the contract; and if (whether innocently or knowingly) there is a substantial difference between the representation and the fact, making the risk materially greater than represented, the policy is not binding; and that a concealment of something known to the assured and not known to the underwriter, which would materially make the risk greater, has the same effect. I pointed out to them that there were two questions of fact for them as to the representation; first, what was the effect of the representation; secondly, was it substantially true? I assumed, if I did not in express terms say, that the loss, on this evidence, was a loss by the perils of the sea, but that the question whether the assured could recover for such a loss might depend upon the answers to the fifth, sixth and seventh questions; telling them that in asking the seventh question I did not mean to ask them whether it was the sole or immediate cause of the loss, but whether the making water was occasioned by unseaworthiness, and the loss arose from her being waterlogged in consequence of that unseaworthiness, so that it would not have happened but for the unseaworthiness.

The jury, after being out some hours, could not agree on their answers to the first, fifth and seventh questions. They were desired to endeavour to agree. After I had left the Court they agreed on their answer to the first question, but were finally discharged without agreeing on the fifth and seventh. Their written answers finally taken were, to the first question, Yes; to the second, third and fourth, No; to the fifth, The jury cannot agree; to the sixth, No; to the seventh, The jury cannot agree. On these findings I directed the verdict to be entered for the plaintiffs on the third and sixth issues.

In the ensuing term a rule for a new trial was obtained by Sir John Karslake, generally. It was agreed that if the plaintiffs were entitled to retain the verdict, it should be ascertained by an average adjuster what deduction, if any, should be made for salvage. Cause was shewn during the last term before the Lord Chief Justice, my brother Quain, and myself, but my Lord h been absent from Court, on accou indisposition, during a considerable of the argument, he takes no part i judgment, which is that of my br Quain and myself alone.

We think that the defendant is en to treat the case as if the jury had ans the two questions on which they unable to agree, in his favour; and if, on that supposition, the plaintiffs not be entitled to retain their verdict, there should be a new trial to asc the facts. The points made on the ment were—first, that the verdict the representation was substantially rect was not consistent with the a finding, that the jury could not agr to whether the ship was in fact seawo or (as we think that the defenda entitled to treat the case for the pu of the argument) a finding that sh not seaworthy, or at least that this ing was against the weight of the evid No complaint was made of the directi point of law as to this question. We t however, that it was a question for the what the effect of the representation and that they might properly think i not involve a representation that vessel was actually made seaworthy only that the plaintiffs had *bona fide* without stint or scamping, all that petent advisers thought necessary t the vessel in thorough repair, and re ably believed that their outlay had sufficient to make her fit for the se If the jury took this view of the r sentation we think they might re ably find on this evidence that it was stantially true, even though the v owing to some oversight or neglect o part of those superintending the re was not in fact made seaworthy. other points made were that if the v was not seaworthy, and the loss caused by the unseaworthiness, the v was not lost by the perils insured ag and that the verdict on the third should not therefore have been en for the plaintiffs. And that though jury found that the plaintiffs did not k of the unseaworthiness, that did not prove the substance of the sixth i We think, however, that even if the had expressly found that the vessel

not seaworthy, and that the loss was occasioned by that unseaworthiness it would have afforded no answer to the action, and that the substance of the sixth plea would not have been proved. The judgment of this Court on the demurrers in *Thompson* v. *Hopper* (13) has never been reversed, and is binding on us. In the case of *Thompson* v. *Hopper* (13), on appeal, there was much discussion and difference of opinion as to what was the proper guide to be given to a jury on the question whether the unseaworthiness caused the loss. Had the finding of the jury been in favour of the defendant on the sixth question, I intended to endeavour to raise the precise points for a Court of Appeal. As it is, that point does not arise. *Thompson* v. *Hopper* (13), on demurrer, decides that there is, in such a case as the present, no warranty of seaworthiness at all; and that even the assured knowingly send a vessel to sea in an unseaworthy state, it affords an answer to an action on a time policy for a loss not shewn to have been produced by that unseaworthiness. But in the same case it was decided that if the assured sent her out in a state not fit to go to sea, knowing it, and the loss was produced by that unseaworthiness, it does afford an answer. Lord Campbell says, at p. 191, "But it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek an indemnity for a loss produced by their own wrongful act. The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock. . . . According to the statement in this plea, the plaintiffs efficiently caused the loss by their wrongful act." This judgment proceeds on the same principle as that of *Bell* v. *Carstairs* (12), where it was held that a ship having been captured and condemned, for want of proper documents, the shipowners could not recover for the loss, though the owner of goods, if not one of the shipowners, might recover on a policy on goods. The reason of the distinction is pointed out by Lord Ellenborough: "The owner of goods was not liable to suffer in respect of his insurance on account of any defect in the documents belonging to the ship, with the procurement or existence of which he has no concern. . . . In the present case, on the ground that the three subjects of insurance were condemned on account of the common default of all the proprietors in their joint character of shipowners . . . we are of opinion that the assured cannot claim from the underwriters an indemnity for a loss thus occasioned by themselves." At the time when *Bell* v. *Carstairs* (12) was decided there were no special pleas, everything being open under the general issue; but it is clear, we think, that the effect of this judgment would have been (after the new rules) to support a plea in confession and avoidance to this effect: "True it is that the ship was lost by a peril insured against, to wit, capture, but the loss was occasioned by the fault of the plaintiffs themselves, and therefore the underwriters are not bound to indemnify them against it." We are bound by authority to hold that there is no warranty of seaworthiness in this policy, and the jury have negatived knowledge on the part of the plaintiffs. We think, therefore, that we cannot hold that the remaining averments in the sixth plea, even if proved, would shew that the loss was occasioned by a wrongful act on the part of the plaintiff, and consequently that the substance of the plea was not proved.

But a further question is raised on the third issue. It is said, and we agree, that an underwriter is not bound to indemnify the assured against every loss that occurs during the period insured, but only against those occasioned by perils insured against. And if the damage or loss arises from no unusual cause, though the winds and the waves may be concerned in it, the loss is wear and tear; for which the underwriter is not responsible. If there has been an unusual cause, it is perils of the sea, for which he is responsible—*Magnus* v. *Buttemer* (17); *Paterson* v. *Harris* (18); and *The Merchants' Trading Company* v. *The Universal Marine Company*, not reported.

(17) 11 Com. B. Rep. 876; s. c. 21 Law J. Rep. (N.S.) C.P. 119.

(18) 1 B. & S. 336; s. c. 30 Law J. Rep. (N.S.) Q.B. 354.

But in all cases the law regards the proximate cause of the loss. And it would be difficult to find a better example of what Lord Bacon calls the infinities of the "Causes of causes, and their impulsion one on the other" than is afforded by this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather, and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was that when she laboured in the rolling sea she made water, and the cause of her making water was that when she left London she was not in so strong and staunch a state as she ought to have been. And this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent anyone who knowingly sent her out in that state from recovering indemnity for this loss.

Two cases were on the argument relied on, viz., *Fawcus* v. *Sarsfield* (14) and *The Merchants' Trading Company* v. *The Universal Marine Company* (not reported, but of the judgment in which we have been furnished with a copy). We think neither case conflicts with our decision. In *Fawcus* v. *Sarsfield* (14) the plaintiff claimed on a time policy on ship for the loss sustained by putting into a port of distress, and there unloading and repairing the vessel, which had become leaky, as the declaration alleged, by the perils of the seas. The plea which the arbitrator found to be true in fact was that the ship was unseaworthy and met with no extraordinary peril, and that the leakiness arose "by and from the said bad and defective condition of the vessel, and the exposure of the vessel to the usual and ordinary force and violence of the wind and waves on that voyage." This seems to be an allegation that the loss was from wear and tear, aggravated by the original bad state of the vessel, and if so the plea was no doubt good. I
Merchants' Trading Company v. *Th*
versal Marine Company (not reporte
appears that the action was on a v
policy on the ship *Golden Fleece* fro
Mersey to Cardiff, whilst there, and t
to Alexandria. On the trial before m
ther Lush it was proved that the (
Fleece, being to all appearance seaw
left the Mersey with a few tons of c
board, and therefore substantially i
last, and arrived safe at Cardiff,
she went into the docks, and there l
a full cargo consisting of 2,000 t
coals. She left the docks and anc
in the Penarth Roads, outside Car
the morning, and on the same
whilst riding at anchor, suddenly
with water and foundered, there
neither wind nor sea, nor anything
count for the going down. The ev
of those on board when she sunk
to have been such as to make it pr
that one of the coal ports had give
not having been properly secured
this my brother Lush appears to
correctly explained to the jury tl
when she started on the voyage fr
Mersey, she was not seaworthy, it
defence; and he further told the ju
the underwriters were answerab
casualties arising from the violent
of the elements as distinguished fr
silent, natural, gradual action of tl
ments upon the vessel itself, which
properly belonged to wear and tear
what the underwriters insured
were casualties that might happe
not consequences which must h
He told the jury that, under the c
stances proved in the case before
the one question which would solv
was this: Was the leak from whi
vessel foundered attributable to
and violence from without, or from
ness from within? For, that if
not attributable to perils of the sea
is, as he explained it, the violent ac
the elements from without, or an
casualty involved in perils of the se
jury could come to no other con
than that it was due to an inher
firmity of the ship itself. On this
tion the jury found for the defe
The verdict was entered for the defe

both on the plea denying seaworthiness and on that denying that the loss was by perils of the seas, and the Court of Common Pleas refused a rule for a new trial, holding the direction unexceptionable. And we quite agree that the direction was unexceptionable; for if the vessel was so weak as to give way from the mere pressure of the water on her port, without anything more, the proximate cause of the loss was that weakness. But it scarcely needs pointing out how very different the facts proved, as regards the loss of the *Golden Fleece*, were from those proved in the present case as to the loss of the *Frances*, which, however unseaworthy she may have originally been when leaving London, had crossed the North Sea twice, and was finally lost because she went ashore, after contending with the winds and waves during some days. We have, therefore, come to the conclusion that the rule should be discharged. No point was reserved at the trial, but we give the defendant leave to appeal on all questions arising on the findings of the jury and the direction as to the first six pleas. We give no leave to appeal on the issue on the seventh plea as to the supposed illegality.

Rule discharged.

Attorneys—Cattarns, Jehu & Cattarns, for plaintiffs; Hollams, Son & Coward, for defendant.

1874. June 3. } PICKERING (*appellant*) *v.* MARSH (*respondent*).

Animals—The Dogs Act, 1871 (34 & 35 Vict. c. 56), *s.* 2—*Power to order Dangerous Dog to be Destroyed.*

Under the Dogs Act, 1871 (34 & 35 Vict. c. 56), *s.* 2, *a Court of summary jurisdiction may order a dangerous dog to be destroyed, without giving the owner the option of keeping it under proper control.*

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 143.]

1874. May 9, 11, 27. } IONIDES *v.* PENDER.

Marine Insurance—Concealment of Material Fact—Over-valuation of Goods—Speculative Risk.

Where the insurer, in effecting a marine policy, does not disclose to the underwriter the fact that the goods insured are largely over-valued, it is a question for the jury whether the concealment is material, having regard to the reasonable practice of underwriters.

In an action upon three voyage policies upon a ship it appeared that the first was on commissions on goods valued at 14,700*l.*, *the commissions being valued at* 1,500*l.*; *the second on profits on charter valued at* 280*l.*; *the third on spirits valued at* 2,800*l.* *The price of goods put on board the vessel, including cost, charges and insurance amounted in the whole to something less than* 8,000*l.*, *the various insurances on the goods including profits amounted to* 14,000*l.*, *and in addition to these there was the insurance on commissions of* 1,500*l.*, *and a further insurance of* 1,000*l.* *on safe arrival. With regard to the spirits, the cost, charges and insurance amounted to* 973*l.*, *while for insurance they were valued at* 2,800*l.* *Evidence having been given that it was material to underwriters to know the extent of the over-valuation when it was to such an extent as appeared in this case, as the risk was then considered a speculative risk, the jury found that the valuations were excessive, that it was material to the underwriters to know that they were excessive, and that the fact that they were excessive was concealed from the underwriters, but that there was no sufficient evidence of fraud:*—Held, *that it was the duty of the insurer to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, and that therefore the jury were justified in finding that the over-valuation was a material fact which ought to have been and was not disclosed, and that upon this finding the underwriters were entitled to the verdict.*

This was an action on three voyage policies on the ship *Da Capo*. The facts, pleadings and arguments are so fully

referred to in the judgment of the Court, that it is quite unnecessary to repeat them.

Sir H. James, *Watkin Williams* and *Lanyon*, for the defendant, cited *Carter* v. *Boehm* (1), *Rickards* v. *Murdock* (2), *The New York Bowery Fire Insurance Company* v. *The New York Fire Insurance Company* (3), *Arnould on Marine Insurance*, vol 1, 4th edit. 511, *Phillips on Insurance*, sect. 531, 537, *Duer on Marine Insurance*, vol. 2, p. 388.

Butt and *F. M. White* (*Sir J. Karslake* with them), in support of the rule, cited *Duer on Insurance*, vol. 2, p. 518 (note), *Haywood* v. *Rodgers* (4), and *Beckwith* v. *Sydebotham* (5).

Cur. adv. vult.

The judgment of the Court (6) was (on May 27) delivered, as follows, by

BLACKBURN, J.—This was an action on three policies of insurance by the ship *Da Capo*, on a voyage to Wladiwostock, all dated on the 1st of May, 1871. The first was on commissions on goods valued at 14,700*l.*, the commissions being valued at 1,500*l.* The second was on profits on charter, valued at 280*l.* The third had originally been on goods, but by an endorsement on the policy it had become on 222 casks of spirits, valued at 2,800*l.* The material pleas were that the ship was not lost by the perils insured against, and that there had been a concealment of a material fact. Particulars were given of this last plea; the one on which the question before us turns was that the insured knew and concealed from the defendant that insurances were made by him, and others in concert with him, on interests alleged to be at risk in the vessel on values greatly exceeding the actual value of those interests. The case came on to be tried before my brother Hannen. It appeared in evidence that Wladiwostock is a harbour south of what, in 1870, was the customs' line of Russia. It was intended by the Russian Governme bring their customs' line lower dov as to include Wladiwostock with and this was, in fact, done in Feb 1871. Richard Dieckman was the son interested in these policies. He in substance this account of the tr tion: Having learned that this c was in contemplation, and believi would make shipments to Wlad tock very profitable, he entered i speculation with one Weneke, by Weneke was to purchase a ship and ter her to Dieckman, who was to p the goods he considered suitable market, put them on board, and overland to Wladiwostock, wher would meet them and sell them. T *Capo* was accordingly bought by W through the instrumentality of I man. Dieckman found some person ing to send out some goods on th venture. Those persons insured goods for 1,080*l.* The freight on goods was fixed by bill of lading higher rate than the charter freight formed the subject of the policy o fits on charter. No evidence was as to the value of the goods thus i for 1,080*l.*, which, therefore, it m taken, were fairly valued. Dieckm being able, for want of funds, to the whole vessel, Weneke purchased similar to those purchased by man, and filled up the vessel with These were to be sold by Diec Under these circumstances Dieckm Weneke employed brokers at Ham to procure insurance, and those burg brokers employed the plaint the record, Ionides & Chapeau brokers in London, to procure ins there. A slip was made out by Io Chapeaurouge on the 29th of 1871, for insurance of 8,000*l.* on co sions, and goods per *Da Capo* to wostock. After making enquiries the port, which was quite unk various underwriters, including presentative of the defendant, in this slip at 3½ per cent. Nothi peared on the face of this slip as future declaration or valuation subject matter of the insurance from the conduct of all parties, i

(1) 3 Burr. 1905.
(2) 10 B. & C. 527.
(3) 17 Wend. (American) 359.
(4) 4 East 590.
(5) 1 Campb. 116.
(6) Blackburn, J.; Lush, J.; and Archibald, J.

have been understood that the interest was to be subsequently declared and valued. The Hamburg broker, towards the end of April, forwarded to Ionides & Chapeaurouge a paper in German declaring the interest to be on spirits with anticipated profit, however high or low, and on other goods, with anticipated profit at 25 per cent. This valuation was certainly seen by the manager of the North China Company, whose name was on the slip before that of the defendant's representative, for he had initialed it. He stated, however, that he did not understand German, and was not aware what was in it. Whether it was or not seen by the defendant's representative or not was left in doubt; but in summing up the learned Judge treated the case as if it had been seen by him also. The policies were then made out and signed. The vessel sailed on the 1st of May, and on the 18th of May sunk at sea under circumstances making it very difficult to understand how she came to sink unless she was purposely scuttled. It appeared that Weneke had insured the ship and freight at a fair value, but that he and Dieckman had here and abroad insured the goods which they had put on board at values very considerably above their cost price. The price, including cost, charges and insurance, amounted in the whole to something less than 9,000*l.*; the various insurances on the goods, including profits, amounted to about 14,000*l.*, and in addition to these there was the insurance on commissions of 1,500*l.*, and a further insurance of 6,000*l.* on safe arrival, so that the assured stood to receive a very large profit if their venture was lost. This was used as an argument to induce the jury to draw the inference that the vessel was purposely scuttled by the captain in complicity with the assured; but besides this, the defendant contended that these high valuations ought to have been disclosed by the assured. The highest valuation was that of the spirits. It appeared in the evidence that the cost, charges and insurance of the 222 casks of spirits amounted to 973*l.*, and for insurance they were valued at 2,800*l.* Dieckman, in his evidence, justified this high valuation by saying that spirits were a very profitable article, and also that he hoped and expected that his spirits would arrive when they could be imported duty free, and that a very heavy Russian duty was about to be imposed immediately afterwards, which would have the effect of raising the value of his spirits to the level of duty paid spirits. The defendant called underwriters, who gave evidence, without any objection being made, that it was material to underwriters to know the extent of the over-valuation when it was to such an extent as appeared in this case. They also stated in effect that where the valuation was excessive, the risk was considered a speculative risk, which one class of underwriters would not take at all, and another class would take, but only if a sufficient premium was offered; that 25 per cent. added was not unusual, and that in one case 30 per cent. had been taken by the first class; that beyond this it would be a speculative risk. On this evidence my brother Hannen proposed to ask the jury seven questions: First, whether the goods were really put on board? Secondly, were the valuations for insurance excessive? Thirdly, if excessive, were they so made with a fraudulent intent? Fourthly, whether fraudulent or not, was it material to the underwriter to know that the valuation was excessive? Fifthly, was it concealed from the underwriters? Sixthly, was the vessel lost by perils insured against? Lastly, did the assured know or intend that the vessel should be cast away?

The counsel for the defendant admitted that the first question must be answered in favour of the plaintiffs. The other six questions were asked of the jury, who answered, that the valuations were excessive; that there was not sufficient evidence to shew whether they were made with fraudulent intent; but that whether fraudulent or not, it was material to the underwriter to know that they were excessive, and that that was concealed; that the vessel was not lost by the perils insured against, but that they had not sufficient evidence to shew whether the assured knew or intended that the vessel should be cast away. Some attempts

were made to get the jury to express a further opinion on the mode in which the vessel was lost, without success. The verdict was then entered for the defendant on these findings.

In the ensuing term Mr. Butt obtained a rule *nisi* for a new trial, on the grounds of misdirection, as to the concealment, and as against evidence. Delays and difficulties came in the way of hearing the argument, but in the three days next after last term, it came on before my brothers Lush, Archibald and myself. We desired the counsel for the present to confine themselves to the question whether there was any ground for disturbing the verdict on the plea of concealment, supposing that plea had stood alone, or the jury had been discharged on the other issue, leaving it for further discussion, whether that would finally dispose of the rule. We have come to the conclusion that there is no ground for disturbing the verdict on this issue. My brother Hannen, in summing up, pointed out to the jury that a valuation of goods for the purpose of insurance might fairly and properly be made, taking into account not only the original cost of the goods, but adding an estimate of the anticipated profits if the goods arrived at their destination; and that opinions might vary as to the profit to be made on a particular venture. He advised them not to find the valuation excessive unless they thought the goods were valued with an addition of profit greater than could be expected to be realised under any circumstances which could be reasonably contemplated. This may, perhaps, be too favourable to the assured, as it makes the question whether there is an excessive valuation or not depend on whether the valuation was so high as to amount, in part at least, to a wager; but no objection on that ground can be taken by the plaintiffs. And we think that the evidence here was such as to justify the jury in finding that the valuation of the spirits, at least, was excessive according to this definition; and this finding cannot be considered as against the weight of evidence. The finding that the excessive valuation was concealed from the underwriters was impugned on the ground that the statement in the German valuation, that the were valued with anticipated or ima profits, be the same high or low, am to a disclosure that the valuation w cessive. As to this, my brother H told the jury, and we think quite ri that in the absence of some active tion, the assured had a right to su that an underwriter read and unde the documents laid before him, an if he did not understand the langu which they were written he would a a translation; and he assumed, summing up, that the defendant's sentative had independent notice th valuation contained the words, " however high." This we have not in the notes of the evidence, but it pr was so. But then he asked the jury t sider whether that was a disclosur there was an excessive valuation sense which he had previously exp to them, of an estimate of profits f with knowledge that it had no found The jury must be taken to have that it was no disclosure, and we say that they were wrong. The f of the jury that the concealmen material was impeached, both c ground that it was against evidenc that of misdirection, as it was con that the Judge ought to have told th that the fact of an excessive val was not one which the assured was to disclose. It is perfectly well estal that the law as to a contract of ins differs from that as to other contract that the concealment of a materia though made without any fraudul tention, vitiates the policy. In *D Insurance*, vol. 2, p. 388, it is said— terms in which the general rule is u stated are, that it is the duty of t sured to communicate all facts tha material to the risks, and which a known or presumed to be known t underwriter; but these terms are guous, and the first and necessary er is by what criterion the material the facts alleged to have been con is proper to be determined. Is th gation of a disclosure limited to the that are material to the risks, *cons in their own nature?* or does it exte all that may be deemed material

insurer, and would probably influence his ultimate decision?"

He admits that a knowingly false representation of a matter which, though extraneous to the risks, may affect the judgment of the underwriter, will vitiate, and that the case of *Sibbald* v. *Hill* (7) is an express decision of the House of Lords to that effect. But he lays it down as being "the most reasonable opinion that those facts only are necessary to be disclosed which as material to the risks in their *own nature*, a prudent and experienced underwriter would deem it proper to consider." The cases and proofs in support of his position are collected at Duer, p. 518, *et seq.* It was argued before us that the nature of the risk, *i.e.*, the strength and seaworthy qualities of the *Da Capo*, and the probability of encountering storms on the voyage, and so forth, were not in the least affected by the amount at which the goods were valued, which is no doubt true. The underwriter is not answerable for any loss occasioned by fraud of the assured, and it was argued that, therefore, the objection which an underwriter might have to take a risk on account of the temptation which the assured might have to make away with the venture, ought not to be taken into account. Whether Duer would have gone so far as this is not clear, but if he would, the Courts in America have refused to follow him. [See the case of *The New York Bowery Fire Insurance Company* v. *The New York Fire Insurance Company* (3)]. In that case the plaintiffs had insured certain property against fire, and the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place; the insured came upon the plaintiffs, who came upon the defendants. The Judge directed the jury that if this information given to the president of the plaintiffs was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the Court on appeal directed a new trial, on the ground that the concealment was of a material fact, and, whether intentional or not, it vitiated the insurance. It is to be observed that the excessive valuation not only may lead to suspicion of foul play, but that it has a direct tendency to make the assured less careful in selecting the ship and captain, and to diminish the efforts which in case of disaster he ought to make to diminish the loss as far as possible, and cannot, therefore, properly be called altogether extraneous to the risks; but we would scarcely base our judgment on so special a ground. We agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But the rule laid down in *Parsons on Insurance* (vol. 1, p. 495), that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act seems to us a sound one. We do not think any of the cases cited by Duer are in contravention of it; and applying it to the present case, there was distinct and uncontradicted evidence that underwriters do in practice act on the principle that it is material to take into consideration whether the overvaluation is so great as to make the risk speculative. It appears to us a rational practice. We think, therefore, that the Judge could not do otherwise than leave this question to the jury, and that their verdict was not against the weight of evidence, and should not be disturbed. It will be for the counsel on both sides to consider what course they will take as to the rest of the rule.

Rule, as to the concealment, discharged.

Attorneys — Stibbard & Cronshey, for plaintiff; Hollams, Son & Coward, for defendant.

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(2) 2 Dowl. P.C. 263.

1874. May 30. } ROBERTS *v.* EGERTON.

Adulteration of Food or Drink—Green Tea painted or faced with Prussian Blue—Practice in Commerce of adulterating Tea—Adulteration of Food, &c., Act (35 & 36 *Vict. c.* 74), *ss.* 2, 3.

By the Adulteration of Food, &c., Act, 35 & 36 *Vict. c.* 74. *s.* 2, "*Every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated,*" *shall for every such offence be liable to certain prescribed penalties.*

The appellant was charged with selling, as unadulterated, two ounces of green tea which was then adulterated. The appellant kept a shop for the sale of tea and coffee. M. went to the shop and asked for some green tea, which was served to him by one of the shopmen, and he bought two ounces. It was delivered to the public analyst for the county, who certified that it was adulterated by a thick facing of mineral matter and Prussian blue. The green tea in question was sold by the appellant in the same state in which it came from abroad, and the appellant did not in any way cause the tea to be painted or faced in this country. A sample of tea was produced by the public analyst before the magistrates, which resembled in colour and appearance what is popularly known as green tea. This was proved by the public analyst to be neither painted nor faced. It was also proved that the tea which is imported from China as green tea and generally known as such in the tea trade is painted and faced in the manner previously stated, and that the sample proved to be neither painted nor faced was imported from Japan, and not known generally in the trade as green tea. The justices convicted the appellant:—

Held, *by the majority of the Court,* COCKBURN, C.J., BLACKBURN, J., *and* ARCHIBALD, J. (QUAIN, J., *dissenting*), *that the conviction was right, for in the case of a simple commodity like tea, the mode by which it was coloured was an adulteration, and this adulteration, though known to the being unknown to the public, the te be taken to be sold as unadulterated*

[For the report of the above ca 43 Law J. Rep. (N.S.) 135.]

1874. June 12. } THE QUEEN *v.* EDMON

Union Assessment Committee Acts, 1864 (25 & 26 *Vict. c.* 103. *s.* 21; 28 *Vict. c.* 39. *s.* 1)—*Alteration of tion List on Appeal to Assessment C tee—Re-deposit of Valuation List.*

Alterations in a parish valuatio made upon appeal to the committee the Union Assessment Committee Ac (27 & 28 *Vict. c.* 39. *s.* 1), *after the l been approved by them, do not requi re-deposited and published in the manner as alterations under the* 1862 (25 & 26 *Vict. c.* 103. *s.* 21).

The assessment committee of the N. upon an appeal made to them by payer, under 27 & 28 *Vict. c.* 39. *s. tered the valuation list by reduci rateable value of certain premises. list, after having been so altered, w re-deposited for inspection, or publis the church door, nor was any day ap for hearing objections to it as is re where the valuation list is altered* 25 & 26 *Vict. c.* 103. *s.* 21. *The gua having made a contribution order, ba the list as altered, the order was brou on certiorari, and a rule nisi obtai quash it:—*

Held, *discharging the rule, that th was valid.*

[For the report of the above ca 43 Law J. Rep. (N.S.) M.C. 156.]

[IN THE HOUSE OF LORDS.]

1874. May 25, 26. } THE GREAT WESTERN RAILWAY COMPANY *v.* MAY.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 127—*Superfluous Lands unsold—Right of Owners of Land adjoining—What is Superfluous Land—Period of Vesting.*

Lands acquired by a railway company, under their compulsory powers, which at the expiration of the time prescribed by s. 127 *of* 8 & 9 *Vict. c.* 18, *are not required for the permanent purposes of the undertaking, are superfluous lands within the meaning of that section, though they may within that time have been used for temporary purposes of the undertaking.*

The employment of such lands by the depositing upon them earth and spoil, from a neighbouring cutting, which is allowed and intended to remain there without being of any further use to the railway, is, after the depositing of such earth and spoil has ceased, a user for a temporary purpose.

If superfluous lands are not sold within the prescribed time they at the expiration of that time vest in the owners of the adjoining lands, and no act is necessary on the part of such owners indicating their acceptance of such lands.

Where lands had so vested in the adjoining owners at the expiration of the time prescribed by the 127*th section, an Act of Parliament, passed in the following year, extending the time for the sale of superfluous lands belonging to the company, was held not to apply to those lands though they were at the passing of the Act in the ostensible possession of the company, or their lessees, being used as market gardens.*

Where lands are included in the plans and books of reference scheduled to the Company's Act, and are purchased after a notice from the company to treat, they are liable to vest in the owners of adjoining lands as superfluous lands, although they may not be included within the limits of deviation delineated on the company's plans, and although they may have been purchased at a price settled by private agreement and without arbitration.

Semble—*If at the expiration of the ten years mentioned in the* 127*th section, or of the time prescribed by the special Act, the company can aver and prove that the lands, though not at that time employed for the permanent purposes of the undertaking, are yet required and are intended to be applied for such permanent purposes; or that at that time they are still being employed, or are likely to be required, as a place for the continuous depositing of spoil or for the correlative purpose of making and carrying away of ballast or bricks for the purposes of the railway, such lands would not be liable to vest as superfluous lands in the owners of adjoining lands.*

If lands are not liable to vest at the expiration of the time mentioned in the 127*th section, they are entirely exempt from the provisions of the Act applicable to the sale or to the vesting of superfluous lands.*

This was a proceeding in error from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Queen's Bench in favour of the defendant in error, upon a Special Case stated in an action of ejectment brought by him and another plaintiff against the company, now plaintiffs in error.

The action was brought to recover possession of a piece of land containing about four acres or thereabouts, situate at Basingstoke, Hants, which had been acquired by the railway company, and which, it was contended, was not, at the expiration of ten years from the time limited for the completion of the railway for the purposes of which the land was purchased, any longer required for the purposes of the railway, and was therefore superfluous land within the meaning of section 127 of the Lands Clauses Consolidation Act, 1845, and as such vested at that time in and ever since belonged to the defendant in error, the same land not having been sold under the provisions of the Lands Clauses Consolidation Act, which provide for the sale of superfluous land.

The facts of the case were stated in a Special Case which will be found printed at length in the report of this case in the Court of Queen's Bench in 41 Law J. Rep. (N.S.) Q.B. 104. They are briefly as follows.

In the year 1845 a railway company was created called the Berks and Hants Railway Company. In the year 1846 the interest of this company was transferred to and vested in the defendants in the Court

below, the appellants on this appeal. There was a field containing 15 acres, 32 perches, which was then the property of Jane May, John Simmons, and Charles Simmons. The whole of this land was included in the plan and books of reference, but the whole was not included within the limits of deviation delineated on the plan. There was a narrow strip on the northern side of the field beyond the line indicating the limit of deviation. By a notice of the 11th of March, 1846, Jane May and the other two owners were required to treat with the defendants for the purchase of the field towards the south, namely, 3 acres, 1 rood, 4 perches, and the value of this portion was settled by an arbitrator at 571*l.* 7*s.* By a further notice of the 5th of November, 1846, Jane May and the other two owners were required by the defendants to treat with them for the remainder of the field, and its value was subsequently agreed upon at 1,768*l.* In both notices it was stated that the land was required for the purposes of the Berks and Hants Railway. By indenture of the 2nd of May, 1847, Jane May and the other two owners conveyed the whole field to the defendants in fee simple. Upon the completion of the purchase the defendants took possession of the field, and upon a portion, namely, 5 roods, 33 perches, towards the south, constructed a portion of the line and a station, and other works connected with the railway, and upon the larger part of the remainder deposited chalk and spoil which in making the railway was excavated from a cutting near the field, and for the purpose of which deposit the defendants had purchased the whole of the field instead of a portion only. A portion of the field remained uncovered by the spoil. The depth of the spoil varied from one foot to eight or nine feet, and since the completion of the railway the surface had been used for growing vegetables, for which rent had been paid to the defendants and their servants. The time for the completion of the railway expired on the 30th of June, 1850. On the 30th of June, 1860, the land adjoining to the north was the property of the plaintiff. The ejectment was brought on the 10th of June, 1869, and the plaintiff claimed to recover under the 127th section of the "Lands C Consolidation Act," the 8 & 9 Vict. as superfluous land, the space cove the spoil, and the small space unco

The company contended first, th land was not superfluous land, but had been and then was required f purposes of the undertaking, name deposit of the spoil. Secondly, that of the land which adjoined the plai land, and which formed part of the claimed, was not acquired by the d ants compulsorily under the provisi the Act, but voluntarily by agre that strip not having been withi limits of deviation, and that the onl that could be subject to the 127th s was the land south of that strip; t that strip was not taken compulsori was acquired by contract, the 127 tion did not apply to the land lying of it, on the authority of *The City o gow Union Railway Company* v *Caledonian Railway Company* (1) that the property in the land adj the land claimed was in fact not plaintiff, but in the defendants them as owners of the strip lying north which they contended was not sub the provisions of the Act with reg superfluous lands, those provisions only applicable to land taken com rily. Thirdly, that by virtue of th visions of two Acts of Parliament, & 25 Vict. c. 204. s. 41, which re the royal assent the 1st of August, and the 31 & 32 Vict. c. 103. which received the royal assent 13th of July, 1868, the defendants entitled to the land in dispute. Th section of the first of these Acts that, the period for the sale of super lands now belonging to the compan be extended for a further period of years from the 1st of August, 1861. by the second of those Acts it is en that the company may retain and ho lands belonging to them for the pe ten years from the 13th of July, 18

The Court of Queen's Bench hel the whole of the land claimed was ac by the promoters of the railway the provisions of its Act of Parli that it was surplus land which the

(1) Law Rep. 2 Sc. App. 160.

bound to sell within ten years of the 30th of June, 1850; that as they had not done so it became then the property of the plaintiff, and that the special Acts of 1861 and 1868 above referred to did not affect his right, and that he could recover it in that action. This judgment was affirmed on error by the Court of Exchequer Chamber per KELLY, C.B., KEATING, J., and BRETT, J. (*dissentientibus* MARTIN, B., and BYLES, J.).

For the report of the case in the Court of Exchequer Chamber see 42 Law J. Rep. (N.S.) Q.B. 6.

The company now brought error to this House.

Manisty, *Thesiger* and *J. C. Mathew*, for the plaintiffs in error, contended that the lands were not superfluous lands, having been required and employed for a purpose of the railway, also that they could not vest in the adjoining owner without his having done some act signifying his acquiescence in such vesting, and that as he had done no such act prior to the passing of the Act of 1861, that Act extended the time for vesting till a period not yet arrived, and they cited *The City of Glasgow Union Railway Company* v. *The Caledonian Railway Company* (1), *Roberts* v. *Davey* (2), *Malins* v. *Freeman* (3), and distinguished *Moody* v. *Corbett* (4).

Cole and *Pindar* were heard for the defendant in error. The arguments of the learned counsel sufficiently appear from the opinions of their Lordships, printed below. They cited *Moody* v. *Corbett* (4), *Beauchamp* v. *The Great Western Railway Company* (5), *Rangeley* v. *The Midland Railway Company* (6), *Quinton* v. *The Corporation of Bristol* (7), *Lund* v. *The Midland Railway Company* (8), *Eversfield* v. *The Mid Sussex Railway Company* (9), and *Dodd* v. *The Salisbury and Yeovil Railway Company* (10).

Manisty replied.

THE LORD CHANCELLOR.—My Lords, before I refer to the history of the land which is in question in this case, I will in the first place ask your Lordships' attention to the clause of the Act of Parliament upon which by the admissions of both sides the question which your Lordships have to determine, must turn. That clause is the 127th of the Lands Clauses Consolidation Act, 1845, taken in connection with the preface without a number by which that clause is immediately preceded. The words to the preface to the clause are these: "And with respect to lands acquired by the promoters of the undertaking under the provision of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes *thereof*, be it enacted as follows." Then certain provisions are made, which I will afterwards refer to, with regard to selling the land which is thus described, and with regard to the vesting of that land in adjoining owners in case it is not sold.

The first question which your Lordships will have to consider upon this clause is (irrespective, for the moment, of the particular point of time at which the question has to be decided whether land is or is not superfluous), what is the meaning of "superfluous land" under those words which I have read? Now the synonym which is given in these clauses for "superfluous land" is this: land acquired by the promoters of the undertaking, but "not required for the purposes" either "of the undertaking" or "of the Special Act or any Act incorporated therewith," according as your Lordships may interpret the word "thereof" to refer either to the undertaking or to the special and incorporated Acts. My own opinion, although I do not think it of very much importance for the question you have to determine, is, that the word "thereof" refers to the undertaking, and that the meaning of

(2) 4 B. & Ad. 664; s. c. 2 Law J. Rep. (N.S.) K.B. 141.

(3) 4 Bing. N.C. 395; s. c. 7 Law J. Rep. (N.S.) C.P. 212.

(4) 5 B. & S. 859; in error, 7 B. & S. 544; s. c. 34 Law J. Rep. (N.S.) Q.B. 166; in error 35 Law J. Rep. (N.S.) Q.B. 161; s. c. Law Rep. 1 Q.B. 510.

(5) 38 Law J. Rep. (N.S.) Chanc. 162; s. c. Law Rep. 3 Chanc. App. 745.

(6) 37 Law J. Rep. (N.S.) Chanc. 313; s. c. Law Rep. 3 Chanc. 306.

(7) Law Rep. 17 Eq. 524.

(8) 34 Law J. Rep. (N.S.) Chanc. 276.

(9) 3 De Gex & J. 286.

(10) 1 Giff. 158; s. c. 28 Law J. Rep. (N.S.) Chanc. 107.

"superfluous land" is, land acquired by the promoters of the undertaking, but not required for the purposes of the undertaking. Again I say (postponing the question of the period of time at which the judgment has to be passed upon what is superfluous land), how is it that land becomes within the definition "superfluous land?" It appears to me that it may become "superfluous land" in one of four different ways. It may be, in the first place, land originally taken under the compulsory powers, but taken upon a wrong estimate or calculation of the quantity of land which would be required for a purpose for which it is afterwards found out by experience that less land than was originally supposed will be sufficient. Or it may, in the second place, be land which, under the provisions of other clauses, the railway company may have been forced to take by reason of their wishing to take a part of premises. There *ex hypothesi* that which they are forced to take is not land which in any sense they wish to take or want for the purposes of their undertaking—it is thrust upon them for the benefit of the landowners, and obviously is superfluous land. Or, in the third place, it may be land taken originally, and required originally, for the permanent works of the line, but which in the course of subsequent years turns out to have been occupied by works which are abandoned, and which by reason of the abandonment of those works originally supposed to be permanent, becomes land no longer required by the company. Or it may, in the fourth place, be land which has been allowed to be taken by the company, or which has been taken by the company for temporary purposes, and which has been taken by the company with intention originally of its being used only for temporary purposes, which temporary purposes have come to an end.

At present I am not sure that there is any other kind of land which could be described as superfluous, but all those four classes of land are clearly superfluous land within that definition which I have mentioned, namely, land which was originally acquired for the purposes of the undertaking, but which is not required for those purposes.

With regard to all these classes c the policy of the Legislature clear plies itself. The policy which di that 127th clause is obviously t railway company is armed with pow take land from landowners agains will. The object to be attained constructing of a great national prise. It is not part of that obje the contrary, it is foreign and antag to that object, to make railway com landowners for the purpose mer owning land. The object on the the Legislature rather is to sec landowners from whom land is tak compulsion, a reverting, as nearly Legislature can accomplish it, of a which becomes useless or not want the purpose of the national ente which is sanctioned by Parliament.

Those being the classes which oc my mind as all the classes into superfluous land should be divide next question which we have to sider is, what is the time under t of Parliament for ascertaining w land is, or is not, superfluous with meaning of the definition. Now again I think it convenient to b mind what I have termed the po the Act of Parliament. No do would be part of the policy, an sistent with that policy, for Parliam accompany and to watch over a r during the whole of its existenc from time to time, not only duri first ten years of its existence, but its whole life, to take care that wh any land became unwanted for th pose of the railway, that land sho taken from the railway company by forcing them to sell it or by pro for its return to its original owner. practically that is a result which could not be attained. It would possible practically to make any l tive provision which should hang a railway in this manner for the w its existence. Therefore, what it a to me, and what I submit Parliame done, is this—it aims at no such imp result as I have described, but it ta that which will conveniently and accomplish its end, a period either years, or of a few years more or o

years less, dating from the creation of the Parliamentary powers; and it appoints that epoch or that crisis as the point of time at which a survey should be taken of the then position of the railway company and of its works, for the purpose of determining what land is at that moment superfluous. And then it appears to me that the problem which has in every case to be solved is this: Can you at that moment of time thus indicated by Parliament predicate of any land in the occupation of a railway company that it is at that moment "superfluous land" within those definitions of the term "superfluous land," which I have mentioned. If it is "superfluous land" within those definitions, then if the railway company does not sell it at the moment, or has not taken steps to have it sold already, the provision of the Act of Parliament for vesting it in the adjoining owner intervenes. If you can predicate of it at that moment that it is land required, that is, then required for the purposes of the undertaking, the railway company have a right to retain it, and Parliament no longer exercises any control beyond that point of time over its destiny.

Now, why is it that I place the point of time where I have placed it, at the expiration of ten years or whatever period is prescribed by the Act of Parliament? The words of the 127th section are these —"Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase money arising from the sale to the purposes of the special Act, and in default thereof all such superfluous land remaining unsold at the expiration of such period shall thereupon," which I take to mean on the occurence of that point of time taking place, and finding the land not required for the purposes of the company, "vest in and become the property of the owners of land adjoining thereto in proportion to the extent of their lands respectively adjoining the same." There may be cases, indeed cases have occurred, in which, short of the period of ten years, or whatever other period may be prescribed, questions may arise as to the disposition of superfluous lands, and the railway company may, short of the ten years, pronounce of their own accord land to be superfluous, and proceed to sell it, and to appropriate it in some other way; and then the adjacent landowners may have rights on that step being taken by the railway company, and they may assert those rights, as they appear to have done in some cases that were cited at your Lordships' bar. But supposing nothing of that kind occurs, the clause contemplates the expiration of the ten years as the point of time at which the ultimate decision is to be made, and then all lands with regard to which, judging of the question of fact, you can predicate that they are at that moment superfluous and not required for the purposes of the undertaking, are to vest in the adjoining landowners.

That being so, let me turn to the history of the land in question in this case, which appears to me a very short one. It was land scheduled to the Act of Parliament.

Notices were given of the ordinary kind by the company to take it as scheduled land under their compulsory powers for the purposes of the Act of Parliament. It is quite possible (I think it necessary to give no opinion on the point), that upon those notices having been given the landowner might have come forward in the attitude of opposition, and might have said to the railway company, "You do not want this land; at all events, you do not want the whole of it for permanent purchase. You are taking it really for a temporary purpose, namely, for a spoil-bank. I prefer that you should not purchase it out and out, but that you should use it in that temporary way under the other clauses of the Act of Parliament, and compensate me for that temporary occupation." But when a landowner is served with a notice, he is not supposed to know and is not bound to know, what particular purpose out of all their purposes it may be for which the railway company are going to use the land. He sees that it is scheduled land, the company tells him the land is required for the purpose of their

Act, and, whatever his rights might be, were he informed of the whole of the case, being dealt with in the way he actually is dealt with, he has a right to say that the land has been taken from him by compulsion, for purposes, at the time represented to him to be the permanent purposes, of the railway company.

It was in this way that the land was acquired by the company. In point of fact, so far as I can understand the statements in this case, it never was acquired by the company, and never was intended by the company to be acquired, as to the whole of it, for any permanent purpose. I find no indication in the statement of the case which would lead me to suppose that even, at the original acquisition of the land, the company supposed that they would require the whole of it for their line. I believe, at least that is the inference which I draw from the statements in the case, that, even at the outset, they were aware that, at all events as to a large part of it, it would only be required for the purposes of covering it with spoil. But whatsoever their original intention or expectation may have been, beyond all doubt the land, by which I mean that part of it which is now in question, never was used for what I may term any permanent purpose connected with the line. It was used for the temporary purpose, and only for the temporary purpose of depositing spoil upon it. At the end of the ten years, for that is the point of time to which I have to direct your Lordships' attention, it was found as a plot of ground upon which spoil had been deposited, but upon which spoil had ceased any longer to be deposited, and there it stood, or there it lay, as a piece of ground useless and unprofitable, having served the purpose for which it was taken, but having no longer, according to this case, any purpose to serve in connection with the railway company.

If, in that state of things, the railway company could have been able to aver and to prove that, although that amount of time, and for some time before, it had ceased to be used even for the temporary purpose of depositing spoil, still there were other purposes of the undertaking, for which it might afterwards come into use, for which it was afterward to be used, or if they had b say, with regard to the de spoil, that that was a work w continue, or that there was wh term the correlative work of t ing of spoil, namely, the carr of ballast, the supply of ballas made by means of the spoil or spoil as deposited; if they had to say that there was that obje ing unsatisfied, and that there object in their view, which the and for which they desired to land, I am far from saying th pany might not, upon that foc justified the retention of the l not think it at all necessary to But I have read this case from to end, and I cannot find a s a word in it which would le suppose that the railway con such an object in their mind, them. The case is absolutely the subject, and I think the onl which can be drawn from the in the case is that at the ex ten years all purposes conne this land had been satisfied, then, as I have already said, a profitable, objectless piece of la nection with the railway compa be so, what is the result? At the ten years the clause of the liament steps in, and, as I res possession of all land which a is in the position I have desc vests that land in the owner of ing land. It appears to me th ration of vesting does not dep way upon the consent or the ac the owner of the adjoining lan absolute, complete, Parliament of the land. Those cases, foun upon the old doctrine of entry fo broken, or upon the covenant introduced for the benefit of in which it has been held t which would apparently make or the lease void, are to be mad by some further Act, indicatin person entitled to take advant condition desires to take advar have, in my mind, no bearing upon the present case. This is

of vesting or not vesting, which is to depend upon the determination of another question, which is a question of fact. If that question of fact is determined against the railway company the vesting takes place, and no person has any power to prevent it. It appears to me that the question of fact at the end of the ten years must be determined against the railway company, and that being determined against the railway company, it appears to me that the vesting took place, and if it did take place, the later Acts of Parliament extending the time during which the railway company is obliged to dispose of superfluous land, have no application, for the time is only extended with regard to land which, after the expiration of the ten years, was found in the ownership and possession of the railway company. If I am right in the observations I have made, this land was not at the time in the ownership of the railway company.

The conclusion, therefore, at which I arrive, and which I submit to your Lordships, is, that the judgment of the Court below is correct, and that the judgment of the Exchequer Chamber ought to be affirmed.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend in every respect, and therefore it will be unnecessary for me to do more than to state very shortly the conclusions at which I have arrived.

In the first place, I think, upon the facts of the special case, that, the lands at the end of the ten years not being required for the permanent purposes of the undertaking, they became superfluous lands, notwithstanding the employment of them for the deposit of spoil, which was a temporary purpose only. Secondly, I think that, at the end of the ten years, the lands immediately became vested in the respondent, as the owner of the adjoining lands, without any act being necessary indicating his acceptance of them. And thirdly, I think that, having so vested at the end of the ten years, which expired on the 30th of June, 1860, the Act of 1861, extending the time of the sale of superfluous lands belonging to the company did not apply, as the land had ceased to belong to the company. It was not an extension of the term of ten years which had expired, but a creation of a new period of seven years.

I am therefore of opinion that the judgment of the Exchequer Chamber ought to be affirmed.

LORD HATHERLEY.—My Lords, I take entirely the same view of the construction of this section, upon which the whole of the case before us depends. I think it would be impossible to apply that section only to the case of lands which either have never been wanted at all for the purposes of the railway, and have therefore been improperly acquired, or to the case of lands, which having been taken for the purposes of the company have, from some change of mind or purpose on the part of the railway company, either been for a time used for the purposes of the company, but afterwards appear not to be so required, or have never been used for any such purpose of the company. In the first place, it is not likely that such a limitation would be in the contemplation of the Legislature, in reference to lands improperly taken and not wanted for the purposes of the company, because to suppose that such a limitation was intended, would be to suppose that the Legislature was providing for those cases in which the Act had been abused, and yet not stating its provision in any precise terms, but leaving it in general terms, as we find it here in the Act, an enactment with respect to all land acquired under the provisions of the Act. I should say that attention would have been immediately directed to the lands which had been acquired under the provisions of the Act, because it was thought that they might be required, and it was expected that they would be required for the purposes of the undertaking, but which, as experience afterwards shews, were not necessary for that purpose.

The Act seems to have been very strict in this respect. The Legislature seems to have enacted this particular clause rather as a means of effectuating the object which they appear to have had in view, of not leaving any lands in the pos-

session of a company which were not wanted for the purposes of their Act, than with any direct view to the benefit of the owner whose lands might have been so improperly acquired. For that purpose they vest this property, not in the persons who sold the land, not in the persons who might at first sight appear to be those entitled to require a reconveyance of it, but, in order evidently to enforce upon the company the sale and disposition of those lands which they did not require, and in order to compel them under no circumstances to retain possession of land which was not wanted for the purposes for which the Legislature gave it; on that account they enacted two provisions, by the one of which they enabled the company to sell all the superfluous lands, and by the other of which they said, "If you do not do that which is required to be done; if you omit or neglect to sell that land which you no longer want, then we will have this somewhat singular mode of coercing you and punishing you for not having so done, and of course at the same time of expediting your movements with respect to the disposition of the land which you do not want, namely, 'vesting' it, as it is here expressed, in the persons who own the adjacent land, according to their respective rights, in regard to the land so adjoining the railway." The clause itself is a very singular one, no doubt, and a good deal of argument has been addressed to us by Mr. Manisty with respect to the word "vesting," and the consequences of holding that which we do hold, that the lands do vest in the adjoining owners.

Having disposed of the first and principal point in the case, namely, as to how lands which are not wanted at the end of the ten years are to be disposed of, I will say no more with regard to the time than this, that there seems to be nothing unreasonable in that time which is given, namely, ten years, as a proper and adequate time for the company to ascertain whether it wants land or not. We do not find in the Act such words as "lands which they originally required," or "which they improperly acquired," or the like; but the question rather is, whether they shall be required at that time w shall come to consider whether required. Looking at the words in the Act, I have no doubt that tention of the Legislature was t survey of the property of the c and the circumstances of the empl and the mode of the employmen property of the company at the that particular period, and to say entire clearance must be mad those lands which shall not wanted.

Now, as regards the facts of t there can be no doubt upon the stated that these lands were no end of the ten years required for poses of the railway company. T been used for the purpose of m spoil bank, and depositing and t upon that land the spoil which way company had taken from th tings and tunnels. Even if you ke very terms of the Act, as has bee observed, you would be led to that that would be considered porary purpose, for it is one of t porary purposes that are express tioned in the Lands Clauses Act clauses which follow clause 30. was observed in the Court belo purpose can be suggested for w spoil bank might be wanted? I easy to suggest a purpose for wh spoil bank might be required aft the spoil had been deposited However, it is not necessary fc enter into that question. I agr the learned Judges of the Court that if a reasonable purpose of t way could be suggested for which of this land covered with spoil w required at some reasonably sh tance of time from the period w are investigating what is bein namely, at the end of the ten year company said then, "We shall this next year, in order to take a ballast, or for any such purpose" not specifying ballast—but indepe of that, if it could be shewn tha wanted for the purpose of a brick for the purpose of obtaining m for future repairs of the railway like, if there was any reasonable

tion of its being required for any such purpose, we should have had that stated in the case. We have nothing of the kind stated in the case; therefore, it is unnecessary for us to form a judgment as to whether it might or might not be wanted for the purposes of the line—purposes which would render legitimate the retention of the land. We are not obliged to consider that. It has been used for depositing spoil; it has performed its duty, and if nothing more is to be done with it at the end of ten years, it appears to me to be clearly land which is not required for the purpose of the railway.

I have said that the mode of compelling a railway company to dispose of land seems a singular one in many respects. Observations have been made, some of them very just observations, by Mr. Manisty, as to the inconvenience which might arise in consequence of the land being so vested in the adjoining landowners. But so it is vested. That is the mode of vesting prescribed by the Act of Parliament distinctly, and I do not know that the inconvenience is greater than it would be under a demise or a conveyance, by which land is vested in a person without some intimation from him of his being willing to receive it. It is not for me to say that that is convenient or inconvenient. I might suggest a number of strange consequences which might arise from the peculiar course which is directed by the Act of Parliament. There might have been some questions of this kind arising: A contest might arise in some cases as to who is an owner of land adjoining a railway. The question also might arise, Is every part of the property of a man who is an owner of land adjoining a railway to entitle him to share, or only the particular part immediately adjoining the railway, and not any part which, after you have passed the hedge or the boundary of the railway, is behind a further hedge? Or the questions might arise, What is to be done with regard to infants? What is to be done with regard to married women? And the like. And what is to be done with regard to partition between the several parties who are interested? All that the Legislature has entirely passed by; but this determination at least they seem to have come to: whoever takes, and whatever difficulty there may be as to who takes it, we are resolved that you, the company, shall not hold it, and if at the end of the ten years you have been ill-advised enough not to have disposed of it, if we find it in your hands, we will take it out of your hands, and put it into the hands of others, leaving it to the decision of the proper tribunals to say who those others shall be; but if you are well advised, you will dispose of it, in order to prevent its vesting in an adjoining owner, as I apprehend that the land has vested in this case.

LORD SELBORNE.—I am of the same opinion. In the preamble to this 127th clause the word "required" is clearly used in the sense, not of "demanded," but "necessary;" and the words "shall not be required" are not only future in form, which, perhaps, is of little consequence, but they introduce provisions intended to operate at or before a fixed future time. Therefore, the question of fact, whether the land is necessary for any purpose of the undertaking or not, unless sooner decided by the company for themselves, must be determined at that time, and the whole policy of the provisions evidently points to the same conclusion.

The rule which your Lordships will lay down will operate both, in some cases, in favour of the company and, in others, against them. It will operate in favour of the company if land not originally required for any purpose of the undertaking, as for example, to take one of the classes pointed out by my noble and learned friend on the woolsack, land which the company were forced to purchase against their will, if such land has afterwards, before the end of the ten years, been actually applied to, or become *bona fide* wanted for some purpose of the undertaking, in that case the rule will operate in the company's favour. On the other hand it will operate against them if land which has been at some time temporarily used or wanted for some purpose of the undertaking, whether that purpose was originally contemplated as temporary

or as permanent, has, before the end of ten years, ceased to be *bona fide* used or wanted either for that or for any other purpose of the undertaking. Upon the whole I think that, while the rule is one which will carry into effect the policy of the statute, and is fairly derivable from the words, it is as convenient a rule both for landowners and for a company as any other which has been suggested in the course of the argument.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Attorneys—Young, Maples & Teesdale, for the company (appellants); Johnson & Weatheralls, agents for Lamb & Brooks, Basingstoke, for the respondent.

1874. July 6. } MARWICK (*appellant*) *v.* CODLIN (*respondent*).

"*The Wine and Beerhouse Act*," 1869 (32 & 33 *Vict. c.* 27)—"*The Licensing Act*," 1872 (35 & 36 *Vict. c.* 94), *ss.* 37 & 74—*New License—Confirmation—Licensing Committee.*

Up to the general annual licensing meeting in March, 1874, *the appellant held licenses granted by the Excise for the sale of wine and beer for consumption on premises in his occupation. The licenses were granted to him under the authority of a justice's certificate, which had been given to him annually since the passing of the Wine and Beerhouse Act,* 1869, *and which was renewed at the last general annual licensing meeting. At such meeting, the appellant, for the first time, applied for a victualler's or publican's license, under the* 9 *Geo.* 4. *c.* 61, *and the Licensing Act,* 1872. *It was granted, but was not confirmed by the confirming authority for the county appointed under section* 37 *of the Licensing Act,* 1872:—Held, *that this license was a "new license," which under section* 37 *required confirmation by the licensing committee, and as it had not been so confirmed, it was invalid.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 169.]

(*In the Second Division of the Court.*)

1874. June 12. { THE COWES AND NEWPORT RAILWAY COMPANY *v.* THE BOARD OF TRADE.

Telegraphs—Compulsory Purchase of Undertaking—Compensation—Postmaster-General—The Telegraph Acts, 1868 *and* 1869.

By 31 & 32 *Vict. c.* 110. *s.* 7, *any railway company possessed of a telegraph open to the use of the public on the* 1*st of January,* 1868, *for transmitting messages for money, or possessing any beneficial interest in such telegraph, may require the Postmaster-General to purchase the right of such railway company to transmit such messages or other beneficial interest. By* 32 & 33 *Vict. c.* 73. *s.* 10, *any telegraph company with which the Postmaster-General may not come to an agreement with respect to the amount of compensation to be paid to them for their undertaking, may have such amount settled by arbitration in manner provided by the Lands Clauses Consolidation Act,* 1845.

By an agreement with a telegraph company, under which the telegraph company erected and placed their telegraphic apparatus on the Cowes and Newport Railway Company's line, the railway company took the exclusive use of one wire during the continuance of the agreement, for messages of their own relating to the business of the company, but were prohibited from using the wire for public use or for profit, or for any other purpose than the transmission of the railway company's own messages, and at the end of the agreement which was to be in force for twenty-one years, the telegraph company were to remove their telegraphic apparatus:—

Held, *that the railway company had no such interest in the telegraph as to entitle them to require the Postmaster-General to purchase it under the Telegraph Acts,* 1868 *and* 1869.

Thesiger had obtained a rule on the 8th of May last, calling upon the Lords of the Committee of Her Majesty's Privy Council for Trade and Foreign Plantations, to shew cause why a writ of mandamus should not issue commanding them to

appoint an umpire pursuant to the Lands Clauses Consolidation Act, 1845, to decide in case of difference between the arbitrators appointed respectively by the Cowes and Newport Railway Company and Her Majesty's Postmaster-General, in the matters in which the said arbitrators shall differ, or which shall be referred to such umpire under the Telegraph Acts, 1868 and 1869, and the said Lands Clauses Consolidation Act, 1845.

By deed, dated the 24th of May, 1865, made between the Electric Telegraph Company and the Cowes and Newport Railway Company, the railway company agreed that the telegraph company should, for the term of twenty-one years, construct, place, maintain, remove, replace, work or use such telegraphic apparatus as they should think fit upon the railways belonging to the railway company, but upon condition that the telegraph company should erect upon the line of railway an efficient electric telegraph with at least one wire for the exclusive service of the railway company. The telegraph company was to maintain the telegraphic apparatus at their own expense, at least one wire to be exclusively applicable to the transmission by or on the behalf or at the wish of the railway company of their own messages relating to the business of their railways, but not of messages of any other description or for others for hire, pay or profit. All the telegraphic apparatus to belong to the telegraph company, and if not previously removed to be removed by the telegraph company within three calendar months after the expiration of the said term. If the railway company should at any time during the said term construct or use a telegraphic apparatus upon any railway belonging to the company they should use the same only for the transmission of the messages of the railway company themselves and not for the transmission of messages for others or for hire, pay or profit.

The railway company claimed compensation from the Postmaster-General under the Telegraph Acts of 1868 and 1869, in respect of such interest as the railway company might have, in possession or reversion, in any rights, powers, privileges, works and other property of such company acquired or used for the transmission of telegrams, so far as the same are or can be used for the transmission of such telegrams for commercial purposes, whether inland or foreign, and the particulars of their claim were for compensation in respect of the reversionary interest in the telegraph receipts from public messages and in respect of the loss of the privilege of granting way leaves, and in making future arrangements with telegraph and other companies, and in respect of granting a monopoly to the Postmaster-General for the conveyance of telegraphs over their line of railway, including an additional sum for extra cost of maintenance of the railway telegraphs, and also a sum for compulsory sale. Also an annual payment in perpetuity for right of way to the Postmaster-General at the rate of 1*l.* for wire calculated upon the wires existing upon the railway at the date of the claim, and used for the transmission of commercial messages, and a further annual payment in respect of such future additional wires as may be placed by the Postmaster-General.

The Solicitor-General (*Sir J. Holker*), *C. T. Simpson*, *C. Bowen* and *Casserley*, now appeared to shew cause, but

Thesiger (*Arthur Williams* with him), were called upon to support the rule.—The effect of the Telegraph Acts of 1868 and 1869 is to give a monopoly to the Postmaster-General to the exclusion of everybody else—32 & 33 Vict. c. 73. s. 4. Then, is there a right in this railway company to have an arbitrator appointed? There is, if this company is within these Acts. By the 3rd section of the 1868 Act (31 & 32 Vict. c. 110), the term "company" may mean "any company, corporation or persons now engaged in the United Kingdom of Great Britain and Ireland in transmitting or authorised to transmit messages for money or other consideration, by means of electric or other telegraphs or mechanical agencies, and each and every of those companies." And by the 1869 Act (32 & 33 Vict. c. 73), the term "telegraph company" shall mean any company, corporation or persons for the time being engaged in transmitting or by any instrument incorporating the

same authorised to transmit telegrams within the United Kingdom of Great Britain and Ireland, for money or other consideration.

[LUSH, J.—Surely "authorised to transmit" in the 1868 Act means authorised by Act of Parliament.]

By the 7th section of the 1868 Act, "If the Postmaster-General shall acquire any one undertaking under the powers of this Act he shall, upon the request in writing of any company possessing an undertaking established by special Act of Parliament or Royal Charter at the time of the passing of this Act, purchase the undertaking of such company upon terms to be settled (failing agreement) by arbitration, provided such request be made within twelve calendar months after the Postmaster-General shall have so acquired any one undertaking. And any railway company possessed of a telegraph open to the use of the public on the 1st of January, 1868, for transmitting messages for money, or possessing any beneficial interest in such telegraph, shall be included in this provision. And any such railway company shall be entitled upon a like request in writing to require the Postmaster-General to purchase the right of such railway company to transmit such messages or other beneficial interest." It is contended that this company comes within the latter part of that provision.

[MELLOR, J.—Does the Act mean more than that a company established by charter or Act of Parliament, or actually carrying on business, is to be entitled to require the Postmaster-General to purchase?]

The Legislature were aware that agreements similar to the one between the railway company and the telegraph company in the present case existed, as is shewn by the recital to the 9th section of the 1868 Act, which recites that "whereas the railway companies in the United Kingdom are for the most part either themselves owners of telegraphs which are used for the conveyance of public messages, and which are also essential for the safe conduct of the traffic on their respective undertakings, or they have contracts for various terms of years with telegraph companies, whose telegraphic apparatus is placed in the stations and along the railways and canals of the r
companies, by which contracts pr
is made with respect to the matters
said;" and though the enacting
which follows relates to certain
panies named, amongst which the
and Newport is not, yet there is a
nition of the existence of such rig
other cases. And the compensat
be paid is to be calculated on the
ciple laid down as to the railway
panies named as above by sub-sec
of the section paragraphs, *c*, *d* and *e*
all rents and annual or other pay
payable to the railway company by
telegraph companies during the s
expired periods embraced in their
tive agreements, and at the term
tioned in the said agreements respec
d, such sums as shall be agreed u
in default of agreement, as shall be
by arbitration in respect of the loss
railway company of the privilege of
ing other wayleaves, and making
arrangements with telegraph or
companies, and in respect of gran
monopoly to the Postmaster-Gene
the conveyance of telegraphs ove
railways as herein provided for;
sums as shall be agreed upon, or in
of agreement, as shall be settled b
tration as the value of the railway
pany's reversionary interest, if
the telegraph receipts from publi
sages on the expiration of the agre
with the respective telegraph com
The railway company here is depr
the right to make future arrange
It is deprived of the right to obt
muneration under the 7 & 8 Vict
s. 13, in case at the expiration
agreement the Postmaster-Genera
to take advantage of that clause.
this company comes within the de
of telegraph company in the 3rd se
the 1869 Act. [They also referred t
Vict. c. 85. s. 14, and sections 8 a
1868 Act.] If the mandamus w
lowed to go, the question of liabilit
be raised in a more formal manner
return.

MELLOR, J.—I would very w
have acceded to the letting of t
for the mandamus go, if I had felt a

sonable doubt on the matter. The Legislature never intended to give the right of obtaining compensation to every company or individual with reference to their power in the future of taking any particular course of action. There would be no end to such claims. The use of telegraphs by companies was contemplated in cases where railway companies did business as telegraph companies for profit and for the use of the public. The Legislature would not in such a case, where the railway company had established its business, take away that right without compensation. So in the other case, with regard to telegraph companies, who by arrangement, license, charter or Act, have power to put down machinery for transmission of messages and telegrams for profit; but here what has been taken away? Nothing has been done but to circumscribe their potentiality for the future. The applicants have failed altogether to shew any right to compensation.

LUSH, J.—If I entertained any doubt I should have thought it right that the writ should go, but I have none whatever. Let us look at the position of the railway company under their agreement with the telegraph company. [His Lordship read the agreement.] All the right the railway company took was the exclusive use of one single wire. They were prohibited from using that wire for the public use or for profit; then, after twenty-one years, the telegraph company were to take the wires away. Is the railway company in respect of their use of that one wire entitled under the Act to compensation? The railway company was not engaged in transmitting messages for money further than any individual in the kingdom is so engaged or is authorised to do so by hiring his land to a company for that purpose. Authorised means authorised by statute. With respect to the 7th section, this was not a telegraph open to the use of the public for transmitting messages for money; nor had the company any beneficial interest in such a telegraph, because they were prohibited from using any wires but the one, and they were confined as to that one to the purposes of their own traffic. I confess I am utterly at a loss to understand how the 9th section expands the meaning of beneficial interest in the 7th. The sub-sections apply to the different companies named in the section. Then the 6th section cannot be applied to this case, while the 5th section of the Act of 1869 contains certain exceptions to the exclusive privileges of the Postmaster General conferred by the Act, thereby saving the rights of this company. The railway company, therefore, is in the same position as if these Acts had not been passed, except that they cannot after the end of the agreement put up a telegraph apparatus for profit, but every individual through whose land a telegraph runs is equally deprived of such a right as that.

The rule must be discharged with costs.

Rule discharged with costs.

Attorneys—Hargrove, Fowler & Blunt, for plaintiffs; the Solicitor to the Post Office, for defendants.

1874. May 22. } THE QUEEN *v.* THE INHABITANTS OF BRADFIELD.

Highway—Dedication of Private Road already set out under Award—Highway Act, 5 & 6 *Will.* 4. *c.* 50. *s.* 23.

A private road, set out under an inclosure award, may, upon proof of sufficient user by the public before the passing of the Highway Act, 5 & 6 *Will.* 4. *c.* 50, *be deemed to be a highway which the parish or township is compellable to repair, though the award provides that such road is for ever thereafter to be kept in repair by the owners or occupiers of adjoining land.*

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 155.]

END OF TRINITY TERM, 1874.

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber

(ON ERROR AND ON APPEAL FROM THE COMMON PLEAS),

REPORTED BY

WILLIAM PATERSON, Esq., AND JOHN EDWARD HALL, Esq.,

BARRISTERS-AT-LAW;

AND ON APPEAL TO

The House of Lords,

REPORTED BY

EDMUND STORY MASKELYNE, Esq., Barrister-at-Law.

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37 & 38 Victoriæ.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords,

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

MICHAELMAS TERM, 37 VICTORIÆ.

1873. Nov. 5 & 6. } THE GREAT NORTHERN RAILWAY COMPANY *v.* WHITHAM.

Unilateral Contract—Consideration, Sufficiency of.

The defendant, by tender, offered to supply the plaintiffs at certain prices with such quantities of iron as the plaintiffs might order from time to time during a limited period. The defendant's tender was accepted by the plaintiffs, but he failed to supply to the plaintiffs all the iron ordered by them during the period specified. An action having been brought for breach of the contract to supply iron,—Held, *that the contract was not void for want of mutuality, and was founded upon a good consideration, and that the plaintiffs were entitled to the verdict.*

This was an action to recover damages for the omission to supply iron pursuant to contract. The cause came on for trial at the Summer Assizes, 1873, for the West Riding division of Yorkshire, before Pollock, B., without a jury, and the following were the material facts of the case.

The plaintiffs advertised for tenders for the supply of iron, and the defendant offered in writing to sell to the plaintiffs iron upon certain terms. The material portions of the defendant's tender were as follows—

"I, the undersigned, hereby undertake to supply the Great Northern Railway Company for twelve months with such quantities of each or any of the several articles named in the attached specification as the company's storekeeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side."

The attached specification mentioned various kinds of iron, with the prices thereof when delivered at Doncaster.

"General Conditions: 4. The storekeeper will issue to the contractor orders for the stores as required from time to time, and the same are to be delivered free of charge at the station on the Great Northern Railway named in the specification for which the tender is accepted, and to be addressed to the company's storekeeper at the depot named in the order.

"5. The orders are to be executed within twenty-one days from date, and should the contractors fail to supply the article ordered, or replace those rejected in due time, the company reserve the right to cancel the contract, and obtain supplies elsewhere, charging the difference of cost, if any, to the contractors."

The defendant's tender was accepted in the following letter, addressed to the defendant by the assistant secretary to the plaintiffs' company—

"I am instructed to inform you that my directors have accepted your tender to supply to this company, at Doncaster station, any quantity they may order

during the period ending 31st October, 1872, of the descriptions of iron mentioned on the enclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to."

The enclosed list specified various kinds of iron, with the prices thereof, to be delivered at Doncaster.

The defendant, in reply, wrote as follows—"I beg to own receipt of your favour accepting my tender for bars, for which I am obliged. Your specification shall receive my best attention."

The defendant failed to supply all the iron ordered by the company during the period specified, and the verdict was entered for the plaintiffs.

D. Seymour (*A. Wills* with him), on Nov. 5, moved, pursuant to leave reserved, for a rule to enter the verdict for the defendant. — The plaintiffs were not bound by the terms of the contract into which the parties had entered to order from the defendant any iron: it was entirely within the discretion of the plaintiffs whether the defendant should derive any benefit from the agreement. This is clear from *Burton* v. *The Great Northern Railway Company* (1). Therefore no consideration existed for the defendant's alleged promise to supply the plaintiffs with iron, and as the agreement was not under seal the want of a consideration avoided it; the supposed contract was altogether unilateral, and was bad for want of mutuality.

Cur. adv. vult.

The following judgments were delivered on Nov. 6.

KEATING, J.—In this case the counsel for the defendant moved for a rule to enter the verdict for him. The plaintiffs advertised for tenders for the supply of iron of various kinds, and the defendant's tender was accepted. The plaintiffs, pursuant to the contract, ordered iron of the defendant from time to time, but he failed to supply all the iron ordered by the plaintiffs. It has been contended on his behalf that, inasmuch as the plaintiffs were not bound to order any iron, the contract for the supply thereof w lateral and void as against the de In support of this argument *Burto Great Northern Railway Company* relied upon. That case certainl to establish that the plaintiffs v bound to order any iron under t tract, and that no action could b tained against them for omitting t and I express no opinion as to w defendant's position would have before any breach of the contra before he failed to supply iron ordered, he had refused to abide terms of the agreement. But fendant's promise being to supp iron as the plaintiffs should from time order, when an order was gi the plaintiffs, there was then a co tion for the defendant's promise. that the verdict ought to stand, a we ought not to grant a rule.

BRETT, J.—The defendant off supply the plaintiffs with such they should from time to time ord ing a limited period, and the con contained in his tender and in th of acceptance by the plaintiffs. It alleged that the contract cannot forced against the defendant, in as it is unilateral, and without co tion. The most that can be made objection is that at the time of the agreement only one party pr Many contracts, which are quit and enforceable by action, are nature. For instance, suppose I to another person 100*l.* upon cond his going to York; he is not b go to York, but if he does go to must pay him the amount promis like manner the defendant's tende that if the plaintiffs would give during the time stipulated he wou ply the iron required, at certain p be paid by the plaintiffs. *Burton Great Northern Railway Company* an authority establishing that the c did not bind the plaintiffs to gi order; but I think that if they gav for iron the defendant was bound cute them, for by giving an or plaintiffs bound themselves to ac iron when supplied by the defend to pay him the stipulated pric

(1) 9 Exch. Rep. 507; s. c. 23 Law J. Rep. (N.S.) Exch. 184.

case has been cited which is in point for the defendant, and this is in itself a strong argument against him, for such contracts as this must be of frequent occurrence. The rule cannot be granted, but I express no opinion whether he might not have put an end to his agreement by giving to the plaintiffs notice of avoidance before committing any breach.

GROVE, J., concurred.

Rule refused.

Attorneys—Johnson, Farquhar & Leech, for plaintiffs; Jacobs, North & Vincent, agents for North & Sons, Leeds, for defendant.

1873. Nov. 20. } BORRIES AND OTHERS *v.* THE IMPERIAL OTTOMAN BANK.

Principal and Agent—Set-off against Principal of Debt due from Factor—Pleading—Negativing Means of Knowledge.

To an action by a principal for the price of goods sold by his agent to the defendant, a plea setting off a debt due to the defendant from such agent, which averred that the agent was intrusted by the plaintiff with the possession of the goods as apparent owner, and that the agent sold the same in his own name and as his own goods with the consent of the plaintiff, and that at the time of such sale the defendant believed the agent to be the owner, and did not know that the plaintiff was the owner, or that the agent was agent, was held good, although it did not by express averment negative either the defendant's means of knowing that the agent was such agent, or that the defendant had had notice that the plaintiff was the owner.

It being an immaterial averment in a plea so pleaded that the defendant had not the means of such knowledge, a replication thereto that at the time of the sale the defendant had the means of knowing that the agent was the plaintiff's agent, and as such sold the goods, was held bad.

The second count of the declaration was for goods sold and delivered, for money received for the use of the plaintiffs, and for interest.

The defendants pleaded to so much of such second count as relates to money payable for goods sold and delivered, that the said goods were sold and delivered to the defendants by certain persons known and carrying on business as Messrs. Scheitlin & Co., then being the agents of the plaintiffs in that behalf, and intrusted by the plaintiffs with the possession of the said goods as apparent owners thereof, and that the said Messrs. Scheitlin & Co. sold and delivered the said goods as aforesaid in their own name, and as their own goods, with the consent of the plaintiffs, and that at the time of the said sale and delivery of the said goods the defendants believed the said Messrs. Scheitlin & Co. to be the owners of the said goods, and did not know that the plaintiffs were the owners of the said goods or of any of them, or were interested therein or in the sale thereof, or that the said Messrs. Scheitlin & Co. were agents in that behalf, and that before the defendants knew that the plaintiffs were the owners of the said goods or any of them or interested therein, or that the said Messrs. Scheitlin & Co. were agents in the sale thereof, the said Messrs. Scheitlin & Co. became, and at the commencement of this suit were, and still were, indebted to the defendants in an amount equal to the plaintiffs' claim. [The plea then concluded with a statement of the subject-matter of such debt, which was pleaded as a set off against the plaintiffs' claim.]

The plaintiffs demurred to this plea, and also replied that before and at the time when the said goods were sold and delivered to the defendants, as in that plea mentioned, by the said persons therein mentioned as Messrs. Scheitlin & Co., they, the defendants, had the means of knowing that the said Messrs. Scheitlin & Co. were merely apparent owners of the said goods, and that the same were intrusted to the said Messrs. Scheitlin & Co. as agents of and for the plaintiffs, and that the said Messrs. Scheitlin & Co. were agents of and for the plaintiffs, and as agents of and for the plaintiffs sold and delivered the said goods to the defendants.

The defendants demurred to this replication.

Udall, for the plaintiffs.—The plea is bad, and the replication is good. If

the defendants at the time of the sale of the goods to them had the means of knowing that the plaintiffs were the owners of the goods, and that Messrs. Scheitlin were merely agents, they would not be entitled to set off the debt due to them from Messrs. Scheitlin. In the notes of Mr. Smith to *George* v. *Clagett* (1), after stating the rule as to the right of a party who has contracted with an agent in his own name for an undisclosed principal when sued upon such contract by the principal, Mr. Smith says that, "the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he has the means of knowing, and though he may not be expressly told, still must be supposed to have known that he was dealing not with a principal but with an agent, the reason of the above rule ceases, and then *cessante ratione, cessat lex.*" In *Chitty's Precedents in Pleading* (3rd edit. by L. Temple, R. G. Williams and Jeffery), p. 574, the form of plea which is given expressly states that at the time of sale the defendant, "did not know, and had not the means of knowing, that the plaintiff was the owner of the said goods or interested therein, or that the said J. S. was only an agent in that behalf." So in *Smith's Mercantile Law*, 8th edit. p. 153, after having stated the reason for the rule, which gives a purchaser from a factor the right of set-off of any claim he had against such factor, it is added, "But if at any time in the course of the transaction he have means of knowing that the person with whom he deals is not a principal, the above reason does not apply, and then *cessante ratione, cessat lex.*" The case of *Purchell* v. *Salter* (2) is referred to in the notes to *George* v. *Clagett* (1) for the mode of pleading such a defence as that set up in *George* v. *Clagett* (1), and in the plea as pleaded in *Purchell* v. *Salter* (2) it is averred that the defendant "did not know, and had not the means of knowing, that the plaintiff was the owner of the said goods or interested therein, or that the said George Mason was only an in that behalf."

[KEATING, J.—Are means of knov anything more than evidence of ledge?]

Knowledge and means of knowled two distinct things. It is consister the plea in the present case, that t fendants had been informed th plaintiffs were the owners, but that time of sale they had forgotten thi

[COLERIDGE, C.J.—Lord Denman judgment of *Purchell* v. *Salter* (2), is a written one, states the effect plea, but in so doing omits an therein about means of knowledge, merely, "and further that the p was not known by the defendant proprietor of the said goods." D J.—The form of plea given in *Bull Leake's Precedents* (3rd edit. p. precisely the same as that in wh plea in question is pleaded in the action, and in a note to such form citing *George* v. *Clagett* (1) and cases, it is said, "If the buyer k means of knowing him to be deal an agent and negligently omitted form himself it would be equival knowledge, and would deprive him set-off—*Baring* v. *Corrie* (3)."]

In the former editions of *Bull Leake's Precedents* it was alleged plea that "the defendant did not and had not the means of knowin (2nd edit. p. 580). No explana given for making this alteratio *Semenza* v. *Brinsley* (4) the objec the plea was that it did not negati defendant's knowledge that M whom he bought the goods, was agent, but only that the goods we by Mole in his own name and as h goods; and Sir G. Honyman, in su the demurrer to the plea, argued s fully that, "where a man buys of on he knows, or has the means of kn is selling as agent for somebody cannot in an action by the princ the price set off a debt due to hi the agent." Lord Tenterden s *Baring* v. *Corrie* (3), "But in wha

(1) 7 Term Rep. 359; s. c. 2 Smith's Lead. Cas. 6th ed. 115.

(2) 1 Q.B. Rep. 209; s. c. 11 Law J. Rep. (N.S.) Q.B. 433.

(3) 2 B. & Ald. 137.

(4) 18 Com. B. Rep. N.S. 467; s. c. 3 Rep. (N.S.) C.P. 191.

ion did the defendants stand in respect o Coles & Co., and what did they omit o do? They knew that Coles & Co. cted both as brokers and merchants, and f they meant to deal with them as merhants and to derive a benefit from so ealing with them, they ought to have nquired whether in this transaction they cted as brokers or not; but they make o enquiry."

[BRETT, J.—*Baring* v. *Corrie* (3) is a very different case from the present. Coles & Co. were not factors but only brokers, and therefore it was decided that though the defendants when they bought of Coles & Co. believed them to be principals, yet they could not set off a debt due from them against the action by the principal.]

Next, the plea is bad for not negativing that the defendants had notice that the plaintiffs were the owners before the set-off accrued. In *Salter* v. *Purchell* (2), in the Exchequer Chamber, Parke, B., says, during the argument, "it," that is the debt which is set off, "must be due either before the sale or before notice to the defendant that the plaintiff was the real owner." If the plaintiff's contention in this case is right as to the plea, then the replication is good.

Hall, contra.—The plea is in the form given by all the precedents, with the exception of that which has been referred to in *Chitty's Precedents in Pleading*. Neither in *George* v. *Clagett* (1) nor in *Rabone* v. *Williams*, cited in *George* v. *Clagett* (1), on the authority of which that last case was decided, is there anything said about means of knowledge. If the defendant had the means of knowledge, and refused to use them, the jury might well consider that the same as knowledge, and accordingly find that he did know. No doubt where the defendant knows that the person of whom he buys the goods is selling them as a factor, he is deprived of the right of set-off, and on that ground *Fish* v. *Kempton* (5) was decided, but there there was nothing alleged in the plea about the means of knowledge. In that case Cresswell, J., says, "this is an attempt to extend the rule laid down in *Rabone* v. *Williams* and *George* v. *Clegatt* (1), which has now been uniformly acted on for many years. If a factor sells goods as owner and the buyer *bona fide* purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal," and he adds that, "Lord Mansfield so lays down the rule distinctly in *Rabone* v. *Williams*." It is not necessary that the plea should negative the notice to the defendants that the plaintiffs were owners, and even if it appeared that the defendants had had such notice at one time, yet if at the time of the sale they did not know that the plaintiffs were the owners and *bona fide* believed they were buying of the owners that would be sufficient, and the plea would be good. [He was then stopped.]

Udall replied.

COLERIDGE, C.J.—I am of opinion that our judgment on these demurrers should be for the defendants. The declaration contains a count for goods sold and delivered, to which the defendants have pleaded that Messrs. Scheitlin, by whom the goods were sold to the defendants, were entrusted by the plaintiffs with the possession of such goods as apparent owners, and that Messrs. Scheitlin sold them in their own names and as their own goods with the consent of the plaintiffs, and that at the time of such sale the defendants believed the said Messrs. Scheitlin to be the owners, and did not know that the plaintiffs were the owners. The plea then sets off a debt due to the defendants from Messrs. Scheitlin against the plaintiffs' claim. Now on the argument of the demurrer to this plea two points have been made by the learned counsel for the plaintiffs. First, it is said that the plea ought to have averred not only that the defendants did not know that the plaintiffs were the owners of the goods, but also that the defendants had not the means of knowing that the plaintiffs were the owners, and further that the plea ought to have stated that the defendants had not had notice of that

(5) 7 Com. B. Rep. 687; s. c. 18 Law J. Rep. C.P. 206.

fact. It appears to me, however, that the plea states all that is material for the purpose of entitling the defendants to make the set-off in question. It states that the plaintiffs entrusted the said Messrs. Scheitlin with the possession of the goods as the apparent owners, and also that Messrs. Scheitlin sold them as their own goods with the consent of the plaintiffs, and that at the time of the sale the defendants believed the said Messrs. Scheitlin to be the owners. The essence of this defence is the real knowledge and state of mind of the defendants at the time they bought the goods of Messrs. Scheitlin, and in this plea they state that they believed Messrs. Scheitlin to be the owners of the goods, and did not know that the plaintiffs were the owners. That brings the plea in this case distinctly within the principle of *George* v. *Clagett* (1), and the form is according to that which is universally used. There is no case in which anything turned on the averment of the defendant not having had the means of knowledge whenever such was stated in the plea, and though in *Purchell* v. *Salter* (2) it was averred in the plea, yet the judgment of the Court of Queen's Bench, when stating the substance of such plea, entirely omits it. Then with regard to the point that the plea ought to state that the defendants had not had notice that the plaintiffs were the owners, I am of opinion that if it be necessary there should be such averment, it is sufficiently averred here by the statement that Messrs. Scheitlin sold the goods as their own goods with the consent of the plaintiffs. With regard to the replication—if the plea be good the replication alleging that the defendants had the means of knowing that Scheitlin were the plaintiffs' agents and only apparent owners of the goods is bad for the reasons which have been given, such allegation being quite immaterial.

KEATING, J.—The point which has been taken by Mr. Udall is that in a plea of set-off where the defence under which it is set up is similar to that in *George* v. *Clagett* (1) it is not sufficient to state the defendants' want of knowledge that the goods were those of the principal, without stating also the want of the means of knowledge. As the plea, however, states that the goods were sold to the defe in the name of the agents and a goods with the consent of the pl and that the defendants did not k believe the goods were the p goods, it seems to me to be unne for the plea to go on and say t defendants had not the means of k these facts, for under a traverse want of knowledge the means of k might be shewn.

BRETT, J.—The material allegat this plea are that the goods were the defendants by Messrs. Scheitl that Messrs. Scheitlin were agent plaintiffs, intrusted by them with t session of the goods as apparent thereof, and that the said Scheitlin sold the said goods a own goods with the consent plaintiffs, and that at the time sale the defendants believed t Messrs. Scheitlin to be the owne did not know that Messrs. Scheitl agents. It has been objected on t of the plaintiffs, that assuming al be true, still the plea is bad for not s that the defendants had not the n knowing that Messrs. Scheitli agents. In my opinion such an av assuming the other matters so s the plea to be true, is immater would moreover throw a burden chasers which would make it very to carry on business, and would which the mercantile law never i they should be subject to. The p having intrusted their goods to a sell as their own must be conten the risk of what may be the po those to whom they have soentrust goods. It is further argued that is bad, because it does not shew defendants had not had notice goods were the plaintiffs. I do n it necessary that the plea shoul but if it be necessary it is, I think stance alleged in the allegati Messrs. Scheitlin at the time of the goods as their own and names with the plaintiffs' conser further and think that even if t cation amounts to an allegatio the time of the sale the defend notice that the goods were the p

yet that is not inconsistent with the material allegations in the plea, and if these be taken to be true it does not prevent the defendants making this set-off. In *Semenza* v. *Brinsley* (4), Willes, J., in delivering the judgment of the Court, states what should be alleged in the plea in order to make a valid defence within the rule, which allows a debt due from the factor to be set off against a claim for the price of the goods by the principal. He states that "the plea should shew that the contract was made by a person whom the plaintiff had entrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff, that the defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued." Now neither of the allegations which Mr. Udall says should be in the plea in the present case were stated by that learned Judge to be amongst those matters which are necessary to be put in the plea in order to make it a good defence. For these reasons I am of opinion that the plea is good. I also think that the replication is bad, inasmuch as if the plea be good, what is so alleged in the replication is immaterial.

DENMAN, J.—I am of the same opinion. Both these matters, which it is contended by Mr. Udall ought to have been inserted in the plea, are, I think, not matters of pleading but of evidence. The means of knowledge may be important in order to ascertain whether the defendants knew or not that Scheitlin & Co. were agents, but it is matter of evidence only, and it is not necessary, but on the contrary it is improper in pleading, to set out what is matter of evidence.

Judgment for the defendants.

Attorneys—Williamson, Hill & Co., agents for Ingledew & Daggett, Newcastle-upon-Tyne, for plaintiffs; G. M. Clements, for defendants.

1873. Nov. 25. } CROWTHER *v.* APPLEBY.

Witness—Attachment—Excuse for not Producing Documents—Refusal by Witness's Master to allow Production.

The Court in the exercise of its discretion will not issue an attachment against a witness for not producing documents in obedience to a subpœna duces tecum when he has only the possession of such documents as servant to his master, who has refused to allow him to take and produce them at the trial.

This was a rule, which had been obtained by *R. G. Williams* for the plaintiff, calling on Frederick Sharpley to shew cause why an attachment should not issue against him for disobedience of the order of the District Prothonotary of the Court of Common Pleas at Lancaster in not producing before the arbitrator the several documents mentioned in such order.

The action was brought in the Common Pleas at Lancaster to recover moneys alleged to be due to the plaintiff in respect of certain contracts with the defendant in reference to the construction of the Louth and Lincoln Railway, and such action had been referred, by an order of Nisi Prius, to an arbitrator. The said Frederick Sharpley was the solicitor and secretary of the said railway company, and as such, it was stated in the affidavit on which this rule had been obtained, he would have and had the custody of the books, documents and papers connected with the said railway and belonging to the said company.

On the 14th of August last an order was obtained by the plaintiff from the District Prothonotary of the Court of Common Pleas at Lancaster, ordering the attendance of the said Frederick Sharpley before the arbitrator to be examined as a witness touching the matters referred, and also to produce before the arbitrator the following documents, namely, "the minute and all other books containing the proceedings of the Louth and Lincoln Railway Company in the years 1870, 1871 and 1872; a contract between the said Louth and Lincoln Railway Company dated the 12th of June, 1871, for con-

struction of the said railway; receipts for all moneys paid by the said company, or on its behalf during the years 1870, 1871 and 1872; all letters written by the defendant to the said company or to any of the directors thereof during the said years 1870, 1871 and 1872; also all drafts, engrossments and conveyances relating to land taken or purchased by the said railway company during the years aforesaid for the purposes of the said railway, and all certificates and authorities for payment of money given by the engineer of the said company during such last-mentioned years; also numerical register, registration book, ledger, journal, cash-book, minute book, transfer book, shareholders' address-book; and all other books and papers containing any list of shareholders kept or used by the said railway company during the years 1870 and 1871, pursuant to the statute in that behalf."

The said F. Sharpley was duly served with this order, and in obedience to it he attended before the arbitrator, but without having with him any of the documents mentioned in such order. He expressed his readiness to be examined as a witness, but declined to produce the documents, stating that the directors of the company had refused to allow him permission to produce them.

Under these circumstances the present rule was obtained, against which

R. Vaughan Williams now shewed cause.—The Court has no jurisdiction to grant an attachment for disobedience of an order of a district prothonotary, although it will be said by the other side that the Court has such jurisdiction, by virtue of 3 & 4 Will. 4. c. 42. ss. 39 & 40, coupled with 32 & 33 Vict. c. 37. s. 6, sub-ss. 1 & 4, and sections 7 & 15, and the rules of Court made under that last Act (see 39 Law J. Rep. (N.S.) Common Law). It is not perhaps necessary to discuss this question, for the answer to this application is, first, that those to whom the documents belong and towards whom the witness, Sharpley, stands in the situation of a servant, have ordered him not to produce them; and, secondly, the form of the order, ordering him to produce the documents, is too general and comprehensive. It is admitt if the witness has the books with Court, he would be bound to p them, but if he has not got the him, because his master, to whoı belong, has ordered him not to tak he would be excused from producin Indeed he could not remove them c to the orders of his master withou guilty of a breach of duty and incu liability of dismissal from his emplc *Lee* v. *Angas* (1) is an authority *subpœna duces tecum* in such a form as the order in this case, is v jectionable, and will not be e against the witness. In tha Wood, V.C., approved of the the *Attorney-General* v. *Wilson* (2) the Vice-Chancellor of England to give effect to a *subpœna duces* not only because it was in too ge form as to the books the witness quired to produce, but also beca books were partnership books be to the bank in which the witness partner, and his co-partners wo allow the witness to produce them only common law case on the su *Amey* v. *Long* (3), which relate sheriff's bailiff being required to the warrant under which he ha and which he was subpœnaed to as a witness. That case is a very c one from the present, and turn much on the pleadings, but the Queen's Bench considered it wou been a good excuse for not produ warrant had it been in the posse another person.

R. G. Williams in support of t —The documents are in the cu the railway company through th of their secretary, and the only obtaining their production is pœnaing the secretary. The c being a corporation cannot be serv a subpœna. In 1 *Chitty's Archb.* 3 edition, it is said that "it is no exc the legal custody of the instrum longs to another if it be in th

(1) 35 Law J. Rep. (N.S.) Chanc. Law Rep. 2 Eq. 59.

(2) 9 Sim. 526; s. c. 8 Law J. R Chanc. 119.

(3) 9 East 473; s. c. 1 Campb. 14.

possession of the witness," and for this is cited *inter alia Amey* v. *Long* (3).

[DENMAN, J.—Further on at page 354 it is stated that "if he be a clerk in a public office, and he is called upon to produce an official paper which his principal has not given him leave to produce, the Court will not compel him to produce it," and reference is made to *Austin* v. *Evans* (4), and see *Lord Falmouth* v. *Moss* (5) where the witness was the plaintiff's steward.]

In that last case the Judge at the trial thought that the possession of the documents by the steward was the possession of his employer, the plaintiff, and therefore not affected by the *subpœna duces tecum*, and in *Austin* v. *Evans* (4) the custody of the accounts which the clerk in the Legacy Duty Office had been served with a *subpœna duces tecum* to produce was in the comptroller, the head of the office. If the rule be made absolute, the attachment may be ordered to lie in the office instead of being at once executed, and no doubt the necessary documents for the plaintiff will then be produced. With regard to the form of the order, there is no case in which it has been suggested that it should be more specific than a notice to produce.

COLERIDGE, C.J.—This is a rule to shew cause why an attachment should not issue against Frederick Sharpley, because he did not produce before an arbitrator a large quantity of documents belonging to the Louth and Lincoln Railway Company, and which they would not allow him to produce. Some technical objection has been taken in the present proceeding to which it is unnecessary to refer, for assuming that we have power to make the order for the attachment, I am of opinion that, in the exercise of our discretion, it would be wrong to do so in this case, and that therefore we ought not to make the present rule absolute. In *Lee* v. *Angas* (1) the decision of the Vice-Chancellor of England in *The Attorney-General* v. *Wilson* (2) is expressly adopted. That was the case of a partner who had been subpœnaed to produce the books of the partnership, and it was decided that he could not be compelled to produce them if his co-partner had refused to allow their production. That seems to me *a fortiori* to apply to the case of a master and servant. Then there is the case of a steward in *Lord Falmouth* v. *Moss* (5), and also the case of *Amey* v. *Long* (3), where the Court of Queen's Bench took very much the same view of the matter. On these authorities it seems to me that we should be doing wrong if we were to attach a person for not producing documents which he has not the custody of otherwise than as servant to the railway company, and which they who are his masters have refused to allow him to produce. I express no opinion whether an action would or not lie against the witness, but only that an attachment ought not to issue against him. This rule will, therefore, be discharged.

KEATING, J.—I am of the same opinion.

BRETT, J.—I assume, though only for the purpose of the argument in the present case, that an attachment will lie for disobedience to the order of a district prothonotary of the Court of Common Pleas at Lancaster. It is a matter about which I have considerable doubt, but I give no opinion whatever on the subject. The question is whether, assuming the attachment will lie, it ought to be issued in this case. This is not a case in which the witness had the documents with him in Court and refused to produce them, but in which the documents are in the possession of the witness as the servant of another, when neither he nor his master are parties to the suit in which they are to be produced. The secretary to the railway company is nothing more than a servant either to the company or the directors; and the question therefore is whether when a servant refuses to bring documents to the Court which he is summoned to attend with as a witness, because his master has refused to allow him to do so, this Court will attach him. Now *The Attorney-General* v. *Wilson* (2) is a distinct decision that a partner is excused from producing the partnership books when his co-partner has forbidden him to produce them. A partner is only in the situation of an agent for a principal, and therefore that case is an authority that an

(4) 2 Man. & G. 430.
(5) 11 Price, 455.

agent cannot be attached for not producing documents which the principal has refused to allow him to produce, and it seems to me to follow that a servant cannot be attached where his master forbids him to produce the documents.

DENMAN, J., concurred.

Rule discharged with costs.

Attorneys—T. Crowther, agent for Hulton & Lister, Salford, for plaintiff; Brooksbank & Galland, agents for T. Sharpley, Louth, for defendant.

1873. Nov. 14. } PEYTON *v.* HARTING.

Practice — Interrogatories — Insufficient Answer—Form of Order for Oral Examination.

When the answers to interrogatories administered pursuant to the Common Law Procedure Act, 1854, *contain statements irrelevant to the questions asked, the interrogatories are insufficiently answered within the meaning of the* 53*rd section of that statute, and an oral examination may be ordered in the discretion of a Judge at chambers.*

An order directing that a person interrogated pursuant to the Common Law Procedure Act, 1854, *shall be orally examined as to the matters concerning which he has refused or omitted to make an affidavit, is sufficient within the* 53*rd section.*

In this case interrogatories had been administered by the plaintiff to the defendant, who was questioned as to certain transactions which had passed between him and Mary Theresa Peyton. Some East India Stock had been transferred by M. T. Peyton to the defendant. The transfers were asked for as loans, but the defendant alleged that M. T. Peyton did not intend to reclaim the stock, and that the same was to be answered out of legacies which she had meant to leave to him and his wife. The following were the material interrogatories—

10. After the execution of a settlement made by Miss Peyton on the marriage of her cousin, Capt. Peyton, was Miss Peyton to your knowledge in want of money? Did she in the year 1861 apply return or re-transfer the said st

11. Did she then inform you had no other property left, or that effect? Did you request h ask you to return any stock, on t that it would be ruin to you family, or words to that effect?

13. In August, 1861, did Cap and Col. Pringle visit you wit sage from Miss Peyton, if so, effect?

16. Did the said Mary Theres on or about the 9th of Febru or when, sign in your presence ment, a copy of which, marked shewn to you?

17. Where did she sign such d and what person or persons wer when she signed it? Was it your request? Did you advi consult, and if so, what profess son before signing it?

18. What consideration, if there for the signing by the s Theresa Peyton of the said docu

19. Were you at any time su to the 9th of February, 1861, when, asked by the said M. T. P give any, and what security fo transfer into her name of the s or any and what part thereof, o payment to her of the value of stock or any and what part ther

The defendant answered these gatories as follows.

10. Miss Peyton made, I belie advances to her cousin, Capt. who is plaintiff in this cause, return from India in 1858, withou reason to believe, any considera merely from motives similar which induced her to assist me East India Stock the subject of th In 1859, she advanced him the 700*l.*, and in 1860 the sum of 6, which year she also became sec him for 2,000*l.* In 1861 she also a post obit bond for 15,000*l.* in f the plaintiff, and afterwards at his in substitution of the said bond, s India Stock which realised a nearly 15,000*l.*, and invested and the same for his, the plaintiff's, She also conveyed to him her es

Sussex for his own use. These large advances greatly reduced Miss Peyton's means, and after the plaintiff, Capt. Peyton, had thus obtained nearly all her fortune without, as I believe, giving any return, she was I believe in want of money. As to the last part of the 10th interrogatory, I say she did not.

11. After making over to the plaintiff all the property mentioned in the last answer, I am aware Miss Peyton had but little or no property left. As to the last part of the 11th interrogatory, I say that I did not.

13. Capt. Peyton, the plaintiff in this cause, and Col. Pringle, his father-in-law, did visit me at the time mentioned in the 13th interrogatory. They came in consequence of a letter I had written to Miss Peyton respecting a baptismal register. This had reference to the gift by Miss Peyton of her estate in Sussex to the plaintiff, and not to the subject of this action, but they told me that Miss Peyton had referred them to me for any information they might want respecting her property generally. Having nothing to conceal I answered all their questions, and gave them a detailed account of what she had done with her money since her father's death, including the East India Stock the subject of this action, and I also told them that Miss Peyton, by her gifts to the plaintiff, and particularly by her gifts of the 15,000*l.* and of her estate in Sussex, had denuded herself of nearly all her property. Miss Peyton subsequently told me that she had not referred them to me for any such information.

16. She did sign the document scheduled on the day mentioned.

17. She wrote and signed it in my office, and I was present. It was not then written and signed at my request, and I gave her no advice, but the transaction happened in the following manner—On the 9th of February, 1861, when Miss Peyton was going to execute the post obit bond for 15,000*l.* in favour of the plaintiff as already described in my answer to the 10th interrogatory, she came from Brighton, where she was then residing, to my office, and then and there executed the bond, which I had prepared at her request. Having done so, and thus having given or secured to the plaintiff the sum of 15,000*l.*, in addition to all the other gifts to him, she assured me, with reference to the East India Stock that had been transferred to me, and which is the subject of this action, that all she required was the interest or an equivalent sum for her life, and that the principal was to be mine. This assurance came wholly voluntarily from herself, and was unasked by me. I then requested that when she got back to Brighton she would write me a letter to that effect; she replied that she might never get back, and that she would write it at once, and therefore without leaving her seat after signing the bond, she voluntarily, and without any request by me, wrote and signed the document referred to in the 16th and 17th interrogatories.

18. There was no valuable consideration, but the gift was made, and the document was signed in consequence of the affection Miss Peyton had for my wife, who was her first cousin, and one of her nearest blood relations, and for my family, and the great friendship that existed between me and her. The fact of her giving so much of her property to the plaintiff, when she had previously promised that my son should be her heir, and had just then executed the bond for 15,000*l.* in the plaintiff's favour, and the other circumstances I have before referred to, doubtless influenced her in this transaction.

19. The only application of the kind was contained in a letter from Miss Peyton to me dated the 22nd of December, 1861, nearly a year after her gift to me, and after the bulk of her property had been made over to the plaintiff, when she had evidently, from the terms of her letter, involved herself in difficulties. There was some subsequent correspondence on the subject with Miss Peyton and her solicitors, Messrs. Walters, Young & Co., who, eleven years afterwards, and after Miss Peyton had died, but not until then, commenced this action against me.

Martin, B., at chambers, ordered that the defendant should appear, and be examined upon oath before one of the Masters of the Court of Common Pleas, as to the matters concerning which he had refused or omitted to make an affidavit.

J. L. Goddard now moved for a rule calling upon the plaintiff to shew cause why the order of Martin, B., should not be set aside. The order of the learned Judge is bad upon two grounds—First, the power to direct an oral examination is confined to those cases in which there has been an omission to answer sufficiently the interrogatories administered. In the present case the defendant has fully answered the questions put to him; he has left nothing unanswered. All he has done is to add matter shewing that M. T. Peyton has been no less generous to the plaintiff than to himself, and was a person very likely to present him with the East India Stock.

[Brett, J.—Suppose the rule to be that the party interrogated is entitled to explain his answer; do not these statements go beyond that limit?]

The words of the Act are confined to omissions to answer fully the interrogatories, and an oral examination cannot be directed, on the ground that the party interrogated has stated more than has been required of him. Secondly, even if such an order be within the meaning of the statute, the present order is bad in point of form; the Judge has directed in general terms that the oral examination shall take place, but the statute requires him to specify what are the points upon which the defendant is to be interrogated; he ought to have specified which answers are insufficient. Moreover an oral examination is objectionable, as, according to the practice of the masters, the defendant may not be allowed to be assisted by counsel when the examination takes place.

Keating, J.—The question brought before us is of importance, because it is of frequent occurrence at chambers. The defendant's counsel has moved to set aside an order of my brother Martin, made pursuant to the Common Law Procedure Act, 1854, s. 53. Two grounds of objection have been urged upon us: First, it has been contended that the order is in substance not within the meaning of that enactment, because there has been no omission to answer fully the questions asked; but whenever an excess of irrelevant matter is inserted in an answer, is an omission to answer sufficiently whenever in the opinion of the Ju chambers there is an excess of im matter, he has authority to order a examination before the master. second ground has been stated for h the order bad; it is said to be imp because it does not specify the point which the oral examination is t place. I do not think this objection tainable; in my opinion the order ficiently within the terms of the s If the rule of practice were such as h suggested, it is difficult to see how it be complied with. It might be imp to specify the particular answers wh objectionable. It is sufficient if the gives directions in general terms, master will obtain the answers dive improper matter. Both the obje taken on behalf of the defendant fa the rule must be refused.

Brett, J.—Interrogatories havin administered to the defendant an has been obtained from my brother that he should be orally examined. defendant's counsel has objected order on two specific grounds: fi contends that the interrogatories been sufficiently answered; but he that the defendant has stated in a matter which is irrelevant to the qu and beyond their scope. It is argu under no circumstances can an ans insufficient, which fully meets ever contained in the question. It may that a party interrogated ought allowed to explain his answers; b are not here called upon to decide w an improper excess, for the prop relied upon goes much further. W the amount of irrelevant matter is cessive as to make an answer insuf is a question for the Judge, and w he is right in the exercise of his disc is not for us to determine. I thin the defendant has refused to make ficient answer within the meaning statute. As to the other objec think no inconvenience will happe drawing up the order in general and then the master will decide as proper mode in which the answers be taken.

GROVE, J.—My brother Martin considered that the defendant had refused to make sufficient answers to the interrogatories administered to him; and I think that he had ample ground for arriving at that conclusion. It was further contended that the points upon which the oral examination is to take place ought to be specially mentioned. It would considerably hamper the master if directions were given in specific terms as to the mode in which he is to conduct the examination. It might be found in many cases impossible to carry the provisions of the statute into effect, if we were to put the construction upon it which has been contended for.

DENMAN, J.—The defendant's counsel has argued that these answers are not insufficient; but I am of opinion that answers containing irrelevant matter ought not to be given, and that the defendant's answers are insufficient within the meaning of the statute. They are objectionable on the ground that the defendant has attempted by indirect means to prevent the plaintiff from using them against him; he thereby defeats the policy of the legislature. The Judge is to use his discretion, by which he must be guided in deciding whether the interrogatories have been duly answered. I think the form of the order sufficient, because there can be no doubt as to the points upon which the examination is to take place (2).

Rule refused.

Attorneys—Walters, Young & Co., for plaintiff; R. S. Taylor & Son, for defendant.

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(2) The oral examination accordingly took place and was attended by counsel on behalf of the defendant. An objection was made to the presence of counsel for the party interrogated, but the master, after stating that the practice was uncertain, ruled that the examination should be conducted on similar principles to an examination in Court, and that counsel ought to be allowed to attend on behalf of the party interrogated. Only those questions which were contained in the written interrogatories were allowed to be asked of the defendant except in one instance, where his answer was not sufficiently precise; other questions were then allowed in order to obtain an explicit statement.

1873. Nov. 25. } PHILLIPS *v.* BRIDGE.

Landlord and Tenant — Ejectment — Re-entry on Default in Payment of Rent — Demand of Rent.

By an agreement under which premises were let at a rent payable on the usual quarter days, a right of re-entry was reserved to the landlord if default should be made "in payment of the rent or any part thereof within twenty-one days after the same shall become due (being demanded):" —Held, *that to entitle the landlord to bring ejectment on such right of re-entry there must be a demand of the rent after such twenty-one days have elapsed, and a demand made during such twenty-one days was not sufficient.*

Ejectment on a power for re-entry for non-payment of rent contained in the agreement under which certain rooms were let by the plaintiff to the defendant for a term of years from the 25th of March, 1870, at a yearly rent payable quarterly on the usual quarter days for payment. The following was the clause giving the power of re-entry—"And this agreement is entered into upon the express condition that if the said John Bridge shall make *default in payment of the said rent or any part thereof within twenty-one days after the same shall become due (being demanded)*, become bankrupt, or on breach of any or either of the foregoing stipulations by or on the part of the said John Bridge, it shall be lawful for the said Edmund Phillips, without giving any notice to quit, and without any other warrant or proceeding, to re-enter and resume possession of the said rooms."

At the trial of the cause in the Mayor's Court of London, the plaintiff's agent proved that he had called on the 9th of April for the Lady-day rent, when the defendant had referred him to his, the defendant's, solicitors. No other demand of rent was made, but the rent not having been paid, and twenty-one days having elapsed after making such demand on the 9th of April, the present action was brought. It was contended on behalf of the defendant that there had been no

sufficient demand to entitle the plaintiff to recover in ejectment. A verdict, however, was entered for the plaintiff, with leave to the defendant to move to set the verdict aside and enter it for the defendant if the Court should think that there had not been a demand in accordance with the terms of the agreement. A rule *nisi* to that effect was accordingly obtained, against which

Hilbery now shewed cause.—It is not necessary that there should have been such a demand of rent as required at common law. In *Newdigate's Case* (1), where, if the rent was in arrear for the space of three months after any feast, &c., there was a power of re-entry "without further demand," the Court held that ejectment might be brought without any demand made by virtue of 32 Hen. 8. c. 32. According to the terms of the agreement in the present case, the landlord might demand the rent when it was due, and having done so he might bring ejectment twenty-one days afterwards if the rent was still not paid without making any further demand. The words, "being demanded," cannot refer to a common law demand, for the re-entry is expressly given, if default be made in payment of any part of the rent, and it was not competent, in a formal demand at common law, to demand part of the rent only. In *Doe dem. Scholefield* v. *Alexander* (2) the statute 4 Geo. 2. c. 28, was held to have entitled the lessor to re-enter where there was more than half a year's rent in arrear, and no sufficient distress, without the lessor demanding the rent, although the lease provided that the rent should be "lawfully demanded."

[Brett, J.—The question depends on the meaning of the agreement. As soon as the rent had become due, the lessor might have brought an action for or distrained for the rent, and the demand of the rent, which was made in the present case, might have been supposed to have reference to that, but when a forfeiture is sought for by reason of non-payment, ought not some notice of this to have been given by a demand after the twenty-one days have elapsed?]

(1) Dyer 68*a*.
(2) 2 M. & S. 525.

No doubt, to create a forfeitu parties stipulate, not merely tha should have been a default for twe days in payment of the rent, but t rent should be demanded; but t stipulation is satisfied by a deman at any time after the rent is due.

Talfourd Salter in support of t —Without these words in the agr "being demanded," the plaintif not have recovered in this action c ment without proving a demand, the niceties required at commo Have these words dispensed wit Unless they are mere surplusag ought to shew the kind of demand must be made before a forfeiture created. In *Woodfall's Landlo Tenant*, 10th edition, p. 1023, in t cedent of a lease, the power of r is given "if the rent hereby rese any part thereof shall be unpaid f days after any of the days on wh same ought to have been paid (*a no formal demand shall have bee thereof*"), and these words in ita stated in a note thereto, to dispen formal demand of the rent; and times, it is said in that note, the wo "the same being lawfully deman any time during the said —— d afterwards." The intention of the by this agreement was that the should have twenty-one days for and then demand of rent before eje The demand could not properly b until the full time of twenty-on had run out, for there could be no ture until then—*Doe d. Dixon* v. *E*

Coleridge, C.J.—I am of opini this rule should be made absolute question turns on the true const of the agreement of letting, w made subject to the express co that if the defendant "shall make in payment of the rent or any par of within twenty-one days after th shall become due (being demande shall be lawful for the plaintiff to r Now, as I understand the facts, t was reserved to be paid at the o quarter days, and Lady-day havi

(3) 7 Com. B. Rep. 134.

pired the rent due on that day was demanded on the 9th of April following, and the plaintiff, after thus asking for it, waited twenty-one days, and then brought the present action. Under those circumstances, it has been contended, on the part of the defendant, that in an action like the present, to enforce a forfeiture by ejectment, the defendant ought to succeed, because the condition under which the forfeiture arises gives the tenant twenty-one days for payment after the rent is due, and has been demanded, which demand must be made after the twenty-one days have expired; that these two conditions must occur, and that a demand made before the twenty-one days have expired was not such a demand as would entitle the plaintiff to succeed. It seems to me that the defendant is right, and that what he has contended for is the true construction of this agreement. It seems clear that the words, "being demanded," were inserted in this agreement to emancipate the landlord from the necessity of going through the formalities of a demand at common law. It is not, however, necessary to consider this, because it is admitted that no such demand has been made, and the question for us is only whether a demand of any kind has been made within the terms of the condition in this agreement. Now I am of opinion that the true construction of this agreement is this, that the rent must be due for twenty-one days, and that a demand of it must be made after such twenty-one days, before there can be such a default as will entitle the landlord to re-enter. My brother Brett has pointed out during the argument that there are good reasons for this construction. The action for rent would lie the moment the rent has become due, but where the tenant is to be turned out for a forfeiture he ought to have the twenty-one days to pay it before there is such a default as would justify the bringing of ejectment. I think the construction I have mentioned is the true one both from the words of the condition and the authorities. In the first place, the note in *Woodfall's Landlord and Tenant*, to which we have been referred, shews that these are apt words used to express such a condition of re-entry for non-payment of rent, and in *Doe d. Dixon* v. *Roe* (3), where the lease contained a clause of re-entry for non-payment of the rent within twenty-one days next after any of the days whereon the same ought to be paid, Cresswell, J., said, "The landlord can have no right of re-entry for non-payment of the half year's rent, the twenty-one days not having elapsed at the time of affixing the declaration and notice. The statute," 4 Geo. 2. c. 28. s. 2, under which the landlord was proceeding in that case, "says that there shall be half a year's rent in arrear, and that the landlord shall have a right to re-enter for the non-payment thereof," and the Court there held that "non-payment thereof" must mean according to the terms of the lease, and as that gave the tenant in that case the whole twenty-one days for payment before the rent was in arrear for that purpose, the landlord was held not entitled to bring ejectment until such twenty-one days had expired. In *Hill* v. *Kempsall* (4), the words of the lease giving the right to re-enter were not entirely the same as here, but were, if default should be made in payment of rent, it should be lawful for the defendant, within twenty-one days, to enter, and the question there was whether the landlord could enter without making a demand of the rent, and the Court held that he could not. Maule, J., in the course of the argument, says, Does the entry of the landlord put an end to the lease? To which the counsel for the defendant answers, Yes. "Then," says Maule, J., "a demand was requisite." "The tenant should have an opportunity of paying the rent by having it demanded." If these words, "being demanded," were added to the condition in that case, it would be an authority directly in point. Therefore, in either view of the case, the true construction seems to me to be that both conditions must take place, namely, the rent must be due for twenty-one days, and the demand must be after that time in order to enforce the right of re-entry.

KEATING, J.—I am of the same opinion. The agreement is that "if the said John Bridge shall make default in payment of

(4) 7 Com. B. Rep. 975.

the said rent or any part thereof within twenty-one days after the same shall become due (being demanded)," the plaintiff shall have a right to re-enter. It would therefore appear that the stipulation as to being demanded was inserted in lieu of the common law right of re-entry for non-payment of rent. Now at common law the landlord could not have entered for breach of condition as to payment of rent without first making a demand of rent, which practically was very difficult to do. That being the case, this stipulation ought to be read so as to make it as much in favour of the tenant as it can reasonably be made. I confess that at first I was inclined to read the words as contended for by Mr. Hilbery, that is to say, as meaning after the rent had become due and had been demanded and after twenty-one days had run from the time of such demand, but I have since come to the conclusion that the opinion of the Chief Justice is correct, and that the meaning is this, to dispense with making a demand at common law, but to give the tenant twenty-one days for payment of the rent, and then to demand the same. That seems to me to be the more reasonable construction, and as the demand was not made here after but before such twenty-one days had expired, this rule ought to be made absolute.

Brett, J.—The question is what is the true construction of the clause in this lease which creates the forfeiture. It seems to be drawn very much according to one of the forms given in *Woodfall's Landlord and Tenant*, and is no doubt a form in general use. Now according to the terms of the lease, the rent would be due on the quarter day, and if there had been nothing more the landlord might immediately afterwards have brought an action for the rent, or he might have distrained for it. He might also on the day it was so due have made a demand according to the formalities of the Common Law, and have thereby created a forfeiture. Now in this lease there is a clause to modify such Common Law right to re-enter for non-payment of rent, and it is made in favour of the tenant. It says if default be made in payment of the said rent "within twenty-one days after the same shall become due." Had it stopped th *d. Dixon* v. *Roe* (3) is a distinct rity that there would have been n ture until the twenty-one days had That case decides that the tenant, a already in default in not paying t on the day reserved for payment twenty-one days afterwards in w might pay the rent to avoid the for Then do the words which follow present case, "being demanded," the condition, or do they form a n dition or regulate it? What is th ing then of these words? I agr Mr. Hilbery that they regulate th ness of a demand at Common Law, apply to part of the rent bein whereas at Common Law a deman not possibly be made if part only rent remained due. They modif fore the condition with respect demand according to Common L they do not take away the time which the tenant has the opport paying the rent, and so getting rid forfeiture. The tenant must, th have the twenty-one days, and the d must be after that has expired. mand which was made here on the f day after the day appointed for p did not give the tenant all the pr to which he was entitled.

Denman, J.—I confess I was nally inclined to put a differen struction on the terms of the co in this agreement from that I now think to be the true one. after having heard the argume both sides, and considered the case have been decided on analogous cl leases, I have come to the conclus the true construction is that wh Court has now put upon it; and I m that I think the words, "being dem are grammatically more consistent meaning that the demand should b after the twenty-one days have e during which the tenant might p rent, than that the demand sho made anterior to such twenty-one

Rule abs

Attorneys—George Rose, Innes & Son, f tiff; C. Butterfield, for defendant

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(*Appeal from Revising Barrister's Court.*)

1873. Nov. 19, 21. { DURANT (*appellant*) v. CARTER (*respondent*).

Parliament—Borough Vote—Residence—Occupation—Inhabitant Occupier—2 & 3 Will. 4. c. 45. s. 27—30 & 31 Vict. c. 102. s. 3—1 & 2 Vict. c. 106.

The respondent was the rector of C., a parish lying within the parliamentary borough of W.; he obtained a license of non-residence under 1 & 2 Vict. c. 106. s. 43, and was absent from C. from October, 1872, to June, 1873, remaining during that period abroad; during his absence the glebe house, which the respondent usually inhabited, was occupied by a curate pursuant to the directions of the bishop, within whose diocese C. lay:—Held, *that the respondent was not entitled to vote for W. under either 2 & 3 Will. 4. c. 45. s. 27, or 30 & 31 Vict. c. 102. s. 3.*

At a Court holden by the revising barrister appointed to revise the list of voters for the borough of New Windsor, the appellant duly objected to the name of the respondent being retained in the list of persons entitled to vote in respect of property occupied within the parish of Clewer, at an election of a member for the borough of New Windsor.

The name of the respondent appeared in the list as follows:—

Carter, Thomas Thellusson	The Rectory	House	The Rectory

The following facts were established by the evidence:

The respondent was and had been for some years the rector of Clewer. In the year 1871 he petitioned the bishop of the diocese for a license to absent himself from his benefice. On the 17th of May, 1871, the bishop granted a license, of which the following is a certified copy:

"John Fielder, by divine permission, Lord Bishop of Oxford, to our beloved in Christ, Canon Thomas Thellusson Carter, clerk in holy orders, rector of Clewer, in the county of Berks, within our diocese, greeting. We do hereby license you to be absent from your said benefice until the 31st day of December, 1872, on account of illness, as medically certified unto us, you having provided for the due and proper performance of the duties of your benefice to our satisfaction. Given under our hand this 17th day of May, in the year of our Lord 1871.

"N.B. The Act directs that a copy of this license shall be transmitted by the incumbent to the churchwardens within one month from the granting hereof, to be by them deposited in the parish chest, and that a copy of the same shall be produced by the churchwardens and publicly read at the visitation of the archdeacon."

The license bore the episcopal seal and signature.

Upon the certified copy of this license produced in evidence was the following endorsement—

"Diocese of Oxford. The Rev. T. T. Carter, Clewer. Copy license of non-residence under 1 & 2 Vict. c. 106. s. 43, &c."

On the 18th of May, 1871, the bishop granted a license to Mr. Edward Dunkin Harrison to act as curate in the parish of Clewer, at the yearly stipend of 100*l.*; he was required to reside in the parish.

On the 7th of September, 1871, the bishop granted a license to Sydney Malet Scroggs, which was as follows:

"John Fielder, by divine permission, Lord Bishop of Oxford, to our beloved in Christ, Sydney Malet Scroggs, clerk in holy orders, M.A., greeting. We do by these presents give and grant unto you, in whose fidelity, morals, learning, and sound doctrine and diligence we do fully confide, our license and authority to perform the office of stipendiary curate in the parish of Clewer, in the county of Berks, and within our diocese and jurisdiction, in reading the common prayers and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Com-

mon Prayer, made and published by authority of Parliament, and the canons and constitutions in that behalf lawfully established and promulgated (you having first in the presence of our commissary duly appointed made and subscribed the declaration of assent and taken the oath of canonical obedience to the bishop, as required by law to be made, subscribed and taken). And we do by these presents assign unto you the yearly stipend of 75*l.*, to be paid quarterly, for serving the said cure, together with the use of the glebe-house (wherein we require you to reside), garden and offices, free from payment of any rent or taxes in respect of the same. In witness whereof we have caused our episcopal seal to be hereto affixed. Dated the 7th day of September in the year of our Lord 1871, and in the second year of our consecration.

"Note. The bishop will revoke the license, and will not countersign the testimonials of any curate who accepts a smaller stipend than the sum assigned in the license, or who undertakes the duty of another cure without the bishop's sanction, or who resigns the curacy to which he is licensed without giving the bishop due notice of his intention. In ordinary cases three months' notice will be required."

"A true copy.

"JOHN M. DAVENPORT,

"Deputy Registrar of the Diocese

"of Oxford.

"(Indorsed)

"'Copy Stipendary Curate's License.'"

The license to Mr. Scroggs bore the episcopal seal and signature. The respondent remained in possession of his house until some day in the early part of October, 1872, when he left the house and went abroad for the winter, with the intention of returning in the spring. Before leaving he arranged with the bishop that Mr. Scroggs should be in the parish as additional helper; and before the license to Mr. Scroggs above set out was obtained, he had made an arrangement with Mr. Scroggs that he should be there as such additional helper. The respondent had nothing to do with the application of Mr. Scroggs to the bishop for the license. Before leaving, spondent arranged with Mr. Scro three rooms in the house should tained by the respondent for his o those three rooms were locked the key left in the possession of a who had been employed by the dent, but was paid by Mr. Scrog the respondent left the house. W respondent had quitted the hou Scroggs went to reside in it, and re there till the month of June, 18 was asserted by the respondent t Scroggs so resided in the house permission, but that if he had r from abroad before the month o 1873, he could not have requi Scroggs to leave the house, unless provided some accommodation elsewhere. There was no evidenc the revising barrister to shew t Scroggs did so reside in the house permission of the respondent, exce evidence as was supplied by th ments set out in the foregoing cas respondent did not return to th until the month of June, 1873, w resumed possession of the house respondent was rated for the hou paid the rates.

It was contended on behalf of spondent that the residence and tion were sufficient to entitle him his name retained on the list of v

It was contended on behalf of jector that the question rested upon 1 & 2 Vict. c. 106, that the before mentioned were founded u said Act, and that under the said was not possible to make any rese of rooms in the house.

The revising barrister was of that there was proof before him t respondent had occupied the hou resided therein sufficiently to enti to vote in respect thereof, and t provisions of the statute above to did not prevent him from b entitled. The revising barrister v of opinion that, inasmuch as the granted to Mr. Scroggs was not s have been granted under the pr of the said statute, and did not face of it, or by reference, appear been made under the provisions

and did not appear to be according to the terms of the said statute, that he ought not to hold that the residence of Mr. Scroggs in the house was not, as alleged by the respondent, by his permission, and he retained the name upon the said list of voters.

If the Court should be of opinion that his decision was wrong, the list of voters was to be amended by expunging the name of Thomas Thellusson Carter from the said list.

Kingdon, for the appellant.—The question is, whether there has been a sufficient residence by the respondent to entitle him to be upon the register; in point of fact he was absent from October, 1872, until June, 1873.

[BRETT, J.—I cannot think that there was a residence within 2 & 3 Will. 4. c. 45. s. 27.]

Gorst, for the respondent.—It is not open to the appellant now to raise the question whether the residence was sufficient; before the revising barrister the objections to the vote were founded upon 1 & 2 Vict. c. 106, and only those points can now be entertained which were taken before him—*Simpson* v. *Wilkinson* (1).

[BRETT, J.—The revising barrister decided that the respondent had occupied the house and resided therein sufficiently to entitle him to vote in respect thereof; we may review this decision as it comprehends the question of residence.]

It will then be necessary to argue the case upon its merits.

[BRETT, J.—The yearly value of the house is not stated; it is difficult to suppose that it was intended to raise a question under 2 & 3 Will. 4. c. 45. s. 27, without stating the value. COLERIDGE, C.J.—The objections which the respondent has to meet seem to arise under the Representation of the People Act, 1867.]

The respondent is entitled to the franchise under 30 & 31 Vict. c. 102. s. 3, or at any rate, under 2 & 3 Will. 4. c. 45. s. 27. Under the latter enactment a claimant to vote may occupy a house merely by putting goods therein—*The Queen* v. *The Inhabitants of St. Mary Collender* (2); s. c. *sub nom. The Queen* v. *The Inhabitants of St. Mary Kalendar* (3). Under 30 & 31 Vict. c. 102. s. 3, the claimant to vote must prove that he has been the inhabitant occupier of a dwelling-house, but under 2 & 3 Will. 4. c. 45. s. 27, a house that is not the dwelling-house of the claimant will confer the franchise—*Daniel* v. *Coulsting* (4). If the respondent is to be deemed to have let his house to Mr. Scroggs, the demise will not deprive him of the franchise—*The King* v. *The Inhabitants of Great Bentley* (5), *The Queen* v. *The Mayor of Eye* (6).

[COLERIDGE, C.J.—*The King* v. *The Inhabitants of Great Bentley* (5) was decided upon the words of 6 Geo. 4. c. 57.]

Mr. Scroggs was not the tenant of the glebe-house; he was required to occupy the same with a view to the more efficient performance of his duties as curate—*Dobson* v. *Jones* (7). The respondent always intended to return to live in his house, and therefore he did not cease to occupy and reside in it—*Glanville's Election Cases*, "*Winchelsey*," pp. 12, 14, 18.

[COLERIDGE, C.J.—In point of fact the respondent did not occupy the glebe-house, and the curate did occupy it.]

The respondent obtained a license of non-residence under 1 & 2 Vict. c. 106. s. 43. The bishop has the right to appoint a curate under sections 75, 77, 78, 98, and to assign the glebe-house to him under section 93; but the power to assign is limited; Mr. Scroggs took no estate in the house; he had merely the use of the house instead of a higher stipend. Moreover the respondent was not absent from his benefice under 1 & 2 Vict. c. 106; his license extended only to the 31st of

(1) 7 Man. & G. 50; s. c. 14 Law J. Rep. (N.S.) C.P. 49.

(2) 8 Law J. Rep. (N.S.) M.C. 54.

(3) 9 Ad. & E. 626.

(4) 7 Man. & G. 122; s. c. 1 Lutw. 230; s. c. 14 Law J. Rep. (N.S.) C.P. 70.

(5) 10 B. & C. 520; s. c. 8 Law J. Rep. M.C 55.

(6) 9 Ad. & E, 670; s. c. 8 Law J. Rep. (N.S.) Q.B. 142.

(7) Barr. & Ar. 243; s. c. 13 Law J. Rep. (N.S. C.P. 126.

December, 1872, and he remained absent until June, 1873. He might have turned Mr. Scroggs out of the house at any time, and might have resumed occupation whenever he thought fit.

Coleridge, C.J.—This decision must be reversed. The respondent is rector of Clewer, and in 1871 obtained a license of non-residence for more than a year. He did not, however, take advantage of his license until October, 1872, and remained abroad until June, 1873. During that period Mr. Scroggs, a curate licensed by the bishop, resided in the glebe-house pursuant to the direction of the bishop. The question arises whether the respondent is entitled to the borough franchise under either 2 & 3 Will. 4. c. 45. s. 27, or 30 & 31 Vict. c. 102. s. 3. Under the former Act it is sufficient if the claimant to vote occupies the qualifying premises; he need not reside upon them, provided he resides within seven miles of the borough. This condition, however, the respondent did not fulfil, for he was out of the Queen's dominions during the greater part of the six months immediately preceding the last day of July, 1873. The facts of this case clearly shew that there was no residence within the meaning of 2 & 3 Will. 4. c. 45. s. 27, even if there was an occupation; but I think that the respondent did not occupy the house. Still less can he be said to have been an inhabitant occupier under 30 & 31 Vict. c. 102. s. 3. The curate was the inhabitant of the house, and occupied it under the license from the bishop; he was in lawful possession of the house, and it would have been necessary to provide him with another place of abode whenever the respondent wished to live again in the house. The respondent did not reside within seven miles of the borough under 2 & 3 Will. 4. c. 45. s. 27, and did not inhabit the house under 30 & 31 Vict. c. 102. s. 3. It is unnecessary to go into the other questions which have been raised.

Keating, J.—I am of the same opinion. The respondent has failed to establish a claim to vote under either 2 & 3 Will. 4. c. 45. s. 27, or 30 & 31 Vict. c. 102. s. 3. He is not qualified under the latter Act, inasmuch as he was abroad for eight months of the qualifying year, a fore was not an inhabitant of tl It is much the same question un Will. 4. c. 45. s. 27. The respo not reside within the borough. may have more residences than is free to go to them at his plea the respondent's house was inh the curate. It is suggested that have returned, and that the curs have been compelled to quit; bu must have provided the cur another abode, for the curate w in the glebe-house under the license; the respondent could authorised any other person curate to live in the glebe-hous his absence; and it seems to clear that there was no residen habitancy by the respondent.

Brett, J.—I have no doubt th the revising barrister the Repre of the People Act, 1867, was al upon; this is clear from the ter decision. There is no stateme annual value of the house, and expressly stated that the respo not reside within seven mil borough; and it is inconvenient 3 Will. 4. c. 45. s. 27, should relied upon. If, however, the re could have made out that he i to vote under the latter Act, w have given judgment in his favo the findings of this case do not a to succeed. It has been conte the absence of the respondent benefice was not pursuant to tl of non-residence granted to hi 1 & 2 Vict. c. 106; facts are no these cases; but I think myse to assume that if the responden believe himself to be acting u statute, he would not have pre quit his benefice. He arranged curate that three rooms should b for him; of course if he kept t under his own control, he coul said to have demised it, and th alleges that the curate lived in permission; but I think that used it as a dwelling-house by the license from the bishop. I a that the validity of the objecti respondent's claim is not got

saying that 1 & 2 Vict. c. 106. was not strictly complied with, for Mr. Scroggs lived in the house until June, 1873. The respondent alleges that he was an inhabitant occupier under the Representation of the People Act, 1867; I think that he was not. When a man keeps the dominion of his house, and has the *animus revertendi*, and merely goes away for an indefinite term, he may properly be said to reside at, to occupy and inhabit it; but when he quits it for a definite term, and leaves another person in possession of it, he neither resides at, occupies nor inhabits it. In this case the respondent during his absence from the borough did not reside within seven miles of it. There was, therefore, no qualification under either 2 & 3 Will. 4. c. 45. s. 27 or 30 & 31 Vict. c. 102. s. 3. The decision of the revising barrister was wrong, and must be reversed.

GROVE, J.—If we were to uphold this claim, we should be introducing a contradiction in terms; for we should be deciding that although another person was in the exclusive occupation of the house, the respondent also was occupying it. It is clear that there was no residence.

Judgment for the appellant.

Attorneys—Durant, agent for Durant, Windsor, for appellant; C. T. Phillips, for respondent.

(*Appeal from Revising Barrister's Court.*)

1873. Nov. 21. } FORD (*appellant*), *v.* PYE (*respondent*).

Parliament—Borough Vote—Residence—2 Will. 4. c. 45. s. 27.

The respondent was tenant of, and usually resided at a house in E., a city returning members to Parliament; the house was of greater annual value than 10*l.* *He was a clergyman, and during the months of July and August,* 1873, *for the sake of relaxation, he exchanged duties with T., who was vicar of S., a parish situate more than seven miles from E. During that period the respondent lived in T.'s vicarage at S., and T. lived in the respondent's house at E. In September,* 1873, *the respondent returned to his house at E.*:—Held, *that the respondent had not resided in E. for six calendar months next previous to the last day of July,* 1873, *and that he was not entitled to be registered as a voter in the lists for E.*

At a Court held by the revising barrister appointed to revise the lists of voters for the city of Exeter the appellant duly objected to the name of the respondent being retained in the list of voters for the said city.

The respondent was a clergyman residing within the city of Exeter, and was incumbent of the district parish of Countess Wear near the said city, and he had for some years previously, except as hereinafter mentioned, continuously occupied and resided in a house on the Topsham Road, within the said city and district parish. The said house did not belong to him as such incumbent as aforesaid, but was rented by him, and was of greater value than 10*l.* a year. In June, 1873, a clergyman named Tordiffe, who was vicar of Southbroom, near Devizes, in the county of Wilts (more than seven miles from the city of Exeter), wrote to the respondent offering to exchange duties with him for the months of July and August, 1873, in order that they might each obtain for themselves and families change of air and relaxation in their duties. The respondent and the said Mr. Tordiffe knew one another previously as brother clergymen, who had at one time resided in neighbouring parishes, but there was no evidence to shew whether they were otherwise acquainted. The respondent assented to this proposal, and a correspondence of some length ensued, by which it was arranged that the respondent and his family should, during the said two months, reside in Mr. Tordiffe's vicarage, and Mr. Tordiffe and his family should reside at the respondent's house in the Topsham Road. It was further arranged that the respondent should take one servant with him, and leave the remainder in his house to wait upon Mr. Tordiffe and his family, and the

respondent, at Mr. Tordiffe's request, engaged a boy for him to attend to a carriage which he took with him to Exeter. Similarly Mr. Tordiffe agreed to leave his servants to wait on the respondent. It was also arranged that each party should use the vegetables and fruit in the garden of the house to which they went, except potatoes and wall fruit. There was no agreement between the parties other than was contained in the said correspondence, and no payment was to be made by either of them to the other. The respondent paid the wages to his servants during the said two months, although they waited on the said Mr. Tordiffe, and wrote once or twice during his absence giving directions to his servants as to their conduct. The respondent's house being larger than was required by Mr. Tordiffe, the respondent retained two rooms (a bedroom and dressing-room), these being either locked up or occupied by one of the respondent's servants during his absence. These rooms were not retained by the respondent with any intention of his using them while Mr. Tordiffe was staying in his house, but because they were usually occupied by an invalid sister who resided with him, and he was desirous they should not be disturbed. There was nothing to prevent the respondent from sleeping in those rooms if he had in law a right to return to his house during the said two months, but he did not in fact do so, and never contemplated or intended to use them for that purpose. The arrangement between the respondent and Mr. Tordiffe was fully carried out, and the respondent returned to Exeter in the beginning of September, 1873. The respondent had no residence apart from the said house in the Topsham Road within seven miles of Exeter.

It was submitted to the revising barrister, on the part of the objector, that the respondent had not occupied the whole of his house in the Topsham Road during the month of July, 1873, and that he had not resided within seven miles of the city of Exeter during the said month of July, 1873; and in support of these propositions the objector contended, first, that the agreement entered into by the respondent with Mr. Tordiffe amounted, in la demise of the said house (or at a of the part not retained by him) Tordiffe in consideration of the demise to him by the said Mr. To his vicarage; secondly, that the s Tordiffe was at least tenant at will said house, or the part of it not r by the respondent, during the said of July, and that the respondent siding in the house, Mr. Tordi complete control over the part o by him, and was not a lodger s make his occupation, in law, the occ of the respondent; thirdly, that spondent's servants became duri said two months, in law, the serv Mr. Tordiffe, and were bound to o orders, and therefore did not occu house on behalf of the respo fourthly, that the legal effect agreement between the responde Mr. Tordiffe was that the responde not entitled to return to or to live said house in the Topsham Road the months of July and August, without Mr. Tordiffe's consent, the retained by him not having been r for the purpose of residence, a being capable of being so used without the use of other parts house; fifthly, that the respo whether or not he had a legal r return, having in fact abandoned tention of returning to the said during the said two months, and ha lotted it to another purpose, did no there during the said months wit meaning of the Acts relating to th chise, even if, in law, he was enti sleep there.

On the part of the respondent contended, first, that the said Mr. T was, during the said two months, position of a visitor to the resp and not of a tenant, and that his c tion was in law the occupation respondent; secondly, that the s of the respondent continued his se and had such a control over the h agents for the respondent as pre the residence in the house of Mr. T amounting to an independent occ in point of law, but that it was a an occupation as lodger; thirdly, t

occupation of the house being the respondent's occupation, the house still remained his residence, and that he had never abandoned the intention of returning to it, and that his mere temporary absence for change of air was no such abandonment; fourthly, that notwithstanding the said agreement the respondent had a legal right to return to his house at any time during the said months, and that it was consistent with *residence* within the meaning of the Acts relating to the franchise that he should have formed the intention of living elsewhere for a time for the sake of change of air and relaxation, and made arrangements by which his return during such time was not contemplated, if he had a legal right to return at any time and intended to return after a short interval.

The revising barrister felt and expressed great doubt as to the correct legal inferences to be drawn from the facts of the case, but after some hesitation he held, and as far as it was consistent with the facts above stated, he found as a fact that the respondent did not demise his house to the said Mr. Tordiffe, but only gave him a permission to remain with his family in the said house during the said two months. The revising barrister held further, as a matter of law, that under the circumstances before stated the servants of the respondent continued his servants, and that the occupation of the house by Mr. Tordiffe and by the respondent's servants was in law an occupation of the house by the respondent. The revising barrister held further that the true effect in law of the said agreement between the respondent and Mr. Tordiffe, and the facts before stated, was to enable Mr. Tordiffe and his family to reside in the said house in the Topsham Road, but not to prevent the respondent returning to his said house in the Topsham Road at any time during the said month of July, 1873, and occupying it in any way which was consistent with the residence therein of the said Mr. Tordiffe and his family, and that the respondent could in fact have returned and kept in the room retained by him without interfering with the residence of the said Mr. Tordiffe and his family in the said house. The revising barrister held further that where a voter has a legal right to return and sleep in a house when he pleases, and an intention to return after a time to such house, the fact that he has no intention of returning to it during a given short period, it being then used for another purpose not physically inconsistent with his returning and sleeping therein, is not a break of his residence in the said house within the meaning of the Acts relating to the franchise. The revising barrister therefore held that the respondent had occupied his house in the Topsham Road for twelve calendar months previously to the 31st of July, 1873, and had resided within seven miles of the city of Exeter during six calendar months preceding the same date, and he allowed the vote.

The questions for the opinion of the Court were, first, whether the respondent had resided in his house in the Topsham Road during the month of July, 1873, within the meaning of the Acts relating to the franchise; second, whether the respondent occupied the whole of his said house in the Topsham Road during the month of July, 1873. If the Court should be of opinion on both questions in the affirmative, the list was to remain unaltered; if the Court should be of opinion on either question in the negative the list of voters for the city of Exeter was to be amended by erasing the name of the respondent.

Kingdon for the appellant.—This case is decided by *Durant* v. *Carter* (1). The respondent did not reside at his house in Exeter during July, as is required by 2 Will. 4. c. 45. s. 27 (2). There was a break in the respondent's residence. The

(1) *Ante*, p. 17.

(2) 2 Will. 4. c. 45. s. 27, enacts—"That in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the

interest of Mr. Tordiffe was a lease for a term; technical words and forms are unnecessary to create a demise. Mr. Tordiffe therefore, and not the respondent, resided at the respondent's house in the Topsham Road. *Powell* v. *Guest* (3) lays down rules which clearly shew that the respondent during the month of July was residing in Wiltshire. The judgment of Erle, C.J., is decisive in the appellant's favour.

The respondent did not appear.

KEATING, J.—I think that the objection to the vote is well founded, and that the claim to be upon the list cannot be sustained. The respondent gave up his house for the space of two months, and whether or not Mr. Tordiffe was a tenant for a term, and whether the agreement between the parties really amounted to a demise, are immaterial questions, because when the respondent quitted his house in July he did not contemplate a return to it until the two months should have expired. The statement from *Elliot on Registration*, 2nd Ed. 204, having been sanctioned by the authority of Erle, C.J., in *Powell* v. *Guest* (3), is decisive against the claim to vote. The respondent had quitted his house, together with his family, and had debarred himself from returning thereto at his pleasure; he had by his own act incapacitated himself living during the month of July a ordinary dwelling-place, and, accordi good law and good sense, he di reside during that month within miles of Exeter.

BRETT, J.—The respondent, durin month of July, had given up the li of returning to his house in the Top Road, or at all events he had giv the intention of returning; he had his family quitted the house for months. Under these circumstan think that he was not entitled to be upon the register.

GROVE, J.—I cannot adopt the that doubtful questions of law as to tration ought always to be decid favour of the franchise. I think there was an abandonment of the i tion of returning during July, and, is termed by Erle, C.J., in *Powell* v. (3), the *animus revertendi* did not ex

DENMAN, J.—I am of the opinion. I regret that the respon has not appeared by counsel; it is cult to decide a case of this kind sati torily unless we hear an argumen each side.

Judgment for the appella

Attorney—J. Elliott Fox, for the appella

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same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough. Provided always, that no such person shall be so registered in any year unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year. . . . . Provided also, that no such person shall be so registered in any year, unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof."

(3) 18 Com. B. Rep. N.S. 72; s. c. 34 Law J. Rep. (N.S.) C.P. 69.

(*Appeal from Revising Barrister's C*

1873. Nov. 21. } FORD (*appellant*) *v.* HA (*respondent*).

Parliament — Borough Vote — Fre —Residence—2 Will. 4. c. 45. s. 32.

The respondent was a freeman of city returning members to Parliament. was an officer in the army, and usuall on duty with his regiment more than miles from E. He had from time to leave of absence, and he then lived a mother's house, who resided within miles of E. During twelve months ceeding the last day of July, 1873, *he obtained three months' leave of ab and during that period had lived i mother's house:*—Held, *that the re*

dent had not resided within seven miles of E. for six calendar months next previous to the last day of July, 1873, *and that he was not entitled to be registered as a voter in the lists for E.*

At a Court held before the revising barrister for the city of Exeter, the appellant duly objected to the name of the respondent being retained in the list of persons entitled to vote in the election of members for the city of Exeter.

The respondent was a duly admitted freeman of the city of Exeter. He was, and had been for several years, an officer in the army, and except when on leave of absence was stationed with his regiment more than seven miles from the city of Exeter. The mother of the respondent (a widow) lived within seven miles of the city of Exeter, and previously to entering the army, and since he had been in the army, whenever he had obtained leave of absence from his regiment, he had lived with his mother in her said house. The respondent had usually obtained leave of absence for three months in each year, and was in fact living in Exeter with his mother during the three months of January, February, and March, 1873. The mother of the respondent had set apart two rooms in her house (one being a sleeping apartment) for his use, in which some of his clothes and other property remained, whilst he was with his regiment; and no other person slept in or made any use of the said rooms whilst the respondent was away. The said rooms were so set apart for the respondent's exclusive use during the whole of the six months preceding the 31st of July, 1873, and the respondent had during the whole of such time his mother's permission to occupy the said rooms whenever he wished. The respondent was not married, and had no home except the said house of his mother, and his rooms in the barracks at which his regiment was stationed for the time being.

On behalf of the objector it was urged that the voter had no residence within the borough or seven miles thereof, first, because the room which he used at his mother's house had been used by him as her guest, to which he had no power in himself to return, unless she pleased, as there was no hiring of such room or consideration for its retention; secondly, because being an officer in the army, he had no power of going home or anywhere without leave first obtained, and that he had no power, as the voter claimed, of throwing up his commission in the army at any time and returning home; thirdly, because according to the evidence he had only three months' leave every year, and therefore there could be no six months' residence as required by the statute; fourthly, because the case of *The King* v. *Mitchell* (1) did not apply, as that was held to be an inhabitancy by means of the family, and the voter in this case was unmarried, and further that a militiaman was only occasionally called out for duty.

On behalf of the voter it was urged that during the whole of the six months previously to the 31st of July, 1873, he did reside within seven miles of the said city; that the arrangement with his mother not having been revoked, the voter had liberty to use the rooms set apart for him in her house, and that such house was *bona fide* his home and residence; that he had never abandoned such residence or the intention of returning to it, and that his occasional absence on the duties of his profession was no abandonment; that the circumstances of an officer in the regular army are the same as those of a militia officer on active service, and that the case of *The King* v. *Mitchell* (1) as affirmed by *Powell* v. *Guest* (2) was an authority for the voter's contention that he had a continuing residence at his mother's house.

The revising barrister decided that the said voter continued to form part of his mother's family, and that he resided with her during the whole of the six months preceding the 31st of July, 1873; that as the mother had not revoked her permission to him so to reside with her, the fact that she might have revoked it was immaterial; that the fact of his absence on his professional duties with the army, did not, according to the authority of *The King* v. *Mitchell* (1) as explained by *Powell* v. *Guest* (2), prevent his mother's

(1) 10 East 511.
(2) 18 Com. B. Rep. N.S. 72; s. c. 34 Law J. Rep. (N.S.) C.P. 69.

house being his residence during the whole of the aforesaid period of six months; the respondent's claim to vote was therefore allowed by the revising barrister. Due notice of appeal was given.

The question for the opinion of the Court was, Whether, consistently with the facts above stated, the barrister could legally find the respondent to have resided within seven miles of Exeter during the six months preceding 31st of July, 1873.

If the Court should be of opinion in the affirmative, the list was to remain unaltered; if the Court should be of opinion in the negative, the list of freemen for the city of Exeter was to be amended by erasing the respondent's name.

Kingdon, for the appellant.—The requisites of 2 Will. 4. c. 45. s. 32 (3) have not been complied with. neither in fact nor in const law a residence. *The King* v (1) is not in point; that case militiamen, who left at the their wives and children; an held that these militiamen wer ants of the city where thei lived. In this case the respor merely a guest, his mother any time have refused to allo come to her house. *Bond* v. *seers of St. George's, Hanover* is distinguishable, because claimant was tenant of the property.

The respondent did not appe

KEATING, J.—I think the rig has not been established. Ac the rule which has been laid d residence the claimant did within seven miles of the city I by no means say that a freeman in the house of his mother i ground disqualified from voting claimant being an officer in the not a right to act freely, he ca regiment only at the will of his ing officer. It is stated in the the respondent usually had le sence, but the permission to be a his duties might or might not it was for his superior officers whether he should obtain it. *sui juris;* by entering the milit of the Queen he has incapacitat from acting at his own plea *King* v. *Mitchell* (1) appear sight to support the vote, but i the claimants to vote had h their wives and children withi in respect of which the election I am not aware of any case de a constructive residence can where the claimant has no ho own in the borough in which h right to vote, and has also volu capacitated himself from return borough whenever he pleases. of fact the respondent has resi seven miles of Exeter only du months of the qualifying year.

(3) 2 Will. 4. c. 45. s. 32, enacts, "That every person who would have been entitled to vote in the election of a member or members to serve in any future parliament for any city or borough not included in the schedule marked A to this Act annexed, either as a burgess or freeman, or in the city of London as a freeman and liveryman, if this Act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year unless he shall on the last day of July in such year be qualified in such manner as would entitle him then to vote if such day were the day of election, and this Act had not been passed; nor unless where he shall be a burgess or freeman or freeman and liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year, within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken; nor unless where he shall be a burgess or freeman of any place sharing in the election for any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction with such respective place so sharing as aforesaid, and named in the second column of the schedule marked E. 2 to this Act annexed.

(4) 40 Law J. Rep. (N.S.) C.P

cision of the revising barrister was wrong, and must be reversed.

BRETT, J.—I take the rule to be that laid down by Erle, C.J., in *Powell* v. *Guest* (2), and that the claimant to vote must have the power of returning to his alleged place of residence whenever he likes. The question is whether although he did not in point of fact live within seven miles of Exeter except for three months during the qualifying year, he can be said to have resided there so as to entitle him to have his name upon the register. I think that in one sense he was at liberty to return to his mother's house, for as a matter of fact he had her permission to go there whenever he chose; and he had the intention of returning so soon as an opportunity should offer itself. But then we are bound to take notice of the law relating to the army, and according to military regulations officers cannot abandon the service and resume their original position as civilians without the consent of the sovereign; the respondent being an officer in the army could not return to his mother's house without the permission of his commanding officer: in point of fact he was living at another place, namely, the barracks at which his regiment was for the time being quartered; he could not quit his duties without leave, and we have just held in *Ford* v. *Pye* (5), that a person who has incapacitated himself from returning to his place of abode has ceased to reside there, and is not entitled to have his name put upon the register of voters. But *The King* v. *Mitchell* (1) is said to raise a difficulty in the way of our deciding upon the grounds which I have stated. In that case it was held that the claimants to vote resided in a city, where they were tenants of houses and where their families resided. I think that they were inhabitants of the city, and that the decision was right. But the statute upon which the question then arose was different from 2 Will. 4. c. 45. s. 32, and the construction adopted by the Court of King's Bench does not govern this case.

DENMAN, J.—I think the revising barrister wrong in deciding in favour of the franchise, and I am desired by my brother Grove (6) to state that he concurs with the opinion of the rest of the Court. For my own part I wish to say that there was no residence by the claimant within 2 Will. 4. c. 45. s. 32. There are cases to shew that a constructive residence may be sufficient to confer the franchise; but they do not apply here. If the facts set out in this case had been stated at Nisi Prius as evidence of a residence, the Judge would have been bound to direct the jury that there was no residence, either actual or constructive. I regret that this case should have been argued on one side only.

Judgment for the appellant.

Attorney—J. Elliott Fox, for the appellant.

(*Appeal from Revising Barrister's Court.*)

1873. Nov. 18. { NOSEWORTHY (*appellant*) *v.* THE OVERSEERS OF BUCKLAND-IN-THE-MOOR (*respondents*).

Parliament — County Vote — Notice of Objection—Service by the Post—6 & 7 Vict. c. 18. *s.* 100—*List of Voters—Alteration of List by the Overseers.*

The list of voters mentioned in 6 *&* 7 *Vict. c.* 18. *s.* 100 *is, as regards county voters, the copy register sent to the overseers by the Clerk of the Peace of the county, and the overseers ought to publish it as they receive it, without alteration.*

Where, therefore, the overseers altered the copy of the register by changing the description of the residence of one of the voters thereon from what it had ceased to be, to what was then the real address, and published the list as so altered, and the voter being objected to, the objector, in order to prove service of the notice of objection, proved posting such notice, addressed to the voter according to the altered address published by the overseers, it was

(5) *Ante*, p. 21.

(6) Grove, J., had been present during the argument, but had quitted the Court before judgment was given.

held that the notice was insufficient, not being in compliance with s. 100 *of* 6 *&* 7 *Vict. c.* 18, *which requires the notice to be directed to the voter "at his place of abode, as described in the said list of voters."*

At a Court held by the barrister appointed to revise the list of voters for the Eastern Division of the county of Devon, Robert Tucker objected to the name of the appellant being retained on the list of voters for the parish of Buckland-on-the-Moor, in the said division of the county. The revising barrister upon the objector to prove his not objection to the said voter, wher following facts appeared:

On the copy of the part of the re of voters of the said division c county relating to the said parish by the Clerk of the Peace of the c to the overseers for the said paris name of the said voter appear follows—

Robert Noseworthy	Boddacleave, in this parish	House and land as occupier	Boddacleave

The overseers, knowing that the appellant had ceased to occupy or reside at the said farm called Boddacleave, and was then occupying and residing at a farm called Bowden, in the same parish, before publishing the list erased the words "Boddacleave, in" in the second column, and "Boddacleave" in the column, and inserted the word "Bo in each column, and they duly sign published the said list so altered.

In the list published by the ove therefore, the name appeared a lows—

Robert Noseworthy	~~Boddacleave, in~~ this parish Bowden	House and land as occupier	~~Boddacleave~~ Bowden

The original copy of the register sent to the overseers was printed, and the alteration was in writing.

The said objector duly sent by post to the said voter a notice of objection founded on the third and fourth columns of the register, which was in all respects in the terms given by the 28 & 29 Vict. c. 36. schedule A, No. 2, unless it was defective in the matters hereinafter mentioned, and such notice of objection was posted in due time by the said objector. It was addressed as follows: "To Mr. Robert Noseworthy, of Bowden Farm, Buckland-in-the-Moor." This was the correct address of the voter at the time the notice was sent.

On behalf of the voter it was objected that the said notice was insufficient, and that the revising barrister had no power to erase the voter's name, First. Because the alteration made by the overseers on the copy of the register sent to them was unauthorised and void, and the notice ought, therefore, to have been addressed to Boddacleave, and not Bowden Second. Because the said notice have, at any rate, been addressed *ipsissima verba* of the list, as publi the overseers, and the second line therefore, have been, "this parisl den," instead of "Bowden farm."

It was further contended, on b the said voter, that the revising b had no power to expunge his nar the said register, inasmuch as the tion made, as aforesaid, in the des of his place of abode and of his q tion, was a mistake of the said ov within the meaning of 6 Vict. c 40, which the revising barrist bound to amend, and that, havin such amendment, and restored th its original condition, no person name of Robert Noseworthy, li Bowden, and qualified in respec occupation of a farm called I would appear on the said list, notice of objection would, for that be null and void.

On behalf of the objector it was answered, First. That the copy of the register, which is, by the 6 Vict. c. 18. s. 6, made the list, and which is referred to in 28 & 29 Vict. c. 36, schedule A, No. 2, was the copy signed and published by the overseers, and it was, therefore, the address upon the list so signed and published, to which the notice ought to be addressed. Second. That, even if a correct copy of the original register was to be taken to be the list, the published copy being authenticated in the mode provided by the Act, and published by the persons authorised to do so, an objector was justified in assuming it to be a correct copy of the register and acting upon it, and a notice addressed by him accordingly was sufficient. Third. That the objector, having no means of knowing that the alteration was made by the overseers, and having taken reasonable means to comply with the Act, the notice was a sufficient compliance therewith. Fourth. That if a notice, addressed according to the list published by the overseers, were insufficient, an alteration made by the overseers would render it impossible that the person whose address was altered should be objected to, while no inconvenience would be inflicted on the voter by holding a notice directed to the altered address to be sufficient, because every voter must inspect the published list, in order to be sure that he has not been objected to. The voter might, therefore, be taken to be aware of any alteration made in the list. Fifth. That it was not necessary that the notice should contain a fac-simile of the address given on the list, if it gave its meaning without any variation, which the notice of objection in the present case did. Sixth. That no amendment made by the revising barrister in the list could prevent the notice having been properly addressed at the time it was sent, or affect its validity. Seventh. That, even if the revising barrister was bound to amend the list by restoring the word Boddacleave and erasing the word Bowden, in the second and fourth columns, he was not bound to do so before deciding upon the validity of the said notice of objection, and that, as Bowden was the then address of the voter, he should so exercise his discretion, if any, as to uphold the said notice of objection.

The revising barrister held that the notice of objection was sufficient, and that he ought not to exercise his discretion, if any, to amend the list till after he had decided upon the notice of objection, and that no alteration, if he made one, in the said list, would affect the validity of the said notice. He therefore called on the voter to prove his qualification as stated in the original register, or in respect of the qualification appearing on the list, as altered by the overseers. This was not done and the revising barrister thereupon expunged the name of the said voter.

The question for the opinion of the Court was whether the said notice of objection was good, and whether the revising barrister had power to expunge the name of the said appellant from the register of voters.

G. Lewis, for the appellant.—The service of the notice of objection was bad. The only service attempted to be proved was by the post, according to section 100 of 6 & 7 Vict. c. 18. The terms of that section were, however, not followed. That section requires that the notice, when sent by the post, shall be "directed to the person to whom the same shall be sent at his place of abode, as described in the said list of voters." The notice, which was posted in this case, was not directed to the voter at his place of abode, as described in the list, for the list was the copy register sent by the Clerk of the Peace before it was altered by the overseers, and consequently the direction, according to the altered list, was not a direction according to the list. In *Allan* v. *Greensill* (1), where the objector relied on the service of the notice of objection at the place of abode, as described in the list, and it turned out that the place so described was not the voter's true place of abode, as he had ceased to reside there, it was held that the service was bad, since the service was not by the post; and, therefore, to be good, the notice must either have

(1) 4 Com. B. Rep. 100; s. c. 16 Law J. Rep. (N.S.) C.P. 142.

been served on the voter personally, or at his true place of abode. The 7th section of 6 & 7 Vict. c. 18, requires the notice of objection to be served on the voter personally, or left for him at his place of abode. The 100th section gives, in addition, the power of sending the notice by the post, but then the terms of that section must be followed; if they are, the service by the post is good, although the voter never received it in due time—*Bishop* v. *Helps* (2). The list mentioned in section 100 refers to the copy register, which, by section 3, the Clerk of the Peace is to send to the overseers, and which, together with the list of claimants, is, by section 6, to be deemed to be the list of voters. The later Act, 28 Vict. c. 36, s. 3, directs the Clerk of the Peace to transmit to the overseers of every parish within the county copies of the part of the register relating to such parish; and it directs, also, the overseers, at the same time with the publication of the notice to send in claims, to publish a copy of the register then in force relating to their parish. The overseers have no power to alter such register. They can, by section 5 of 6 & 7 Vict. c. 18, add the word "objected" to the name of any person thereon whom they may believe to be not entitled to vote, or the word "dead" before the name of any person they may believe to be dead; but they can do nothing more to the register, and their duty, as stated in *Rogers on Elections*, 11th ed. p. 129, is to publish it "just as they have received it from the Clerk of the Peace." By section 27 of 6 & 7 Vict. c. 18, it is provided that, in case there should be no list of voters, or in case it should not be published, the register for the parish then in force is to be taken to be the list of voters for the year ensuing.

No one appeared for the respondents.

KEATING, J.—The duties of the revising barrister are described by the 40th section of the Registration Act, 6 & 7 Vict. c. 18, and very precise directions are there given as to what the revising barrister is to do with respect to the list, as well as to the

(2) 2 Com. B. Rep. 45; s. c. 15 Law J. Rep. (N.S.) C.P. 43.

steps to be taken on the occasion (revision. The legislature probably w to leave as little as possible of the r to the discretion of the revising bar and therefore it prescribed definite for his guidance. Now the 40th s enacts that "where the name of an son inserted in any list of voters have been objected to by the overse by any other person, and such othe son so objecting shall appear by hi or by some one on his behalf, in su of such objection, and shall prove th gave the notice or notices respective quired by this Act to be given by every such barrister shall then requ to be proved that the person so obj to was entitled on the last day of then next preceding to have his nan serted in the list of voters in respe the qualification described in such It is, therefore, a condition precede the revising barrister calling on the to prove his qualification that the objecting should prove that he gav notice required by the Act. Her objector appeared in support of his (tion, and he objected to the name c appellant being on the list of voters he proved that he had sent to the a lant by the post a certain notice of (tion. The statute says that the r must be directed to the person obj to "at his place of abode as describ the said list of voters." Now wl the duty of the overseers as to the prescribed by section 3 of 28 Vict. (which provides that the clerk of the of the county is to transmit to the seers of every parish or township w the county a sufficient number of c of the part of the register relati such parish or township, and tha overseers "shall, on or before the day of June in every year, and a same time with the publication o notice" there referred to, "publi copy of the register then in forc lating to their parish or township.' is clear, therefore, that it is the du the overseers to publish that part o register which is sent to them b Clerk of the Peace. That part being published, the voter whose name is o same may be objected to by the over

(which it is not material to the present case to enquire into) or by any person who is entitled to vote, and the person objecting is to send notice of objection to the voter in the way prescribed by the 7th section of the Act 6 & 7 Vict. c. 18, and which notice is now to be according to the form No. 3 in schedule A to 28 Vict. c. 36, and according to that form the objector is to address the notice to the "name and place of abode of the person objected to as described in the list." What is that list but that part of the copy of the register which the Act directs is to be sent by the clerk of the peace to the overseers, and which the overseers are bound to publish in its integrity as they receive it. The difficulty in the present case arises from the overseers taking upon themselves to alter both the qualification and place of abode of the appellant as described on the register. The objector was, no doubt, misled by this, and he accordingly adopted the address as altered by the overseers, and sent the notice to that address, and not to the address as it appeared on the copy of the register sent by the Clerk of the Peace. Now the objector appeared before the revising barrister in support of his objection, and he was required to prove that he had given the notice of objection. The Act provides that he may prove the giving of such notice in one of three ways. He may prove that he gave it to the person objected to personally, or that he left it for him at his place of abode as described in the list, or, lastly, that he sent it by the post. In the present case the objector adopted the last of these three modes, and he only attempted to prove his notice by proving that he had sent it through the post. Accordingly he proved the sending a notice by the post directed to the voter at his place of abode *as described on the altered list*, and not as described on the copy register sent by the Clerk of the Peace; and the question for us is whether that is sufficient. The question is not whether having failed to prove the service of the notice of objection by the post the objector could have resorted to any of the other modes of proof. My impression is that he could have done so, though in that case the notice might have been still open to an objection as to its form, but he did not do this, and the only proof he gave of service was a service by the post, and that, as it appears to me, was not one which was in compliance with the statute. Before the voter can be called upon to prove his qualification the objector must prove he gave the notice of objection, and in the case of such proof by sending it by the post it must by section 100 be "directed to the person to whom the same shall be sent at his place of abode *as described in the said list of voters*." The list there mentioned means, I think, the list which the overseers ought to publish, and if, instead of publishing the list as they have received it, the overseers take upon themselves to alter it, anyone who acts on it as altered does so at his peril. The revising barrister took a view of the matter which abstractedly may seem right, because the address of the voter on the list as altered was the right address, but although we might feel disposed to wish to adopt that view, we cannot alter the words of the statute, and the address to which this notice was addressed was not such as the statute has required, and therefore the voter ought not to have been called upon to prove his qualification, and the revising barrister was in error in this respect.

BRETT, J.—The question in this case seems to me to be whether the revising barrister was in the position to call on the person objected to to prove his qualification. The revising barrister has only a limited jurisdiction to call for such proof, and his authority to do so is contained in the 40th section of 6 & 7 Vict. c. 18, and is there made dependent on the condition precedent that the objector prove he gave the notice required by that Act. The notice so required is, as to counties, contained in the 7th section of that Act and in the 6th section of 28 Vict. c. 36 (which is made part of the 6 & 7 Vict. c. 18), and according to section 7 the service of it is to be in one of two ways, namely, on the person or else at the place of abode of the voter. Another mode of service is given by the 100th section, and that is by the post, in which case the notice must be "directed to the person to whom the same shall be

sent at his place of abode as described in the said list of voters." The objector, therefore, may satisfy the 40th section by proving a notice given according to either of these three ways. The power of proving service by the post is a great privilege (for according to *Bishop* v. *Helps* (2), when the notice is so sent by the post it is conclusive that the voter has received it, and it is not open to him to shew that he never in fact received it, or not in due time). Therefore if the objector elect to avail himself of that mode of service he must prove that he sent the notice strictly according to the terms of that 100th section. He must shew that the notice was directed to the voter at his place of abode as described on the said list of voters. Now what is that list? Under the old Act, 6 & 7 Vict. c. 18. s. 6, it is stated that the list of claimants, "together with the said copy of the register," that is, the copy which was sent to the overseers by the Clerk of the Peace "shall be deemed to be the list of voters of such parish." The list of voters is, therefore, the copy of the old register and the list of claimants. Then by 28 Vict. c. 36. s. 2, at the same time as the publication of the notice to send in claims the overseers are bound to publish a copy of the register then in force. Consequently the list which the overseers are to publish is that copy of the register; and if the objector elects to prove his notice by proof of its being delivered at the post-office he must take care that the notice is correctly addressed according to the address of the voter which appears on the copy of the register in force at the time. It may be that the overseers have failed to publish any list of voters; then, in that case, the Act (6 & 7 Vict. c. 18) says that the list shall be the old register which is then in force, and the objector must then take care to obtain a copy of such old register. It may be that by reason of some blunder the copy which the overseers have published is not a correct copy, and it may be that the overseers are liable to penalties for this, but that cannot relieve the objector from the necessity of proving under the service of a notice according to section 100 that the address was the same as that described in the list. Then let us see if this was done by the ol in the present case. It certainly w and if we are to assume that th evidence before the revising barri service of the notice of objection w of a service by the post, then, as it to me, the objector failed to compl that condition precedent which w cessary to give authority to the re barrister to call on the voter to pro qualification. It would seem from v. *Pilcher* (3) that after the object failed to prove service of notice b post according to section 100 of Vict. c. 18, he may prove service o notice by another mode of service, assume no such other evidence was here, and that the proof of servic made to rest on service by the po therefore am of opinion that the de of the revising barrister must be rev

Grove, J.—I am of the same op The question appears to me to d on the construction of section 1 6 & 7 Vict. c. 18, and particula these words in that section, namel such respective list as aforesaid," "as described in the said list of vo Now although there is a provision i Act for the publication of the l voters, I cannot find any provision m the list published by the overseer only authorised list and the list to alone the person objecting to anyon look. Mr. Lewis has stated that t no such provision, and that is con by cases which refer only to sectio to what is to be deemed the list, an throws us back on section 5, which the overseers to prepare a list of clai and gives the overseers a limited po deal with such list and with the c the register received by them fro Clerk of the Peace. It enables th put the word "objected" before the of any person on the margin of su or copy of register who they may is not entitled to be on the registe also to add the word "dead" befo name of any person in the said c the register whom they shall believ dead. And it further directs the seers to publish copies of such li

(3) 38 Law J. Rep. (N.S.) C.P. 69; s. Rep. 4 C.P. 417.

claimants and of the copy of the register with all such marginal additions. If then the proper construction of the words in the 100th section to which I have referred is that they mean the list and copy register directed to be published by section 5, then the list which the objector took here was not such, but a list amended by the overseers, who had no such power to amend given them by the statute. Has the objector then complied with the requisites of the 100th section which has given him the privilege of sending the notice by the post? It says that he must send it "directed to the person to whom the same shall be sent at his place of abode as described in the said list of voters." Now the direction in the present case was not the place of abode as described in the said list, but the one to which it had been changed by the overseers. No doubt this imposes a hardship on the objector, but it would be hard if the voter were to be liable to be disfranchised by the unauthorised act of the overseers. I am of opinion, therefore, that the service of notice proved did not comply with the requisites of the 100th section of the Act, and the decision of the barrister ought to be reversed.

DENMAN, J.—I am of the same opinion. I own that it does seem hard that the objector should be deprived of his power of objecting by a mistake of the overseers, but what we have here to do is only to put a construction on the 100th section. The words "said list of voters" in that section refer to the list directed to be published, that is, the copy of the register sent by the clerk of the peace, and as the altering the voter's address therein was the unauthorised act of the overseers, I think it was incumbent on the objector, if he sent the notice by the post, to send it directed to the voter's address as described in the old register. It is not satisfactory to determine a case when counsel for one side only has been heard, but I agree that the decision of the revising barrister should be reversed.

Decision reversed.

Attorneys—Coode, Kingdon & Cotton, for appellant.

(Appeal from Revising Barrister's Court.)

1873. Nov. 19. } LORD RENDLESHAM (*appellant*) *v.* HAWARD (*respondent*).

Parliament—County Vote—Qualification—Incapacity—Irish Peer.

An Irish peer, who at the time of registration is not a member of the House of Commons, is incapacitated by law from voting at parliamentary elections, and therefore is not entitled to have his name inserted in the register of parliamentary electors.

At a Court held before the barrister appointed to revise the lists of voters for the Eastern Division of the county of Suffolk, an objection was duly made to the name of Baron Frederick William Brook Rendlesham, commonly called Lord Rendlesham (hereinafter called the appellant), being retained upon the list of voters for the said division of the said county.

The name, place of abode and qualification of the appellant appeared upon the said list as follows—

Rendlesham, Frederick William Brook, Baron	Rendlesham Hall	Freehold Mansion and Lands	Rendlesham Hall

The following facts were admitted: The appellant was and had been during the qualifying period an Irish peer, and was not, nor ever had been a representative peer or a Member of Parliament. The appellant had been and was duly qualified to have his name retained in the said list and to be registered as a voter in respect of the qualification described in the said list, unless disqualified by the fact of his being an Irish peer.

The revising barrister expunged the

name of the appellant from the said list, on the ground that the appellant being a peer, and not during the qualifying period nor at the time of the registration elected a Member of the House of Commons, was not entitled to vote at the election of knights of the shire, and consequently not entitled to have his name retained upon the list.

O'Malley, for the appellant.—The decision of the revising barrister was wrong. After *Earl Beauchamp* v. *The Overseers of the parish of Madresfield* (1), it cannot be argued that an English peer is not permanently incapacitated from voting at an election for the House of Commons; but an Irish peer stands upon a different footing: he may be elected a member of the House of Commons, and if he serves he becomes entitled to take his seat, as is allowed by 39 & 40 Geo. 3. c. 67 (2); he is then a commoner for all purposes, and there can be no doubt that he then becomes entitled, if otherwise qualified, to vote at elections for boroughs and counties. The appellant does not now sit in the House of Commons, but he may at any time be chosen a member; and the decision of the Court in this case turns upon the question, whether the right to be put upon the register of parliamentary electors depends upon a disqualification, which may at any moment be removed, but which exists at the time of registration. In the *Droitwich petition* (3), a Committee of the House of Commons were of opinion that no statute under which the revi rister could exclude from the lis the name of an Irish peer. decision which, so far as it goes, in point. An Irish peer is not tated to the same extent as a peer; whether he is entitled to pends upon his *status* at the mon he tenders his vote, for it is not that an Irish peer can exercise chise, unless he has been ele serves as, a member of the Commons.

[BRETT, J.—This is a case o disability; if a claimant to infant at the time of registratio be of full age during the ensuin is not entitled to have his upon the register of parliamen tors.]

It is enacted by 6 Vict. c. 18. that in case it shall be prov claimant is incapacitated by a statute from voting, the revisin shall expunge his name from voters. Now the resolutions of of Commons are in effect rene session; but nothing except t tion against the interference of parliamentary elections preve from voting, and this resolution a law nor a statute. The disqu of infancy is an incapacity e law.

[COLERIDGE, C.J.—The Ac union of the two kingdoms o

(1) 42 Law J. Rep. (N.S.) C.P. 32.

(2) 39 & 40 Geo. 3. c. 67, by the fourth article enacts, "That any person holding any peerage of Ireland now subsisting, or hereafter to be created, shall not thereby be disqualified from being elected to serve if he shall so think fit, or from serving or continuing to serve, if he shall so think fit, for any county, city, or borough of Great Britain, in the House of Commons of the United Kingdom, unless he shall have been previously elected as above, to sit in the House of Lords of the United Kingdom; but that so long as such peer of Ireland shall so continue to be a member of the House of Commons, he shall not be entitled to the privilege of peerage, nor be capable of being elected to serve as a peer on the part of Ireland, or of voting at any such election; and that he shall be liable to be sued, indicted, proceeded against, and tried as a commoner, for any offence with which he may be charged."

(3) Knapp & O. 65.

(4) 6 Vict. c. 18. s. 40, enacts— name of any person inserted in any l shall have been objected to by the ov any other person, and such other pers ing shall appear by himself or by so behalf, in support of such objectio prove that he gave the notice or n tively required by this Act to be gi every such barrister shall then req proved that the person so objected to on the last day of July then next have his name inserted in the list of spect of the qualification described i and in case the same shall not be p satisfaction of such barrister, or in ca proved that such person was then inc any law or statute from voting in t members to serve in Parliament, s shall expunge the name of every such the said lists."

d Scotland (5 Anne, c. 8) does not allow otch peers to sit for English constituen-s, and the fact that a Scotch peer cannot come a member of the House of Com-ons shews that the right of an Irish peer sit therein depends on the Act for the nion of Great Britain and Ireland. The se of *Earl Beauchamp* v. *The Overseers f the parish of Madresfield* (1) establishes hat the resolutions of the House of Commons as to parliamentary elections are at least to be deemed declarations of the law. BRETT, J.—The judgment of Erle, C.J., in *Powell* v. *Bradley* (5) is material to our decision. It seems to shew that the existence of a disqualification must be negatived at the time of registration. That was a case of alleged disability from infancy. KEATING, J.—It seems to be provided by 1 Hen. 5. c. 1, that peers shall not interfere at elections of members for a county; it is thereby enacted that "the knights and esquires and others, which shall be choosers of those knights of the shires, be also resident within the same shires." These words seem to contemplate that peers are to be excluded.]

In *Elliott on Parliamentary Electors*, p. 262, it is said, "In *Heywood on County Elections*, 316, there is the following passage—When the members of the House of Peers were first excluded from voting at the elections of members of Parliament does not exactly appear; the returns preserved by Prynne shew that in the earlier periods of our history they exercised that privilege, and even after their personal attendance at the County Court had fallen into disuse, we find instances in which their attorneys returned the knights of the shire."

G. Browne, for the respondent, was not called upon.

COLERIDGE, C.J.—The decision of the revising barrister was right and must be affirmed. *Earl Beauchamp* v. *The Overseers of the parish of Madresfield* (1) shews that English peers are disqualified from voting at elections for members of the House of Commons, and from placing their names upon the register of parliamentary voters. The question raised in this case is, whether the appellant, who is an Irish peer, and is not, nor ever has been a representative peer, or a Member of Parliament, is in the same position as an English peer. In my opinion no difference exists in this respect between an English and an Irish peer. I think that this is shewn by the Act for the Union of Great Britain and Ireland (39 & 40 Geo. 3. c. 67), which provides that Irish peers may sit in the House of Lords by representation. The same statute, by the fourth article, allows any person holding any peerage of Ireland to be elected a member for any county, city or borough of Great Britain; and if he chooses to serve as member of the House of Commons, he is to be deemed for all purposes a commoner. The effect of this enactment is to turn an Irish peer, who serves for a county or borough of Great Britain, into a commoner by reducing his *status*. If it were not for this provision in the Act of Union between Great Britain and Ireland, an Irish peer would be disqualified from sitting in the House of Commons in the same manner as a Scotch peer is. I think that, except the right to sit in the House of Lords, an Irish peer is a peer for all purposes, and is subject to all the disqualifications annexed to the peerage.

It has been urged that this disability as to voting at parliamentary elections may be removed during the ensuing year by the appellant's being elected a member of the House of Commons, and that, therefore, he is entitled to have his name put upon the register. I am of opinion that this argument is not maintainable. The statute 6 Vict. c. 18. s. 40 uses the words, "in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in Parliament, such barrister shall expunge the name of every such person from the said lists." The word "then" means the time of registration, and the test given by the statute is whether the appellant was disqualified from voting when he claimed to be registered. He certainly was disqualified both on the 31st of July and on the day when the revising barrister held his Court. I

(5) 18 Com. B. Rep. N.S. 65; s. c. 34 Law J. P. (N.S.) C.P. 67.

think that *Powell* v. *Bradley* (5) shews conclusively that if at the time of registration a disqualification exist, the claimant is not entitled to have his name inserted in the list of voters. It is clear that as the appellant was disqualified from voting at the time of registration, the revising barrister was bound to strike his name out of the lists. The decision must be affirmed.

KEATING, J., BRETT, J., and G concurred.

Judgment for the resp

Attorneys—J. B. Wood, for appellant; & Thorn, agents for F. B. Jenning for respondent.

(*Appeal from Revising Barrister's Court.*)

1873. Nov. 19. } SHERWIN (*appellant*) *v.* WHYMAN (*respondent*).

Parliament—County Vote—Consolidated Appeal—Indorsement of Name of Appellant—Statement of Qualification—"Rent-Charge on Freehold House"—Amendment.

In a consolidated appeal from the decision of a revising barrister, the indorsement upon the case of the names of the appellant and the respondent is sufficient, and it is unnecessary to indorse the names of the persons whose appeals are consolidated.

In a claim to vote for a county the qualification was stated to be "rent-charge on freehold house":—Held, *that, inasmuch as there is but one kind of rent-charge, namely, a freehold rent-charge, u confer a vote, the qualification ciently stated; but that if it wer rate, it could be amended by ins word "freehold" before the wor charge."*

Consolidated appeal from the of the revising barrister for the division of the county of Derby.

The respondent duly objecte name of the appellant being retai the list of voters for the paris Alkmund, Derby, in the southern of the county of Derby, and grou objection on the third column o gister, in respect of the natur appellant's interest in the qualif perty. The entry on the list was as follows—

Sherwin, Samuel.	Cherry Street, Derby.	Rent-charge on Freehold House.	Parker Stre W. B. Sherwin,

It was contended, on behalf of the objector, that the qualification of the appellant, as stated in the list of voters, was insufficient in law to entitle him to vote, on the ground that the rent-charge was not stated in the third column to be a "freehold rent-charge." It was contended, on behalf of the appellant, that the qualification as stated was sufficient; that a freehold rent-charge was the only rent-charge which could confer a vote; and that therefore the omission of the word "freehold" was immaterial, and, at most, a misnomer or inaccurate description; and, further, that the barrister had power to amend by adding the word "freehold," if amendment was necessary. The barrister was of opinion that, under 8 Hen. 6. c. 7, a freehold tenure was of the very essen qualification, and that this did n on the face of the list, either by statement or by necessary implicati this it followed that, in his opi case was not one of misnomer n accurate description, within secti the Registration Act, 1843, and t was no power to amend under s of the same Act. The barriste quently expunged the name from

The names of fourteen other contained in a schedule annexe case, and all in like manner duly to by the respondent, were expu the same grounds, from the list for the several parishes of St. A Litchurch and Littleover, in the

vision of the county of Derby. Their several cases depended upon the same points of law as this case and ought to be considered therewith.

If the Court should be of opinion that the decision was wrong then the names of the appellant and the said several other persons were to be restored to the said several lists of voters, with or without amendment, as the Court might think fit.

At the foot of the case was the following memorandum—

"I, for myself, and on behalf of all the other persons who are interested as appellants in this matter, and whose names are written in the schedule hereunder annexed, do appeal against this decision, and agree to prosecute this appeal.

"Samuel Sherwin.

"I agree to appear and answer this consolidated appeal.

"Robert Whyman."

The schedule contained the names of fourteen claimants to vote, whose qualification was stated to be "rent-charge on freehold house" or "houses."

The case was indorsed as follows—

"County of Derby, Southern Division: Polling district, Derby: Parish or township of St. Alkmund, Derby: Samuel Sherwin, of Cherry Street, Derby, appellant: Robert Whyman, of London Street, Litchurch, respondent."

The signature of the revising barrister and the date were likewise indorsed.

Hardinge Giffard (*Gorst* with him), for the respondent, took a preliminary objection.—This is a consolidated appeal, but it is not indorsed as is required by 6 Vict. c. 18. ss. 42, 44, 45 (1). The revising barrister has indorsed only the names of the appellant and the respondent; the names of the fourteen other persons ought to have been indorsed. *Wanklyn* v.

(1) 6 Vict. c. 18. s. 42, enacts "That it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who, in any such case, shall be aggrieved by or dissatisfied with any decision of any revising barrister, on any point of law, material to the result of such case, either himself, or by some person on his behalf, to give to the revising barrister in Court, before the rising of the said Court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous of appeal, and in such notice shall shortly state the decision against which he desires to appeal; and the said barrister thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which, according to his judgment, shall have been established by the evidence in the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against; and such statement shall be made, as nearly as conveniently may be, in like manner as is now usual in stating any special case for the opinion of the Court of Queen's Bench, upon any decision of any Court of Quarter Sessions; and the said barrister shall read the said statement to the appellant in open Court, and shall then and there sign the same; and the said appellant, or some one on his behalf, shall, at the end of the said statement, make a declaration in writing under his hand to the following effect, that is to say, 'I appeal from this decision;' and the said barrister shall then indorse upon every such statement the name of the county, and polling district or city and borough, and of the parish or township to which the same shall relate, and also the Christian name and surname, and place of abode of the appellant and of the respondent in the matter of the said appeal, and shall sign and date such indorsement; and the said barrister shall deliver such statement, with such indorsement thereon, to the said appellant, to be by him transmitted to her Majesty's Court of Common Pleas at Westminster, in the manner hereinafter mentioned; and the said barrister shall also deliver a copy of such statement, with the said indorsement thereon, to the respondent in such appeal who shall require the same."

Sec. 44. "That if it shall appear to any revising barrister that the validity of any number of such claims or objections determined by him at any Court as aforesaid depends and has been decided by him upon the same point or points of law, and the parties, or any of them, aggrieved by or dissatisfied with his decision thereon, shall have given notice of an intention to appeal therefrom, it shall, in such case, be lawful for the said barrister to declare that the appeals against such decision ought to be consolidated; and the said barrister shall, in such case, state in writing the case, and his decision thereon, in manner hereinbefore mentioned, and that several appeals depend upon the same decision, and ought to be consolidated, and shall read such statement, and sign the same, as hereinbefore mentioned; and thereupon it shall be lawful for the said barrister to name any person interested and consenting, for and on behalf of himself and all other persons in like manner interested in such appeals, to be the appellant or respondent respectively in such consolidated appeal, and to prosecute or answer the said appeal, in like manner as any

Woollett (2) is an authority in the present case.

[KEATING, J.—Surely all consolidated appeals are in this form.]

It is not clearly found that the appellant appeals on behalf of the fourteen persons named in the schedule. This is not merely a formal objection. The appellant, if he succeeds, may be entitled to costs under 6 Vict. c. 18. s. 70, and he ought to have the opportunity of knowing from whom he is to receive them.

COLERIDGE, C.J.—We must proceed with the hearing of this case. The objection is founded on some of the provisions in 6 Vict. c. 18. The 44th section enacts at considerable length the procedure as to consolidated appeals. I should quite agree that if the rule of practice laid down by the statute had not been complied with, we ought not to hear this appeal; but in my opinion all the requirements of the Act have been observed. It is stated that the names of fourteen other persons which had been objected to same ground have been expunge the lists, and that their severa depended upon the same points of this case and ought to be considere with. I think that this statemen sufficiently indicate that each of th teen persons appealed to this Cou that the barrister considered th appeals ought to be consolidated appellant and the respondent unc the duty of bringing the quest every case before the Court, an names were put upon the case ac to the prescribed procedure; the their consent that this case sho stated in its present form. Th section has been complied with s tially. We were pressed with th of *Wanklyn* v. *Woollett* (2); b decision is not in point here. The was there asked to hear an ap which the statute had not been out; the signature of the barris not been obtained at all; it was different case from this.

KEATING, J., concurred.

BRETT, J.—Section 42 is merely tory enactment, and section 44 i same nature. The 62nd section some portions of the 42nd and 4 tions conditions precedent to the of an appeal; and I think that th ments as to the indorsements are made obligatory. This seems to ha decided in *Wanklyn* v. *Woollett* (a similar reasoning prevailed in v. *Brooks* (3). Section 44 makes ful for the barrister to name any interested in the appeals to be th lant or respondent in the cons appeal, and to prosecute or ans appeal in like manner as an appe respondent might prosecute or an his own case. The indorsement tion 42 is to contain the name appellant and respondent. Now that the appellant is sufficiently i in this appeal, and that the cas perly indorsed. Section 45 regul mode of paying costs.

GROVE, J., concurred.

appellant or respondent might in his own case under the provisions of this Act."

Sec. 45. "That in and with regard to every such consolidated appeal the like proceeding shall be had and taken, and the like rules and regulations shall apply, as in the case of any other appeal under this Act; and that every order, judgment or decision of the said Court of Common Pleas shall be equally valid and effectual for all the purposes of this Act, and binding and conclusive upon all the parties named in or referred to as parties to such consolidated appeal as aforesaid; and that if, in any case, all or any of the parties to such consolidated appeal shall make or enter into any agreement as to the mode of contributing among themselves to the costs and expenses of such appeal, the said agreement may, upon the application of any party or parties thereto, be made a rule of the said Court of Common Pleas, if the said Court shall think fit."

Sec. 62. "That every appellant who shall intend to prosecute his appeal shall, within the first four days in the Michaelmas Term next after the decision to which such appeal shall relate, transmit to the Masters of the said Court of Common Pleas the statement in writing so signed by the said revising barrister, as aforesaid, and shall also therewith give or send a notice signed by him, stating therein his intention to prosecute the said appeal, and the said appellant shall also give or send a notice, signed by him, to the respondent in the said appeal, stating his intention duly to prosecute such appeal in the said Court."

(2) 4 Com. B. Rep. 86; s. c. 16 Law J. Rep. (N.S.) C.P. 144.

(3) 11 Com. B. Rep. 41; s. c. 21 Law (N.S.) C.P. 7.

The Court then proceeded to hear the case upon its merits.

The *Attorney-General* (*Sir H. James*), (*John Edwards* with him), for the appellant.—The questions are whether the claim clearly shews a freehold qualification, and if it does not whether there is power to amend. By 2 Will. 4. c. 45. sch. H., forms 2 and 3, it was provided that it should be stated in the register whether the qualifying interest was freehold, copyhold, leasehold, or derived from occupation; these provisions were repealed by 6 Vict. c. 18. s. 1, and forms 2 and 3 in sch. A. of that statute do not expressly require these particulars to be inserted; and it might perhaps be argued that it is unnecessary to state them. However that may be, it is clear that the nature of the qualifying interest is sufficiently set forth. A freehold rent-charge alone gives the right to vote—*Warburton* v. *The Overseers of the Township of Denton* (4), and hence it ought to be taken that the qualification consists of a freehold rent-charge. Some cases mentioned in *Rogers on Elections*, 133 (10th edit.), are very much in the appellant's favour; thus in *Howitt* v. *Stephens* (5), "50*l.* occupier" was considered a sufficient statement of the qualification of a person who occupied as tenant a farm rented at not less than 50*l.* a year. This case was decided under 2 Will. 4. c. 45. s. 20. In *Birks* v. *Allison* (6), a voter's qualification was described as "tenant;" and this was held to be a sufficient description of an occupying tenant at 50*l.* rent under 2 Will. 4. c. 45. s. 20. In *West* v. *Robson* (7), and in *Webster* v. *The Overseers of Ashton-under-Lyne* (8), the qualification was stated to be a "rent-charge." *Nicholls* v. *Bulwer* (9) is not in point; the claim was in respect of a rent-charge, whereas it ought to have been in respect of houses. At all events the barrister has power to amend under 6 Vict. c. 18. ss. 40 and 101 (10) by inserting the word "freehold" before the word "rent-charge."

Hardinge Giffard (*Gorst* with him) for the respondent.—"Rent-charge" is an insufficient description of the qualification: it may mean a rent-charge for a term of years, which would not confer any vote; the claimant must state his qualification in the third column, and the revising barrister cannot amend so as to give a new qualification.

COLERIDGE, C.J.—We all are of opinion that this appeal must be allowed. The revising barrister intended to leave to us

(4) 40 Law J. Rep. (N.S.) C.P. 49.
(5) 5 Com. B. Rep. N.S. 30; s. c. 28 Law J. Rep. (N.S.) C.P. 105.
(6) 13 Com. B. Rep. N.S. 12; s. c. 32 Law J. Rep. (N.S.) C.P. 51.
(7) 3 Com. B. Rep. N.S. 422; s. c. 27 Law J. Rep. (N.S.) C.P. 262.
(8) 42 Law J. Rep. (N.S.) C.P. 38.
(9) 40 Law J. Rep. (N.S.) C.P. 82.

(10) 6 Vict. c. 18. s. 40, enacts, "That the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list. Provided always that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same."

Section 101. "That no misnomer or inaccurate description of any person, place or thing named or described in any schedule to this Act annexed, or in any list or register of voters, or in any notice required by this Act, shall in anywise prevent or abridge the operation of this Act with respect to such person, place or thing, provided that such person, place or thing shall be so denominated in such schedule, list, register or notice as to be commonly understood."

the questions whether the qualification was insufficiently described, and if it was whether he had power to amend. I think that he decided wrongly on both points. Our decision is governed by *Howitt* v. *Stephens* (5), from which it seems to follow that although a qualification may be set out in inaccurate language, yet if the terms used in describing it are sufficient when understood in a particular manner, the claim to vote ought to be allowed. This I take to be the effect of the judgments in that case. The qualification seems to me sufficiently stated; but at all events the revising barrister had power to amend by inserting the word "freehold" before the word "rent-charge," if he was of opinion that the nature of the rent-charge did not appear upon the face of the claim. He came to a wrong conclusion as to his power to amend, for there can be no doubt that it was a proper case for amendment.

KEATING, J.—I think the revising barrister was wrong on both points. There is but one kind of rent-charge which gives the right to vote at parliamentary elections, namely, a freehold rent-charge, and I think that we ought not to construe the statement of the qualification as indicating a chattel instead of a freehold interest. I think the description sufficient as it stood. But at all events it was the duty of the revising barrister to insert the word "freehold" before the word "rent-charge." He clearly had power to amend under 6 Vict. c. 18. ss. 40 and 101.

BRETT, J.—I think the qualification sufficiently stated as it stands. The third column need never contain a strictly accurate statement. If the statement had been equally applicable to two different qualifications, I should still have been of opinion that we ought to give judgment for the appellant; for in my opinion this is the result of *Townshend* v. *The Overseers of the Poor of St. Marylebone* (11), and *Ford* v. *Boon* (12). In those cases the Court decided in favour of the claim to vote, although the statement in the third column was applicable to different kinds of qualification. In the present case only one kind of rent-charg confer a right to vote; and I thin the statement sufficiently describ qualification for the purpose of ide tion. But *Howitt* v. *Stephens* (5 *Birks* v. *Allison* (6), which was c on the authority of that case, she even if the qualification were impr stated the power to amend exist agree that a freehold interest in charge is necessary to confer the r vote; but in other respects the r barrister took an erroneous view law; I think that it does app necessary implication that the rent- in respect of which the claim was was of a freehold nature, and that was power to amend under 6 Vict ss. 40 and 101. The question w whether the qualification was state legal accuracy, but whether it wa ciently stated for the purposes of fication. The barrister made a n in point of law, and his decision n reversed.

GROVE, J.—The object of the ments as to the third column are t claimant to vote shall therein st interest in the qualifying property sufficiently distinguishes the natur qualification, the statutes are co with. I think the entry on the voters shews what kind of quali was intended. There is only one d tion of rent-charge which can con right to vote, namely, a freehol charge. I do not agree with the r barrister, who seems to have thoug the qualification ought to be defin legal accuracy. But the power to existed, although, in my opinion, unnecessary to exercise it, as I thi the qualification was sufficiently and that no amendment was requi

Judgment for the appe

Attorneys—T. C. Greenfield, agent for Derby, for the appellant; S. B. So agent for W. R. Holland, Ashbourne respondent.

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(11) 41 Law J. Rep. (N.S.) C.P. 25.
(12) 41 Law J. Rep. (N.S.) C.P. 28.

1873. Nov. 10, 13. } JOLLIFFE AND ANOTHER *v.* THE WALLASEY LOCAL BOARD.

Statute—Construction of Local Act—Landing Stage to Ferry—Negligence—Insufficiently Buoying a Sunken Anchor—Notice of Action—Public Health Act, 1848 (11 & 12 *Vict.* c. 63), *s.* 139.

The defendants, a local Board of Health, were the proprietors of a ferry between Liverpool and New Brighton, which was worked by steamboats; and, the conveniences for landing at New Brighton being insufficient, a local Act, passed in 1864, *empowered the defendants, by its* 7*th section, to make, "in the line, and according to the levels defined in the deposited plans," and "upon the lands delineated in the said plans . . . the following works: that is to say, a pier or landing-stage at New Brighton . . . together with all such jetties, esplanades, landing-places, toll-gates or bars, and other works or conveniences in connection therewith," as the defendants should from time to time think fit. The Act also, by its* 8*th section, required that, previously to commencing the pier or landing-stage, the defendants should deposit, at the Admiralty Office, plans "of the said pier or landing-stage, and works connected therewith," for approval, and that "such pier or landing-stage and works should be constructed only in accordance with such approval." The Act, the objects of which, as shewn by its recital, required the provisions of the Public Health Act,* 1848, *for their performance, by its* 2*nd section enacted that it should be executed by the defendants, "subject to the powers and provisions of the Public Health Act,* 1848."

The defendants accordingly constructed a pier and landing-stage at New Brighton. The pier was a solid structure, which did not extend to low water mark, but the landing-stage floated on the river, and was moored, below low water mark, by anchors fixed in the bed of the river, a bridge being made to connect the landing-stage with the pier. Part of this landing-stage was beyond the limits marked on the deposited plans, but it, with its mooring anchors, received the approval of the Admiralty, pursuant to the said 8*th section of the Act. One of the mooring anchors to which the floating stage was attached, was insufficiently buoyed to indicate its position under the water, and thereby injured a boat of the plaintiffs', which, whilst lawfully navigating the river, and without any negligence of the plaintiffs', struck against such anchor. The defendants were guilty of negligence in the means used to indicate the position of the anchor; but, as to this, they acted in the bona fide belief that they were acting under the powers given them by their Act of* 1864.

Held, *in an action for the injury to the plaintiffs' boat,* 1*st. That the landing-stage and works were authorised by the Act of* 1864. 2*nd. That there was a cause of action against the defendants for negligence in insufficiently buoying the anchor, which caused the injury to the plaintiffs' boat.* 3*rd. That section* 139 *of the Public Health Act,* 1848, *which requires notice of action for anything done or intended to be done under that Act, was, by section* 2 *of the local Act of* 1864, *made to apply to what had been intended to be done by the defendants under such Act of* 1864, *and that the defendants were therefore entitled to notice of action.*

The first count of the declaration stated that the defendants had constructed, and were in possession, and had the management of a certain landing stage, called the New Brighton Landing Stage, upon a certain public navigable tidal river, and that the defendants sunk, placed and kept, in and upon the bed of the said river, at a part thereof where it was navigable, a certain anchor of the defendants, attached by a cable to the said landing stage, which said anchor was covered with water and wholly concealed from view, and in such a position and at such a depth, that vessels in navigating the said river, and passing in and along and over the said place where the said anchor was so sunk and placed as aforesaid, without having notice of the said anchor so being sunk and being in the said place, would be and were in great danger of striking against the same, and of being thereby damaged and injured, and that whilst the said anchor was so sunk and placed and kept as aforesaid, no notice was given nor any proper care or precaution taken by the

defendants to prevent or guard against the said danger to vessels lawfully navigating the said river, and passing in, along and over the said place where the said anchor was so sunk, and by means of the premises a certain vessel or steam tug of the plaintiffs, while lawfully navigating the said river and passing in, along and over the said place, struck against the said anchor and thereby became and was swamped. Averment of special damage.

The second count stated that whilst the defendants were in possession of the said landing stage, and of the said anchor in the said river, as in the first count mentioned, the anchor became and was in such a dangerous position, that vessels in navigating the river and passing over the place where the anchor was sunk were in great danger of striking against the same and being damaged, whereof the defendants had notice, yet the defendants wrongfully and negligently allowed the said anchor to be, and kept the same for a long and unreasonable time in, the said position and place, and by reason thereof a certain vessel or steam tug of the plaintiffs, whilst navigating the said river, struck against the said anchor and thereby was swamped, &c., as in the first count.

The third count stated that by the Wallasey Improvement Act, 1864, it was enacted that the defendants, subject to the provisions of the said Act and the statutes incorporated therewith, might make and maintain in the line or situation, and according to the levels defined upon the deposited plans and sections, and upon the lands delineated on the said plans and described in the books of reference thereto, certain works in the said Act mentioned, viz., amongst others a pier or landing stage at New Brighton, from a point at or near the east end of Victoria road, together with all such jetties, &c., and conveniences, as the defendants should from time to time think fit, and that previously to commencing the said pier or landing stage, the defendants should deposit plans at the Admiralty Office for the approval of the Commissioners executing the office of Lord High Admiral, and that such pier or landing stage and works should be constructed only in accordance with such approval, and when such pier, &c., should been commenced, it should not be for the defendants to alter or exte same without the like approval, an it was further enacted that the defe in the construction of the pier, &c., deviate laterally from the line she the deposited plans to the extent limits of deviation shewn in those The count averred that the defe did deposit such plans, whereto t proval of the Admiralty was signifie the defendants did construct a c pier, &c., as and for such pier and l stage as in the said Act mentione the defendants did not construct th pier, &c., in accordance with the s proval and the said Act of Parli but constructed and extended th pier, &c., otherwise than in acco with such approval, and so as th same deviated from the line or sit thereof shewn on the deposited beyond the limits of deviation she the said plans, without the defe having obtained such like appro such deviation, and by reason of so the defendants placed and kept the as in the first count mentione omitted to give notice and to ta caution, whereby the plaintiffs' struck against the anchor and damaged as in the first count men

The fourth count was the same third count, except that it omitt mention of the approval of the Adn Office.

The material pleas were—Not by statute 11 & 12 Vict. c. 63. s. public Act; and 21 & 22 Vict. c s. 4; 27 & 28 Vict. c. cxvii. s. 2, a & 31 Vict. c. cxxxii. s. 5, local Act

And to the first count that the d ants did what was complained virtue of their powers under the W Improvement Act, 1864, and the incorporated therewith.

The cause came on to be tried Kelly, C.B., at the Liverpool S Assizes, 1871, when a verdict was for the plaintiffs by consent for 1,00 ject to be reduced or vacated, and i thereof a verdict for the defendant nonsuit, to be entered according to cision of the Court upon the foll

case; the Court to be at liberty to draw inferences of fact a jury ought to have drawn.

CASE.

The plaintiffs are the owners of steam-tug boats plying for hire within the port of Liverpool, and were on the 15th of June, 1870, the owners of a certain steam-tug boat called the *Lioness*.

The defendants were possessed of a certain pier, bridge and landing stage at New Brighton, which said bridge at one end thereof was attached to the said pier, and at the other end thereof was attached to the said landing stage, which said landing stage and bridge rose and fell with the tide. The said pier was constructed of piles screwed down into the soil of the river Mersey between high and low water mark, and the whole of the said pier was above low water mark of ordinary spring tides. The said bridge did not rest upon or touch the soil or waters of the said river Mersey, and the greater part thereof in length was above low water mark of ordinary spring tides; the remaining part thereof was suspended to the said landing stage below low water mark of ordinary spring tides, and the whole of the said landing stage, which was moored by anchors fixed into the bed of the river, floated upon the waters of the said river below low water mark of ordinary spring tides, and certain anchors, which moored the said landing stage, were fixed into the bed of the said river outside the line of the said landing stage, and below low-water mark of ordinary spring tides. The river at the *locus in quo* runs north and south, and the landing stage, which was 204 ft. long and 30 ft. 6 in. wide, was moored in the said river lying north and south.

The case set out a copy of an appointment, made by the commissioners for the conservancy of the river Mersey, on the 9th of February, 1865, under 5 & 6 Vict. c. cx., "an Act for better preserving the navigation of the river Mersey," of Admiral Evans as Acting Conservator of the river Mersey, for the purposes of 5 & 6 Vict. c. cx., and the case afterwards stated that the plans for the construction of the said pier, bridge and landing stage, as also the plan shewing the mode in which the landing stage was to be moored, were all of them duly approved by the commissioners for the conservancy of the river Mersey, and by the Lord High Admiral or the Commissioners for executing the office of Lord High Admiral of the United Kingdom, on the 1st of November, 1865.

No such notice as mentioned in 5 & 6 Vict. cx. s. 6, was sent to the clerk of the peace for the county of Chester and borough of Liverpool, and no parliamentary plans were deposited with the clerk of the peace for the borough of Liverpool, nor was any notice given to him. Though parliamentary plans were deposited with the clerk of the peace for the county of Chester, no notice was deposited therewith.

The only mooring anchor which is important in this case was laid out with an iron chain from the south end of the said landing stage, in a south-easterly direction, in a part of the bed of the river Mersey, below low water mark of ordinary spring tides, and over which vessels navigating the said river used and had a right to sail, and where vessels navigating the said river used and had a right to bring up and anchor.

The said anchor was a mooring-anchor, with one fluke and an arm at the end of the anchor-shaft, running at right angles to the said fluke, and which, when the said fluke was properly imbedded in the bed of the said river, rested upon the bed of the said river, and to the ring at the end of the shank was attached a long piece of light iron chain, having at the end of it a piece of timber, intended to act as a buoy, but which piece of timber, by reason of the strength of the current of the river, was carried below the surface of the water, and in no respect indicated the position of the mooring-anchor below, except at and about dead high and low water of the tides. The said piece of timber was wholly insufficient to indicate the position of the anchor, and the defendants were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides, so as properly and efficiently to indicate the position of the anchor below.

The defendants frequently, and as often

as they deemed necessary, with a long rope, each end of which was attached to a boat, swept over the whole of their mooring-anchors, including the mooring-anchor in question, in order to ascertain whether the said anchors were in their proper places and undisturbed, and this they had done two or three days before the occurrence hereinafter mentioned.

The defendants were not guilty of any negligence in the mooring-anchors they used, in the mode of laying them down, or in the means they adopted to ascertain from time to time whether they were undisturbed, and in doing what is complained of, the defendants acted in the *bona fide* belief that they were acting under the powers given them by their Act of 1864, and the Acts incorporated therewith.

The plaintiffs did not give the defendants any notice of action.

Early in the morning of the 15th of June, 1870, the plaintiffs' steam tug boat *Lioness* anchored 400 or 500 yards to the south and east of the said landing stage, and in about four hours afterwards, having lifted her anchor, the tide being an ebb tide and near low water, she struck against the arm of the said mooring-anchor, which went through the bottom of the said steam tug boat *Lioness*, and there and then sank her, and caused her considerable damage. She was afterwards raised, taken into dock and repaired.

The said mooring anchor, by some means unaccounted for and unknown to the defendants, had been lifted from the bed of the said river, and the arm of the said anchor, instead of resting in a horizontal position upon the bed of the said river, had assumed an upright position, and thus had penetrated the bottom of the steam-tug boat.

The plaintiffs were guilty of no negligence whatsoever in navigating the said steam-tug boat, in anchoring, or in raising the anchor, but in all respects navigated and managed the said steam-tug boat in a lawful, careful, seamanlike and proper manner.

There was no floating landing stage at the *locus in quo*, or at or in connection with the old slip, but the present floating landing stage was the only one which had ever been placed in that part of th Mersey.

The question for the opinion Court was, whether the plaintiffs w titled to recover from the defe upon the facts as stated in this ca the Court should be of opinion affirmative, then the verdict was to but the damages were to be redu the sum of 550*l*. If the Court sho of a contrary opinion, then the v which had been entered for the pl was to be vacated, and instead the nonsuit or verdict was to be ente the defendants.

Aspinall (*Leofric Temple* with for the plaintiffs.—First. The defe had no power to construct and ma the landing-stage, to which the was fastened, and consequently the itself was a nuisance. Second. was negligence, in point of fa fixing and in maintaining the a Third. No notice of action was requ

As to the first point, the defe cannot rely upon any statutory autl Power is conferred by 27 & 28 V cxvii. s. 7 (1), to make and maintain or landing-stage at New Brighto this landing-stage is not authori that statute, for it is without the of deviation, as defined by secti (which enables the board to deviat the lands shewn on the deposited "as regards the pier and landing not exceeding five feet"), and not indicated on the deposited although the fixed pier is there des There being no legislative aut for putting the anchor into th of the river, it was a nuisance by mon law—*Hart* v. *The Mayor of* (2), *White* v. *Crisp* (3), and *W Phillips* (4). These cases explain v. *Mallett* (5). A passage from *The*

(1) This section is set out in the judg Keating, J., *post*, p. 46.

(2) 9 Wendell (N.Y.) 571.

(3) 10 Exch. Rep. 312; s. c. 23 Law (N.S.) Exch. 317.

(4) 15 Com. B. Rep. N.S. 245; s. c. 33 Rep. (N.S.) C.P. 33.

(5) 5 Com. B. Rep. 599; s. c. 17 Law (N.S.) C.P. 227.

Book of the Admiralty, vol. 1, p. 111 (Twiss's edit., A.D. 1871), shews that anchors dropped in dangerous places are nuisances; and in Hale, *De Portibus Maris*, p. 85, "The leaving of anchors in the port without buoys or marks, whereby ships or vessels may strike against them and be spoiled," is mentioned as a nuisance. It is of no consequence what the depth of water was when the injury to the tug happened; for the public are entitled to use a navigable river at all states of the tide—*The Mayor of Colchester* v. *Brooke* (6). As to the second point, there was negligence on the part of the defendants in not keeping the anchor in its proper place, or taking proper means to indicate its position. Having a thing under the water which might become dangerous to those navigating the river, they were bound to take care that it did not become dangerous. As to the third point, the defendants are not entitled to notice of action. The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 139, enacts that no writ shall be sued out against a local board for "anything done or intended to be done" under the provisions of that Act, without notice of action. The landing-stage was erected under 27 & 28 Vict. c. cxvii. (local). The 2nd section of this Act provides that the Act shall be executed by the local board, "subject to the powers and provisions of the Public Health Act, 1848." The question is, whether these words confer upon the local board the right to notice of action given by section 139 of the Public Health Act, 1848. Surely they do no such thing! The later Act, 30 & 31 Vict. c. cxxxii. (local) s. 5, provides that that Act "shall be executed by the local board with the powers and *indemnities*, and according to the provisions of the Public Health Acts." If the landing-stage had been constructed under the last-named Act, probably notice of action would have been required; but the words are much wider than those in 27 & 28 Vict. c. cxvii. s. 2. Moreover, the action complains of an omission by the defendants; that is, of the omission to take due care to guard against danger from the anchor; and the Public Health Act, 1848, s. 139, only protects things done, or intended to be done, under the Act. The omission to take due care cannot be said to be a thing done, or intended to be done, under the statute.

Sir J. B. Karslake (*Butt* and *R.G. Williams* with him), for the defendants.—The erection of the landing stage and the fixing of the anchor were acts within the powers conferred upon the defendants by 27 & 28 Vict. c. cxvii. ss. 7, 15. If the consent of the Admiralty be obtained, it is no matter whether the landing stage be or be not within the limits of deviation —section 8 (7). The moving of the anchor not being the act of the defendants, they are not responsible for the consequences thereof—*Hancock* v. *The York, Newcastle and Berwick Railway Company* (8). Even if the defendants' works were not authorised by the Act, it does not follow that placing the mooring-anchor by the defendants, who were owners of the ferry, was a nuisance, the landing stage to which it was attached being for the public advantage—*The King* v. *Russell* (9). Next, the defendants are entitled to notice of action, for the Public Health Act, 1848, is made a part of the defendants' Local Act of 1864, and the defendants acting under its powers, or *bona fide* believing at all events that they were so acting, are entitled to the notice provided for by section 139 of the Public Health Act, 1848. It is said that the act of negligence complained of by the plaintiffs was one of pure omission and not of commission, and that, therefore, the 139th section does not apply. The authorities shew that there is no such distinction, and that even for neglect of duty, where the defendant intends to do his duty, he is still entitled to the protection of the Act—*Newton* v. *Ellis* (10), *Davis* v. *Curling* (11), *Poulsum* v. *Thirst* (12), *Wilson*

(6) 7 Q.B. Rep. 339; s. c. 15 Law J. Rep. (N.S.) Q.B. 173.

(7) The substance of this section is given in the judgment of Keating, J., *post*, p. 47.

(8) 10 Com. B. Rep. 348.

(9) 6 B. & C. 566.

(10) 5 E. & B. 123; s. c. 24 Law J. Rep. (N.S.) Q.B. 337.

(11) 8 Q.B. Rep. 286; s. c. 15 Law J. Rep. (N.S.) Q.B. 56.

(12) 36 Law J. Rep. (N.S.) C.P. 225; s. c. Law Rep. 2 C.P 449.

v. *The Mayor, &c., of Halifax* (13), and *Judge* v. *Selmes* (14). Here, however, the defendants did put some mark to indicate the position of the anchor, and what they are sought to be made liable for, is not for mere omission, but for putting an insufficient buoy, so that it is not necessary in this case to go the length which some of the authorities have gone to.

Aspinall replied.

KEATING, J.—We have carefully considered this case, which, no doubt, is of considerable importance to parties using this ferry and landing-stage, and to all the inhabitants of Liverpool and the neighbourhood. The plaintiffs complain that while they were lawfully navigating the river Mersey and in a place where they had a right to go, the stock of an anchor, concealed under water, and placed there by the defendants, pierced the bottom of their vessel, and caused them very considerable damage. Now, it appears from the facts in the case, which has been stated by an arbitrator, that the defendants are the Wallasey Local Board of Health, and as such local board have, by virtue of several Acts of Parliament, been allowed to engage in the transport of passengers by a ferry from Liverpool to New Brighton upon the Mersey, and have been empowered to provide boats and other means of conducting that ferry, and the state of things up to the passing of the Act of 1864 (27 & 28 Vict. c. cxvii.) was that the Wallasey Local Board of Health had powers to manage this ferry. But it was found that the landing place was inconvenient, and therefore it was sought by the defendants to obtain powers from Parliament to construct a ferry and landing stage for the purpose of facilitating the embarkation and the landing of passengers at New Brighton. Accordingly the Act of 1864 was obtained, and under that Act a pier and landing stage were constructed. The pier was constructed as a solid structure, but from the pier there ran a bridge to a landing stage, which was a structure

(13) 37 Law J. Rep. (N.S.) Exch. 44; s. c. Law Rep. 3 Exch. 114.

(14) 40 Law J. Rep. (N.S.) Q.B. 287; s. c. Law Rep. 6 Q.B. 724.

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confined to lands delineated in the said plans," with reference to any permanent structure which they constructed; for I think that the words "upon the lands delineated in the said plans" override all the subsequent words in the section. Now comes the 8th section. It is to be remembered that the Mersey is under the care of conservators of that river, and that these conservators have substituted Admiral Evans for them on this occasion. Now the 8th section provides that before commencing the pier or landing stage, the local board shall deposit at the Admiralty office plans "of the said pier or landing stage, and works connected therewith, for the approval of the Lord High Admiral of the United Kingdom or the Commissioners for executing the office of Lord High Admiral, such approval to be signified in writing under the hand of the Secretary of the Admiralty, and such pier or landing stage and works shall be constructed only in accordance with such approval." As I understand plans were so deposited at the Admiralty office and the approval of the Admiralty was in fact obtained to the plan which has been produced before us, and which, it is admitted, represents the state of things as it now exists—namely, the landing stage as it was afterwards constructed, and the anchor as afterwards laid in the bed of the river, and the works which were actually constructed. These works received the approval of the Admiralty required by section 8. Now, what is the meaning of these two sections? I think the intention of the Legislature was this, "We deal with the taking by the local board of any lands which it may be necessary to schedule in the book of reference; but in the construction of the landing stage there may be something that will interfere with the navigation of the river, and therefore we will require that the plans shall be approved by the Admiralty, and that the works shall be executed according to their approval." The Legislature, I think, intended that everything connected with keeping the water way clear should be left, as it was left, in the best possible hands, namely, in the hands of the Admiralty, or of the conservators of the river. Their approval, which was given, drew with it the sanction of the Legislature, as much as if the works which they approved had been originally authorised by the Act itself, and therefore I think even the excess of this landing stage being so authorised under the 8th section, fulfilled the intention of the Legislature and legalised the landing stage, together with its moorings. But even assuming this to be so, Mr. Aspinall contends, and I think properly, that the local board were bound to exercise their powers with due care; and he says that as the arbitrator has found that the laying down of insufficient buoys was an act of negligence, the defendants are to be held responsible for the same, and in my opinion they would be so responsible for such negligence assuming that the anchor had been legally placed where it was. As a matter of fact, looking to the whole of this case, I come to the conclusion that the negligence complained of was negligence causing the accident in question. Taking the whole finding of the arbitrator together, my impression is that the negligence which the arbitrator meant to find here was a negligence contributing to the accident, and therefore I think that that would give the plaintiffs in this case a cause of action against the board. Then Sir J. Karslake says, that even supposing that to be the case, still the defendants are not liable, because they have not received notice of action. It is admitted that they have not received such notice, and the question is whether they were entitled to have it. I must say, for myself individually, that I very much regret that the case should be decided on any such point; but the point has been raised and we are bound to consider it, and in my opinion the defendants were entitled to notice of action. The defendants' board were originally constituted under the Board of Health Act, 1848, and the first question is, whether the provisions of section 139 of that Act, which requires notice of action for anything done under that Act, extend to the subsequent Act, the Wallasey Improvement Act, 1864, under which the pier and landing stage were constructed,

and that depends on the 2nd section of that last Act. Now it seems to me to be very material to look to the object of that Act. That Act recites the expediency of constructing a landing stage or pier, but that is not its only object. It recites also that it is expedient that the local board should be empowered to raise a further sum for the purposes of their ferries, landing stages and piers, and that further provision should be made with reference to the borrowing, re-borrowing and paying off moneys borrowed by the local board; that it is also expedient to alter the qualification of persons entitled to vote in the election of members of the local board, and also to make provision for superannuation or other allowances to the officers and servants of the board, and further, that it is expedient to confer further powers on the local board in relation to the good government and sanitary condition of the district and otherwise. Having thus stated that the legislature had all these objects in passing the Act, the 2nd section enacts that the "Act shall be executed by the local board, subject to the powers and provisions of the Public Health Act, 1848." The question is, whether that does not carry on the provisions of section 139 of the Act of 1848 into this Act of 1864, and it appears to me that it does. The words are large enough to take in the 139th section of the Public Health Act, 1848, which is a provision, and an important provision, and looking to the objects of the local Act, not only are all the provisions of the Public Health Act applicable, but they are requisite in working out the subsequent Act of 1864. But Mr. Aspinall says that sect. 139 would not extend to the works which were constructed under the Act of 1864, because the local board are limited to the Wallasey district. I think, however, that the intention of the legislature was to extend the Act of 1864 so as to make it a workable scheme in all its parts, and it could not be worked in all its parts if it were confined to the limits that Mr. Aspinall would assign. I therefore think that the 139th section does extend to the Act of 1864. But there still remains the question, which has been argued at great length, whether the acts complained of were acts that could be done wit meaning of that statute, so as to the board to notice of action. N arbitrator has found that the defe in doing what is complained of a the *bona fide* belief that they were under the powers of their Act of and of the Acts incorporated the That finding is as express as it c sibly be, and if it were necessary, I say that we are bound by it, but it necessary to say so because I see no to differ in the slightest degree f propriety of that finding. The o maining objection urged against t fendants' right to notice of action cases of nonfeasance are not c which the protection of notice of is given. That is not so; the c *Wilson* v. *The Mayor of Halifax* (13), v. *Curling* (11), *Newton* v. *Ellis* (10 *Judge* v. *Selmes* (14), establish t cases which appear to be mere n sance the defendant is entitled to t tection of the Act. But here, in the defendants are not driven to a dry nonfeasance. The case for the tiffs is, not that the defendant omitted to buoy the anchor, but th have buoyed it ineffectually by u piece of timber for that purpose at all other tides than dead high a water was carried below the surf the water, and left the position anchor concealed, and in doing t arbitrator has found that the defe were guilty of negligence. This is which, if they did, and intended to the arbitrator finds, in the belief th were complying with their Act, within the statutory protection. notice of action is required it is required where something has bee which ought not to have been done; wise no notice would be necessary, fo would be no action. I repeat my that this point should have been and the case decided upon it, but I that notice of action ought to hav given, and that the defendants are e to our judgment.

BRETT, J.—The plaintiffs sue fo pensation for injury suffered by steam-tug, and, as I apprehend, they

their case in one of two ways. First, they say that the defendants had placed an unauthorised structure in a navigable river, that is to say, in a public highway, so as to become an obstruction and a nuisance to the highway, whereby, without any negligence on their own part, the plaintiffs suffered damage, and therefore are entitled to sue, and no doubt if they could maintain their proposition that would be a valid cause of action. But the plaintiffs go further, and say that even if the obstruction were authorised by Act of Parliament, yet the defendants, if they did place the obstruction in the river, were bound not to do something which they have done, or to do something which they have not done, so that the plaintiffs, who, without negligence, contributing to the accident have suffered an injury, are entitled to recover; and I agree as to this also, if they can make out such proposition. The defendants reply that the obstruction was not unlawful, but authorised by Act of Parliament; and therefore they say the first cause of action necessarily fails. If they are right of course it does. They also say that even though the arbitrator has found negligence he has not found that such negligence contributed to the accident. Lastly, they say that even though they are liable either on the first ground or the second, they are entitled to a notice of action, which it is admitted was not given, and that therefore the plaintiffs cannot recover. Now if the Court thinks that notice of action was required, and that the second ground, namely, the case of negligence, is made out, it is not necessary to decide the first question at all; but that question is of the greatest importance to the inhabitants of Liverpool, and I think the Court ought to state what opinion it has formed upon it; either that it is clear, if it be clear, or, if otherwise, that it is a matter of doubt. It is so important with regard to the mode in which this ferry is to be maintained, that if it is clear that this floating landing-stage is beyond the powers of the Wallasey Board, or even if it is doubtful whether it is beyond their power or not, they and the parties interested ought to know it, so that a remedy may be applied. It is for that reason, and that reason only, that I think we ought to give our opinion upon the first point. And now with regard to that first point, it must depend entirely upon the construction of the statute, and unless the statute gives the defendants authority, I take it to be clear that they could not place in the navigable part of the river Mersey this permanent obstruction. Unless that is done by authority from Parliament, it seems clear to me that it is an unlawful obstruction of the rights of the public, and a nuisance. The question is, whether it is authorised by the Act of Parliament. Now in order to construe this Act of Parliament, which is by no means a clearly worded one, I think it necessary to consider in the first place, what was the state of things before it, and what it was that was required. The defendants, for their own private benefit, and for the public benefit also, had become the purchasers, under a former Act, of this ferry. This is a peculiar ferry. It consists of carrying people from Liverpool to New Brighton, and *vice versa*, a distance of some four miles or more, I should think, in steamboats, and landing them at Liverpool, and landing them at New Brighton. I think the preamble of the Act shews that the conveniences for landing the public at New Brighton were not what they ought to have been on the passing of their Act of 1864, that they were not what was desirable, and the Act upon the face of it shews that what was required was a new ferry or landing stage. Now, in order to erect that landing stage it is obvious, if they were to erect or construct a landing stage, the defendants would require Parliamentary powers, because this landing stage, to be of any use as a ferry landing stage in that place, must be constructed on some land which would belong to private owners. It must necessarily, in that place, as it seems to me, be constructed on a part of the foreshore, between high and low water-mark, which either belonged to the Crown or the lord of the manor. But to take the pier or landing stage to the edge of low water would not make a sufficient landing place in that river, where there is such a rise and fall of the tide. If the pier or

landing stage, or any part of it necessary for the purpose of landing, was taken into the river below low water-mark, the question of taking other people's land did not arise. If there was a permanent structure laid below low water-mark, it would be upon land which, I apprehended, did not belong to anybody, at all events not in the sense in which the foreshore or other lands belonged, and if what was done as a part of the whole landing was not fixed into the bed of the river at all, obviously the question of taking land did not arise, and the only question upon the navigable part of the river would be, whether the rights of the public were to be, or not to be, obstructed. It is, therefore, with regard to that state of things that this Act of Parliament was passed. The Act of Parliament contains first of all the enactment in words, and then by reference it brings in the deposited plans. The deposited plans might, one would think, shew the mode in which the permanent structure was to be made; and with regard to any land which was to be taken for the purpose of the permanent structure, one would expect it to have lines of deviation in the ordinary way. But it does not at all follow that when they came to deal with the mere obstruction to navigation, they would be laying out the plans which were to be followed with regard to a matter floating on the river, or even with regard to the driving of piles into the bed of the river, in which land nobody was interested; and it would not signify to anybody whether that land was used, unless the using it became an obstruction to the navigation of the river. And therefore, I think, it may be well anticipated that these plans would deal with only what was to be done by way of permanent obstruction, and would not deal with that which was done by way of floating obstruction. All must depend upon the construction of the words of the statute. The powers given to the local board are contained in sections 7 and 8, and by those sections the local board "may make or maintain in the line or situation, and according to the levels defined on the deposited plans and sections, and upon the lands delineated in the said plans, and described in the books of reference thereto, the following works." N all after that had related to per structures, or if it had been clearly that the word "works," and a precedes it, were to be applicable that comes after it, I should ha very great doubt whether the "floating stage" could be adde the word "works" seems to me capable of being applied to the mo manent works which would requ taking of other people's lands. are more things than one required constructed as a permanent work. is to be a pier or landing-stage, taking the plans into account, was a construction upon other people' and there is to be a reservoir, wh matter which we have not had with in this case, but which, I was another permanent work to b on other people's land, and mus been required to be shewn in some sited plan. The Act says that the have power to construct "a pier o ing stage at New Brighton, to with all such jetties, esplanades, ing places, tollgates or bars and works and conveniences in con therewith as the board shall time to time think fit." It se me that this contemplates not works which were then in the mi the defendants, nor merely works were shewn upon the deposited but works which were not then i minds, which might from time t become necessary as conveniences, parts of these works, but as conve in connection with them. And wh think what it was that was requir view seems to be strengthened. according to the deposited plans, fixed pier, which is in fact itself which according to the deposited p carried out to low water mark little beyond, and I am inclined to that at one time the defendants contemplate making the adjunct which they afterwards did. But t to be taken out into the Mersey. we know what sort of a river t the bed alters, not only from year, but from month to month, a week to week. Everybody must

that even though steamers might come to the foot of that fixed pier or landing stage at the time it was constructed, although they might come there at any height of the water, still in such a river as that it must be subject to the possibility, nay, to the probability, that at any time mud might be silted up, so that the boats could not come to the pier; and if they could not come to the pier at low water, the inconvenience to a large body of people would become at once monstrous; and what it had been, as everybody who knows Liverpool knows, up to the time of the passing of this Act of Parliament, that although there used to be formerly a landing pier, which ran out at low water, yet at spring tides and different conditions of the river, it could not reach far enough, and people were obliged to get out of the steamboats into flat-bottomed boats, and so were carried, with great danger, to the landing place. Therefore, it seems to me, what the legislature contemplated was further conveniences which were to be dealt with from time to time. Still, the defendants were not to have absolute power to deal with the Mersey according to their views of the convenience of the public with reference to this landing stage. The rest of the public and those who frequented the Mersey were to be considered also; and, accordingly, the powers of section 7 were given to them, subject to the control mentioned in section 8. At the first blush section 8 would seem to be somewhat against what I have said, because it says, "Previously to commencing the pier or landing stage," the matter is to be laid before the High Admiral, or the person acting for him at Liverpool; but I think that must be read subject to what I have said, and that the meaning is previously to commencing a pier or landing stage at the beginning, and previously to commencing the works which are to be done from time to time as the necessity arises, previously to doing any work which it may be necessary to do from time to time, the plan of that work is to be deposited at the Admiralty office, and the Admiralty is to pass its judgment upon it. That would give the necessary protection to all the public. That being the true meaning, it would come to this: whether it does not give the defendants power to do any work, with the consent of the Board of Admiralty; this it does not seem to me to give anywhere. It must be to do work which may fairly be considered as a convenience in connection with the pier or landing stage at New Brighton. Now, what was it that happened? According to the original plan, no doubt there was to be a permanent pier or landing stage going down somewhat below low water. Before that was actually constructed, it seems to me that it became obvious to the defendants that that was not the best plan, and thereupon they abandoned the permanent pier; they did not take it down to low water mark, they made a bridge which might be thrown over from that pier to a floating landing stage, and, having constructed the floating landing stage, they moored it below low water mark, and threw the bridge from that permanent pier on to the floating landing stage. It has been remarked, as my brother Keating has pointed out, that the floating landing stage is not to the north or to the east to go beyond the line of the permanent pier, as at first projected; and he has in part grounded his judgment upon that fact. I, of course, in what I am now about to say, speak with the greatest hesitation, but, as I said, I feel bound to give my opinion that in my judgment, even if the floating stage had gone beyond these lines, as long as it could fairly be said to be a convenience attached to this landing place, and has the consent of the Admiralty, and also of the conservators, it would be within the Act. I, therefore, have come to the same conclusion, not absolutely for the same reason as my brother Keating, that the floating landing stage, and the moorings of it, being undoubtedly capable of being considered conveniences in connection with the pier or landing stage, and having been approved by Admiral Evans, who was acting for the Admiralty and for the conservators, were constructions authorised by this Act of Parliament. It seems to me, therefore, to be clear that the plaintiffs cannot succeed upon the first cause of action. But

then comes the question whether, assuming this landing stage and its moorings to be within the authority of the Act, there is nevertheless a cause of action which the plaintiffs can maintain. I think it is a true proposition that the defendants were bound to exercise due care in the way in which they did that which they were authorised to do. Whatever my own private opinion may be as to the particular finding which has been found by a most able arbitrator, I should not think of acting on any private view of my own as against the real spirit of his finding, but he has found there was negligence in the defendants in not placing a different kind of buoy to notify the position of one of the anchors to that which they did place. He has found—I take it to be, the real meaning of his finding, because otherwise his finding would have been obviously futile—that there was no negligence of any kind on the part of the plaintiffs. He has, therefore, found that the defendants had either done something negligently which they were bound to do with reasonable care, or that they had negligently omitted to do something which they ought to have done, and that this has been the cause of injury to the plaintiffs. That seems to me to be, under the ordinary rules, a cause of action under which the plaintiffs would be entitled to recover. Then comes the question, whether the plaintiffs are prevented from recovering by not having given notice of action. That again depends on the construction of the Act of Parliament, and wherever there is to be a construction of Acts it is impossible to say that the matter can be without difficulty. The floating landing stage was either placed as it was without any authority at all, or it was placed as it was under the authority of the Act of 1864. It is found as a fact that the floating stage and anchor were both placed there by the defendants under a *bona fide* belief that they were acting under the powers of that Act. The first question then is, whether if the thing be done under such *bona fide* belief, any notice of action is to be given to the defendants by this Act. That depends upon whether section 139 of the Public Health Act, 1848, is not incorporated in it, and whether it can be applied thing which is done, or *bona fide* su to be done, under the Act of 1864 depends upon the construction of s of that Act of 1864, which say "this Act shall be executed by t board, subject to the powers an sions of the Public Health Act, I understood Mr. Aspinall to say powers could be given to the loca under the Public Health Act such powers as they would h execute within the Wallasey It must be obvious, I think, constructing the pier, and in with the landing stage, they are ex the Act of 1864, because it is executing this Act that they can things. It is no doubt an anomalo of things that the Wallasey Board be given this ferry at all; but it i It was done by a former Act of ment, and their powers are in under this; and when they are co ing and maintaining the landing s New Brighton, and when they ar ing out everything which this Act rises, it seems to me impossible that they are not "executing" t Then the Act is to be executed su the powers and provisions of the Health Act, 1848, and the real seems to be, is section 139 a "pro of the Public Health Act, 1848 doubtedly it is, and a provision most important kind; and theref within the terms of this second that what they do in order to this Act of 1864 is to be sub that provision. Then the case that it is not only what is done the Act but what is done under *fide* belief that the Act is being ex that is to be protected; and the pr is hardly wanted unless they ha beyond the Act. But then Mr. takes two objections. He says, ev posing that that is a provision w applicable, yet it is not applicable case, because here it is a mere ance. As I understand the d they come to this, that whenever a person in tort for either a breach or for an omission to properly pe duty which has been imposed,

case within the meaning of a clause requiring notice of action, as the person is considered to be sued for improperly doing an act he was bound to do. In *Newton* v. *Ellis* (10) Coleridge, J., says —"This is not a case of not doing. The defendant does something, omitting to secure protection to the public." And Erle, J., says—"The cause of action is making the hole, compounded with the not putting up a light." Then Kelly, C.B., delivering the judgment of the Court, in *Wilson* v. *The Mayor of Halifax* (13) says, "We think that whatever may be the construction which might be put upon the words of the statute, if the question arose in this case for the first time it is now settled by authority that an omission to do something that ought to be done in order to the complete performance of a duty imposed on a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done within the meaning of the clauses requiring notice of action for the protection of public bodies under Acts of Parliament imposing public duties." I cannot conceive words which would more completely control the present case. And moreover *Davis* v. *Curling* (11) is a decision expressly in point. Then it is said that as the omission is to mark an anchor which was placed entirely beyond their authority under the Act, the negligence of omitting to give notice with regard to something which they had no right to do, does not come within the statute. That is, as I understand it, to say that a negligence upon a negligence deprives a party of his right to notice of action. But it seems to me impossible to maintain that the second negligence was not equally done in the belief that it was in execution of the Act, and therefore within the rule entitling the party to notice of action. I think, for the reasons already mentioned, that the plaintiffs cannot maintain their first cause of action; that they might have maintained their second cause of action if they had given notice; but inasmuch as they have not given notice, they cannot maintain the second cause of action any more than they can the first. I further think that even though they could have maintained the first cause of action as well as the second, yet that for want of notice they cannot maintain either.

DENMAN, J.—I apprehend the cause of action here is the not properly buoying the anchor. It has been argued on the part of the plaintiffs, first, that as there was no statutory authority to put an anchor there at all, there must be a liability on the part of those who put it there, since by reason of its being there the accident occurred, and especially this would be so if the anchor was improperly buoyed. To this the defendants have replied, that even if they had no such statutory authority, they are still not to be held liable, on the ground that what caused the accident was not wholly a nuisance, and was for the benefit of the public, and for this they cite *The King* v. *Russell* (9). Now I had long understood that *The King* v. *Russell* (9) was practically overruled by *The King* v. *Ward* (15). Since the date of *The King* v. *Ward* (15) no case following *The King* v. *Russell* (9) can be found. Without statutory authority, therefore, for putting the anchor where this anchor was put, I should have held that this action would lie. But the plaintiffs say that, even if there were statutory authority to put the anchor, an action will lie for negligence, and the arbitrator has found negligence in fact. I should also be of opinion that the action could be maintained for such negligence but for the question whether or not notice of action was requisite, that is, whether section 139 of the Public Health Act, 1848, can be taken to apply. I think that notice of action was required; and the cases have been so fully gone into both during the argument, and by my learned brethren, that I think it is quite unnecessary to add anything to that part of the case, except to say that I entirely concur that here a notice of action was required. It would be unnecessary, in order to decide this case, to say anything further, but as the case is one of considerable importance I think it right to say also that section 7 of the Act of 1864, coupled with section 8, is in my judgment

(15) 4 Ad. & E. 384; s. c. 5 Law J. Rep. (N.S.) K.B. 221.

quite clear enough to shew that the act done in placing the anchor at the bottom of the river was done under the authority of that statute. The words of sect. 7 are not very artificial, because they raise a considerable doubt as to whether the first user of the word "works" might not be held to overrule the subsequent user of the same word; and if so, whether the whole work must not be taken to have been done on the lands delineated on the plans. But a sufficient answer, I think, has been given to that by my brother Brett when he severs the word "works" from the word "conveniences;" and I think, taking the whole of the Act together, that "conveniences in connection therewith" are not necessarily conveniences, upon any lands delineated on the plans in the same strict sense in which permanent works must be so held to be confined. This view is strengthened by looking at the whole of the statutes together, and by seeing what powers the Board took under the Act of 1858 (21 & 22 Vict. c. cxiii.), as well as that of 1864. It must be remembered that this is a ferry to be worked by steamers running between Liverpool and New Brighton, and I cannot help laying some stress on sect. 37 of the Act of 1858 which, after sect. 36 had given the power to the local board for the first time to lease or purchase the ferry, confers upon such board the power to hire and charter, as well as purchase and maintain such steam and other boats and things as should be necessary for the proper working of such ferry. So that they were a board with the power given them, and the duty imposed upon them of working the ferry to and fro. Then there having been an intention, gathered from the plans deposited, of having certain permanent works, a portion of them between high and low water mark, and a portion below low water mark, sect. 8 of the Act of 1864 comes, and gives the Admiralty power to place a veto not only upon the pier or landing stage or the works connected therewith, but orders that the local board shall deposit plans at the Admiralty office, "of the said pier or landing stage and works connected therewith." Those works were to be works to the board to work the ferry to an and it does in fact appear from th that the Admiralty had before them not only of a solid structure upon delineated lands, or on the part exp delineated below low water mark that they had before them this scheme, and that they sanctioned i useful mode of carrying out the oper of the Act; and that being so, an question being one on which w draw inferences of fact, I come to th clusion that this was, in the st sense of the word, a convenience i nection with the landing stage at Brighton; that it was a work whic convenient for the carrying on very duty which the board had to pe and consequently, that the putting of the anchor, which I take to hav an essential part of the floating itself, was an act authorised by the st Then, having done that, and having mitted some act of negligence in the of buoying that particular anchor, I that they are entitled to notice of and that therefore on these two gr our judgment must be for the defen

Judgment for the defenda

Attorneys—Chester, Urquhart, Bushby & M agents for Wright, Stockley & Becket, pool, for plaintiffs; Norris, Allens & for defendants.

1873. Nov. 6. } HUNT *v.* GOODLAKE.

Libel—Innuendo—Evidence—Q for Judge.

In an action for libel it is the d the Judge to determine, upon the ev adduced at the trial, whether the complained of are reasonably capa the defamatory meaning ascribed to t the innuendoes, and if they are not, bound to withdraw the case from th and to direct either a nonsuit or a for the defendant.

The first count of the decla stated that before and at the

of the committing of the grievances hereinafter mentioned the plaintiff was and had represented himself to be a captain in the Royal Artillery; yet the defendant, well knowing the premises, but contriving to injure the plaintiff, falsely and maliciously printed and published of the plaintiff and of him as such captain, and of the said representation, in a newspaper called the *Times*, the words following, that is to say: "We are requested to state that the honorary secretary" (meaning the plaintiff) "of the Tichborne Defence Fund, is not and never was a captain in the Royal Artillery, as has been erroneously described" (using the words in an actionable sense, and meaning that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in the Royal Artillery).

The second count charged that the defendant, well knowing the premises, again falsely and maliciously printed and published of the plaintiff, and of him as such captain, and of the said representation, and of the said libel in the first count, in another number of the said newspaper the words following, that is to say: "We have received a letter from the honorary secretary of the Tichborne Defence Fund" (meaning the plaintiff) "in which he complains of the injustice done to him by our paragraph which appeared in our impression of Saturday last" (meaning the libel in the first count), "stating that he was not nor ever had been a captain in the Royal Artillery. The gentleman in question" (meaning the plaintiff) "was a paymaster in the Royal Artillery, and as such received in due course the honorary rank of captain in the Army, which is so stated in his commission. His name appears under the head of paymasters on half-pay in this month's Army List. He" (meaning the plaintiff) "is certainly not entitled to hold a command as an Artillery officer" (using the words in an actionable sense and meaning that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in the Artillery).

Pleas: first, not guilty; second, that the plaintiff was not a captain in the Royal Artillery in manner and form as in the introductory averments to each count alleged; third, that the defendant had not knowledge of the premises in manner and form as alleged; fourth, as to the first count that the words in that count mentioned without the alleged meaning are true in substance and in fact; fifth, as to the second count that the words in that count mentioned without the alleged meaning are true in substance and in fact.

Issue thereon.

The cause came on for trial at the Sittings in London after Trinity Term, 1873, before Bovill, C.J., and a special jury, and the following appeared to be the material facts of the case.—

The plaintiff had been and was a paymaster in the Royal Regiment of Artillery, and afterwards, namely, by a commission from the Queen of 17th February, 1865, he was raised to the honorary rank of captain; he was thereby appointed "to have the honorary rank of captain in our Army." After the receipt of this commission from the Crown the plaintiff was usually addressed as a captain by military officers. The publication of the alleged libels was proved; but there was no evidence of actual malice.

Bovill, C.J., ruled that a commission appointing an officer a captain in the army did not make him a captain in the Royal Artillery, and the plaintiff's military rank depended upon his commission. His Lordship stated that the plaintiff might be entitled to be treated as a captain in all the courtesies of life, and that if the issue had been whether the plaintiff were a captain he should have been in the plaintiff's favour, but as matters stood the defendant must have a verdict upon the second plea, for the plaintiff was not a captain in the Royal Artillery, and that he should so direct the jury.

The plaintiff was thereupon nonsuited.

D. Seymour (*Nasmith* with him) now moved for a new trial.—He contended that the alleged libels might be construed in a sense disparaging to the plaintiff, and that the question whether the language used in the *Times* was defamatory ought to have been left to the jury upon the evidence.

KEATING, J.—The late Lord Chief Justice, who tried this cause, was of opinion that as the plaintiff was not a captain in the Royal Artillery but a captain in the Army, the alleged defamatory statement was true, and that the plaintiff had adduced no evidence in support of the innuendoes. For my part I cannot see that the words, as they stand, can have an actionable meaning; possibly these words may be understood by other persons in a disparaging sense of the plaintiff; but it is our duty to ascertain, whether upon the facts of this case the statements complained of could have been used in the sense ascribed to them by the innuendoes. Now the alleged libels on the plaintiff's own shewing are true, and give an accurate account of his military rank; but it is urged upon us that they may be taken by other persons as imputing to the plaintiff that he wilfully misrepresented himself as a captain in the Royal Artillery; this would be a most exaggerated construction to put upon them, and as Judges we cannot assume that it would be adopted. I agree that the question, What is the meaning of words alleged to be defamatory? must be left to the jury, when that meaning is a matter of doubt; but some limit must be adopted to this doctrine; the true rule seems to be that if at the end of the plaintiff's case the words complained of can be reasonably construed in the sense put upon them by the innuendoes, it is for the jury to say whether they were used in that sense; if they cannot be so construed, the judge must nonsuit the plaintiff or direct a verdict for the defendant. I think that the late Lord Chief Justice was right in the view which he took at the trial, and that the nonsuit ought not to be disturbed.

BRETT, J.—The rule to be applied in cases of this description is that laid down in the judgment of the Exchequer Chamber, delivered by Wilde, C.J., in *Sturt* v. *Blagg* (1): "Undoubtedly it is the duty of the Judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to : plaintiff in the present action shewn in the course of his ca words complained of were fai of the meaning ascribed to t innuendoes, it would have be tion for the jury whether they in that meaning. But I do no the alleged libels can be taken that the plaintiff is an impost do not charge him with an and without that a man can impostor. There was no evide port of the innuendoes; fo: publication of the supposed li be evidence of the alleged meaning. The paragraphs co: contain nothing derogatory o ing of the plaintiff; for it i inferred from them that he misrepresented his military conclusions, which other perso reasonably draw from the plained of, cannot be relied upo of the plaintiff's case, and depart from a wholesome rul we were to grant a rule.

GROVE, J.—I agree with the has been expressed by my learn I am always reluctant to case from the consideration of limit must be placed upon thei When the supposed libel cann meaning put upon it by the the Judge ought not to allow go to the jury. The questio plaintiff's case was, whether complained of could reasonabl stood in the sense ascribed to declaration. I certainly thin could not. The plaintiff wa in the Army, but he was not the Royal Artillery, and it for the defendant to describe ing to his true rank. There i for saying that the words co in the declaration were libello cannot take notice of the which other persons may w ground put upon the stateme

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Attorneys—T. Beard, for plaintiff; for defendant.

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(1) 10 Q.B. Rep. 906, 908.

1873. Nov. 6. } ASHWORTH *v.* REDFORD.

Evidence—Construction of Document—Question for Jury—Mercantile Usage.

If a mercantile document is insensible, when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage.

The plaintiff sold to the defendants certain goods; the invoice was dated the 1st of May, and at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price thereof on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the Judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage. The jury having found that the action was not brought too soon,—Held, *per* KEATING, J., *and* BRETT, J. (GROVE, J., *doubting*), *that the direction to the jury was proper, and that the plaintiff was entitled to the verdict.*

The declaration was for work done and materials provided; for goods bargained and sold; and for goods sold and delivered. Plea—Never indebted. Issue.

The plaintiff sold to the defendants certain cops for 28*l.* 14*s.* 2*d.* The invoice sent by the plaintiff was dated the 1st of May, 1873, and after stating the names of the parties and the particulars of the goods sold, had these words written at the end—"Terms—Net cash to be paid within six to eight weeks from date hereof." This memorandum was signed with the plaintiff's intitials. The cops not having been paid for, the writ in the present action was issued on the 18th of June, 1873.

At the trial at the Manchester Summer Assizes, 1873, Brett, J., left to the jury the question whether the credit, upon which the goods were sold, had expired on the 18th of June according to mercantile usage. The jury found that the action was not brought too soon, and the verdict was thereupon entered for the plaintiff for 28*l.* 14*s.* 2*d.*

Holker (*R. G. Williams* with him) now moved for a new trial on the ground of misdirection.—The learned Judge was wrong in leaving to the jury the question whether the credit had expired on the day when the action was commenced; for he thereby submitted to the jury the construction of a written document. The meaning of the invoice was a question of law, and the Judge ought to have directed a verdict for the defendants, for they had, it is contended, eight weeks' credit from the 1st of May, whereas the action was commenced when scarcely seven weeks from that date had expired.

KEATING, J.—The defendants' counsel has moved for a new trial on the ground of misdirection. The goods were sold upon the terms that they should be paid for within from six to eight weeks. The present action was brought when scarcely seven weeks had elapsed. My brother Brett left to the jury the question what was the meaning of the words in the invoice relating to the terms of payment, and I think that he was right in taking that course; moreover, he construes the words in the same sense as the jury did. The language of the invoice seems hard to interpret; on the face of the contract the words, "to be paid within six to eight weeks," appear insensible, and it was a proper question for the jury whether they had acquired by mercantile usage a definite meaning; in this case the jury found that the action was not brought too soon. At first there was a difference of opinion amongst us, but *Alexander* v. *Vanderzee* (1) has removed to a great extent the doubts felt by my brother Grove. In that case maize had been sold "for shipment in June and [or] July, 1869," and my brother Brett, who tried the case, left the question to the jury, whether two cargoes, the loading of which commenced in May and terminated in June, were June shipments in the ordinary business sense of the term; and my brothers Martin and Lush held, in the Exchequer Chamber, that my brother Brett was right in his direction. In my opinion a similar rule is to be applied here. I think that in this case my

(1) Law Rep. 7 C.P. 530.

brother Brett was right, and that there was at the trial no misdirection.

GROVE, J.—I have had some doubts in this case which have not been wholly removed by *Alexander* v. *Vanderzee* (1); there the words upon which the dispute arose were "for shipment in June and [or] July," and they had no doubt a mercantile meaning. The difficulty, which I have experienced in the present case, is to see how the words at the end of the invoice can be deemed to be words of mercantile usage, and how they are capable of being construed according to mercantile meaning. The word "week" is of ordinary and common occurrence, and is not used in a sense peculiarly mercantile. It has been a great question in my mind whether the words at the end of the invoice ought not to be construed most strongly against the plaintiff according to the principle contained in the maxim, *verba chartarum fortius accipiuntur contra proferentem;* but the case of *Alexander* v. *Vanderzee* (1) has gone far to remove my doubts, which are not sufficiently strong to induce me to dissent from the opinions of my learned brothers.

BRETT, J.—The defendant's counsel contends that I ought not to have left to the jury the question as to the construction of the invoice. If I were bound to construe the document, I should be of opinion that the time at which payment was to be made was some period fairly between six and eight weeks from the 1st of May; and even in that case it would be a question for the jury whether the day on which the action was begun, namely, the 18th of June, was not fairly between six and eight weeks. But a phrase may have a mercantile meaning, although it is in itself insensible and even ungrammatical. In *Alexander* v. *Vanderzee* (1) the form of question submitted to the jury was very similar to that which I left to the jury in the present case. I think that the construction of the ambiguous language in the invoice was for the jury, and that they arrived at a right conclusion as to its meaning.

Rule refused.

Attorneys—John Leigh, Manchester, for plaintiff; Shaw & Tremellen, agents for P. & J. Watson, Bury, for the defendant.

1873. Nov. 17. { DICKINSON v. FLET OTHERS. / DICKINSON v. FLET YOUNGER.

Penalty—Mine—Neglect of 1 23 & 24 *Vict. c.* 151. *ss.* 10, 22—.

As a general rule no penal o are incurred where there has b sonal neglect or default, and c is essential to an offence und enactment, unless a contrary in pears by express language or inference.

The 23 & 24 *Vict. c.* 151. *s.* 1 *as a general rule to be observe mine by the owner and agent, th safety lamps are required to b mine they shall be examined a locked by a person duly authori* 22 *enacts that if any general r neglected or wilfully violated by agent, or viewer, he shall be liabl niary penalty.*

Safety lamps were given out i which the above Act applied w duly locked; a competent lam been appointed, and there was n default in either the owners or the mine:—Held, *that the own agent of the mine were not liabl victed under the above statute.*

[For the report of the abo 43 Law J. Rep. (N.S.) M.C. 25

1873. Nov. 24. } *Ex parte* GRE

*Attorney — Articled Clerk — Office—Employment—*23 & 24 1 *s.* 10.

The appointment as clerk to both an office and an employmen & 24 *Vict. c.* 127. *s.* 10; *and t service of a clerk under articles to is insufficient, when the clerk al appointment of clerk to a vestry.*

E. E. Greville was articled a Mr. A. D. Michael, a solicitor, in 1871; his father, who had b

clerk to the parish of Wandsworth, died in March, 1872, leaving his widow and three sons quite unprovided for. The care and maintenance of the widow and the two younger sons devolved to a great extent upon E. E. Greville, who found himself unable to continue serving his articles, unless he could at the same time obtain some income which would allow him to live and help to support his family. Upon the death of his father, E. E. Greville was elected by the vestry to the vestry clerkship of the parish of Wandsworth; the remuneration attached to the office was about 100*l.* a year, and without it, since he had no salary as articled clerk, he would have been obliged to break his articles and find a situation with a salary. After the 22nd of April, 1872, E. E. Greville continued to hold the office of vestry clerk. The work was done in the evening, with one or two very trifling exceptions not amounting in the aggregate to more than three and a half days, and he had never been absent without the consent of his principal, the said A. D. Michael, at whose office he attended as an ordinary clerk.

E. E. Greville was admitted to the intermediate examination by the examiners of the Incorporated Law Society; but the examiners intimated to him that it was not their intention in any event to grant him a certificate of having passed, until the Court should have made some order as to the sufficiency of his service under his articles.

The above facts being stated in affidavits of E. E. Greville and A. D. Michael,

The Attorney-General (*Sir H. James*) now moved for a rule, calling upon the Incorporated Law Society to shew cause why the service of the said E. E. Greville should not be deemed sufficient.—It is contended, upon the authority of *Ex parte Peppercorn* (1), that the service of E. E. Greville was sufficient. The proper mode of construing the 23 & 24 Vict. c. 127. s. 10 (2), is by reading the words, "other than the employment of clerk to such attorney," as "*inconsistent with* the employment of clerk to such attorney." This will give a reasonable construction to the statute, and the service of E. E. Greville will then be sufficient; for his employment as vestry clerk was certainly not inconsistent with the performance of his duties as articled clerk. The appointment of clerk to the vestry has obliged him to make himself conversant with the law as to parishes and charities (3). It is not wished to raise the question, whether the present moment is the proper time for the Law Society to take the objection that the service was insufficient.

Garth (*Murray* with him), for the Incorporated Law Society, who appeared to shew cause in the first instance, was stopped.

COLERIDGE, C.J.—I regret to be compelled to come to the conclusion that the service of E. E. Greville has been insufficient. I think that his appointment was within the words of 23 & 24 Vict. c. 127. s. 10, and that he has both held such an office, and engaged in such an employment as are forbidden by that statute. It is a hard case; but to construe the statute in favour of the applicant would be to verify the saying that "hard cases make bad law." The facts in *Ex parte Peppercorn* (1) were, as is intimated in

(1) 35 Law J. Rep. (N.S.) C.P. 239; s. c. Law Rep. 1 C.P. 473.

(2) 23 & 24 Vict. c. 127. s. 10, enacts that "No person hereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever other than the employment of clerk to such attorney or solicitor, and his partner or partners (if any) in the business, practice or employment of an attorney or solicitor, save as by the first hereinbefore mentioned Act or this Act otherwise provided; and every person bound as aforesaid, shall, before being admitted an attorney or solicitor, prove by the affidavit required under section 14 of the first hereinbefore mentioned Act, that he has not held any office or engaged in any employment contrary to this enactment, and the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for this purpose."

(3) The appointment and duties of a vestry clerk are regulated by 13 & 14 Vict. c. 57. ss. 6 and 7.

the judgment, very peculiar: in that case the articled clerk had held the office of steward to a manor, which was part of the property of his family, and in which he himself had an interest. We do not question that decision, which appears to have been pronounced with the concurrence of the Judges of the Queen's Bench; but I repeat, that the facts were very peculiar, and we cannot take the judgment in that case as guiding our decision in this.

KEATING, J., BRETT, J., and DENMAN, J., concurred.

Rule refused.

Attorneys—A. D. Michael, for the applicant; Williamson, for the Incorporated Law Society.

1873. Nov. 25. } TURNER *v.* GOULDEN.

Negligence—Action, when maintainable—Valuer—Arbitrator—Interrogatories.

The plaintiff purchased the goodwill, stock and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. The plaintiff employed the defendant as his valuer, and the defendant and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, the plaintiff applied to administer interrogatories to the defendant to ascertain the basis on which he had agreed with the valuer of the vendor to calculate the valuation:—Held, *that the defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and the plaintiff accordingly was allowed to administer the interrogatories.*

The plaintiff purchased the goodwill, stock and fixtures of a Mr. Robert Turner, a bookseller, at Aldborough, at a valuation to be agreed upon by two valuers, one to be appointed on each side for that purpose, and in case of difference umpire to be chosen by the valuers plaintiff employed the defendant, a to act as his valuer, and Mr. Turn pointed a Mr. Holmes as his valuer two valuers fixed the sum of 195*l.* value of the goodwill, the sum of as the value of the stock-in-trad the sum of 102*l.* 14*s.* as the value fixtures. It was suggested, on th of the plaintiff, that the defendar been guilty of negligence in valuin goodwill, in this respect—that l agreed with Mr. Holmes to tak year's net profits of the business average of the then three preceding as the value of the goodwill, the dant and Mr. Holmes took by n the average of three former years i of the three last years of profits, a so doing the goodwill was valued high a value. The present actio brought against the defendant for t gligence of his in so making the val whereby, as the plaintiff alleged, h a larger sum than he ought for th goodwill. In order to support the tiff's case it was necessary to as the basis on which the valuation ha made, since the certificate of the v only stated the sum agreed, and d shew how it was arrived at. F purpose the plaintiff applied for le administer interrogatories to the dant, and the interrogatories pr were framed to discover the basis upon between the two valuers for the value. The application for the rogatories was, in the first instance at Chambers, but Martin, B., refer to the Court. Accordingly,

Lumley Smith now applied for to deliver such interrogatories.—It mitted that if the defendant stood position of an arbitrator, the p would not be able to maintain this —*Pappa* v. *Rose* (1). But the def was merely employed as a valuer, such was liable for negligence—.

(1) 41 Law J. Rep. (N.S.) C.P. 11; s Rep. 7 C.P. 32, and in Exch. Ch. 41 Rep. (N.S.) C.P. 187; s. c. Law Rep. 7 C.

v. *Betham* (2) and *Collins* v. *Collins* (3); and the charge against the defendant in the present case, is not for want of skill, but only for negligence.

Hamilton shewed cause in the first instance.—The present case does not fall within *Jenkins* v. *Betham* (2), but rather within *Pappa* v. *Rose* (1). Besides, the nature of these interrogatories is to disclose what took place between the defendant and Mr. Holmes, the other valuer, so that the answer might affect the liability of a third party, and such interrogatories ought not therefore to be allowed without shewing special circumstances—*Saman* v. *Jenkins* (4).

COLERIDGE, C.J.—I am of opinion that this is a case in which interrogatories should be allowed to be put to the defendant. If he had been acting as an arbitrator in the matter I should have had some doubt about it, but the case of *Collins* v. *Collins* (3) seems good authority for holding that the defendant was not in the situation of an arbitrator, but of a valuer only. That case was acted on by the Court of Exchequer in *Boss* v. *Helsham* (5), and both those two cases were recognised as law by the Court of Queen's Bench in *Re Hopper* (6), although the Court distinguished them from that case, and did not act upon them. There the point is thus well expressed by Cockburn, C.J., "I am not disposed to quarrel," he says, "with the decisions in *Collins* v. *Collins* (3) and *Boss* v. *Helsham* (6), but I must say that the language used in those cases ought not to be understood to control proceedings which have been taken to determine the amount of compensation or value to be received by one of the parties where the matter appears to possess the character of a judicial enquiry, and the parties would be entitled to bring evidence before the arbitrator or umpire." There does not appear to be anything of that kind in the case which is now before us. If the two valuers arrived at the same figures there was no dispute between them. If they could not agree an umpire was to be had recourse to, and no doubt in that case, there being then a dispute, he would be an arbitrator in the strict sense of the word. As it is, the two valuers agreed, and there was no arbitration. I, therefore, am of opinion that it is right to allow the interrogatories to be put.

KEATING, J.—I am of the same opinion, although I have arrived at that conclusion not without some considerable doubt.

BRETT, J.—It is necessary to consider in what character this action is brought against the defendant. If it be brought against him for negligence in his conduct as an arbitrator, I do not think it will lie (7). But even if it would, I think if the defendant stood in the position of an arbitrator he could not for any purpose be asked to state the grounds on which he came to his decision, and therefore if the defendant acted as arbitrator these interrogatories certainly ought not to be administered. When, however, a person undertakes to carry on a business for reward, he is bound to bring adequate skill and reasonable attention to such business, and for want of either of these an action will lie against him; and if such an action be brought, there is no reason why in such action these interrogatories should not be allowed. The question is therefore reduced to whether the defendant acted as arbitrator, or whether as a valuer who had held himself out as such for reward. Now the defendant professed to be a valuer by trade, and what the defendant was employed by the plaintiff to do was to act for the plaintiff in fixing the sum which the plaintiff was to pay for the goodwill of a business. It is true that there was another valuer for the seller, and these two were between them to

(2) 15 Com. B. Rep. 168; s. c. 24 Law J. Rep. (N.S.) C.P. 94.

(3) 26 Beav. 306; s. c. 28 Law J. Rep. (N.S.) Chanc. 184.

(4) 39 Law J. Rep. (N.S.) C.P. 258; s. c. Law Rep. 5 C.P. 738.

(5) 36 Law J. Rep. (N.S.) Exch. 20; s. c. Law Rep. 2 Exch. 72.

(6) 36 Law J. Rep. (N.S.) Q.B. 97; s. c. Law Rep. 2 Q.B. 367.

(7) See the Tharsis Sulphur and Copper Company v. Loftus, 42 Law J. Rep. (N.S.) C.P. 6.

fix the price, and if they differed the amount was to be determined by an umpire. The question is whether in so fixing the price the defendant acted as an arbitrator. If it had not been for the case of *Collins* v. *Collins* (3) I should have had some doubt about the matter, but I think that that case is a distinct authority that the defendant did not act as an arbitrator. It is true that case turned on the Common Law Procedure Act, 1854, but when we look at it after *Re Hopper* (6) it seems to me that we must now take it that where valuers are employed to fix the price to be received by one of the parties so employing them, and if they differ, an umpire is to be appointed, there is no arbitration until there is a difference and an umpire has been appointed. Therefore if the defendant has acted in this matter without due care or skill he is liable to an action, and on principle these interrogatories ought to be allowed.

DENMAN, J.—I also am of opinion that these interrogatories should be allowed, but I do not found my judgment on the character of the defendant, for as at present advised I do not hold that an arbitrator, if liable to an action, as he certainly may be for acting corruptly, is privileged from disclosing the grounds on which he decided. I cannot but think that the privilege applies only to cases *inter partes*, and not as to third persons who may be required to justify their conduct, and be liable to be interrogated as to the same. It is unnecessary to determine that in the present case, for here it must be assumed that there is a good cause of action, and the interr are certainly admissible and oug allowed.

Rule al

Attorneys—Sharp, Parkers & Co., fo R. Sherwood, for defendant.

1873. Nov. 20. } HOBBS (*appellant*) *v* (*respondent*).

Local Government Act, 1858— *Vict. c.* 98. *s.* 34—*Local Board o —Bye-laws—New Building.*

The occupier of a house in a which a local board was constitut the Local Government Act, 1858 *Vict. c.* 98), *caused a small buildi had been erected against the wa yard belonging to his house, to be to another side of the yard, usi reconstruction other parts of the the yard for two sides of it, but respects substantially the same as were used to form it original wall of the yard had been bui the formation of the local board that the building so reconstruc a new building within the mea section 34 of the Local Governm* 1858, *and of a bye-law made there such local board, which required be given to the surveyor of the boa the erection of any new building.*

[For the report of the above 43 Law J. Rep. (N.S.) M.C. 21.]

END OF MICHAELMAS TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords,

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

HILARY TERM, 37 VICTORIÆ.

1873. Nov. 22. 1874. Jan. 12.

MEGRATH v. GRAY.
GRAY v. MEGRATH.

Debtor and Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 49, 50, 125, 126—*Release of one of two Joint Debtors—Equitable Set-off—Evidence of Trust.*

Sections 49 *and* 50 *of the Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *which relate to the effect of an order of discharge, apply to discharges under proceedings in liquidation under sections* 125 *and* 126, *and the rules and forms relative to them; and consequently an order of discharge in all these cases releases only the debtor in whose favour it is given, and not his solvent co-debtor.*

M. and H., who were partners, and jointly liable to G. on a bill of exchange accepted by them for goods sold, dissolved partnership, and after their acceptance had been dishonoured H. filed his petition for liquidation by arrangement under the Bankruptcy Act, 1869, *and a composition was accepted by his creditors and duly paid, and B., to whom G. had endorsed the bill, proved under the liquidation, and received the composition. G. himself afterwards filed his petition for liquidation by arrangement under the Bankruptcy Act,* 1869, *and a composition was agreed to and paid, the trustee being authorised by the creditors to transfer to G. the debts which were set forth in a schedule annexed, but which did not include the liability of M. in respect of the acceptances given by him and H.; the reason for such omission being that B. was at that time the holder of the bill, and the debt was considered by the trustee of G.'s estate of no value, and not from any intention of reserving to the trustee any right in respect of it. The bill was afterwards given by B. to G., and in an action against G. by M. for a debt due to him separately, G. set off what was due to him on the said acceptance of M. and H. in an equitable plea of set-off:*—Held, *that the discharge of H. under the liquidation by composition under the Bankruptcy Act,* 1869, *did not release M., but left him liable to G., who, whether the right to sue for it was legally in him or in his trustee in trust for him, might maintain such equitable plea of set-off.*

Held also, *that in order to establish the trust for G., evidence was admissible as to the reasons why M.'s liability in respect of the bill had not been inserted in the schedule to the resolution of G.'s creditors to accept the composition, and also that such resolu-*

tion had been founded on a proposal by G. to pay such composition in consideration that the trustee should be authorised to transfer to G. any debts vested in him which had not been realised.

These were cross actions. In *Megrath* v. *Gray* the plaintiff sought to recover 64*l.* 8*s.* 10*d.*, the balance due for money lent, and the question was as to the right of the defendant to set off various sums of money paid to the Adelphi Bank, Liverpool, in respect of two acceptances—one for 249*l.* 19*s.* 1*d.*, and the other for 167*l.* 7*s.*—given to the defendant by the plaintiff and George Highton, the plaintiff's co-partner in trade, and which raised the point, *inter alia*, whether a release of Highton by his creditors on the occasion of a liquidation by arrangement under section 126 of the Bankruptcy Act, 1869, was a release of the plaintiff Megrath, who had been jointly liable with him on these two bills.

In *Gray* v. *Megrath* the plaintiff Gray sought to recover the amount due to him in respect of these two acceptances.

The action of *Megrath* v. *Gray* was tried before Brett, J., at Liverpool at the Summer Assizes, 1872, when a verdict was entered for the plaintiff for 70*l.*, subject to the opinion of the Court on a special case; and the action of *Gray* v. *Megrath* was tried before the Judge of the Liverpool Passage Court, when a verdict was entered for the plaintiff for the sum claimed, with leave to the defendant to move, pursuant to which a rule *nisi* was obtained to enter a verdict for the defendant or to reduce the amount of the verdict, on the ground that on the facts proved the plaintiff made out no title to sue on the bills in question, and that the release of Highton operated as a release of the defendant Megrath, or to reduce the verdict to the amount for which Gray the plaintiff was made liable on such bills to the Adelphi Bank. The special case and the rule were argued together in Michaelmas Term last by

C. Russell, *W. H. Butler*, and *T. H. James*, for Megrath.

Herschell and *Gully*, for Gray.

The facts and the arguments are fully stated in the judgment of the C addition to the authorities men the judgment, the following w during the argument, namely, point that bankruptcy included liquidation by arrangement an sition—*Ex parte Hartel, re Thorp* on the point on which the Court no opinion, viz., as to the debt p Gray under the resolution of his and as to a court of law not rel deed in order to give effect to an to pass anything under it—*Perez* (2), *Teed* v. *Johnson* (3), and *Harrop* (4).

Cur. ad

The judgment of the Court (5 Jan. 12) delivered by—

Lord Coleridge, C.J.—In case the plaintiff sued the d for goods sold and delivered, fo lent, &c., and the defendant, other pleas, pleaded a plea and a plea upon equitable grou before the accruing of the c action, &c., the plaintiff was to the defendant in an amou to the plaintiff's claim for, d afterwards, and after the Ba Act, 1869, &c., the defendant su a general meeting of his credito section 125 of the said Act, and t a trustee was appointed, and trustee sold to the defendant and claim due from the plainti said trustee in respect of the debt by the plaintiff to the defen &c.; and the plaintiff has not said debt or any part to the sai or to the defendant, &c., and fendant is willing to set off, d

(1) 42 Law J. Rep. (N.S.) Bankr. 34.

(2) 11 Exch. Rep. 506; s. c. 25 La (N.S.) Exch. 65.

(3) 11 Exch. Rep. 840; s. c. 25 La (N.S.) Exch. 110.

(4) 6 Hurl. & N. 768; s. c. 30 La (N.S.) Exch. 273, and in Exch. Ch. 1 H 262; s. c. 31 Law J. Rep. (N.S.) Exch.

(5) Lord Coleridge, C.J.; Keating, J.; and Denman, J.

particulars of set-off were for goods, and for money paid to the Adelphi Bank in respect of two acceptances given to the defendant by the plaintiff and one George Highton, then the plaintiff's co-partner in trade.

In the cross action of *Gray* v. *Megrath*, the plaintiff Gray sued the defendant to recover the balance due in respect of the acceptances mentioned in the equitable plea of set-off in the first action, after deducting a dividend received out of the estate of Highton. In the first action the facts were stated in a special case. They were as follows—

Previous to June, 1873, after the dissolution between the plaintiff and Highton, the plaintiff Megrath sold goods to the defendant, and received in payment the defendant's acceptance, and afterwards lent the defendant 70*l.* 3*s.* on his I. O. U. to meet the outstanding acceptance, of which 64*l.* 8*s.* 10*d.* was due at the commencement of this action.

The plaintiff was formerly in partnership with one Highton, which partnership was dissolved on the 1st of May, 1870, Highton undertaking to pay all debts and to indemnify the plaintiff, &c. Among the liabilities of the firm of Megrath & Highton were two firm acceptances for 249*l.* 19*s.* 1*d.* and 167*l.* 7*s.* respectively, in favour of the defendant for goods sold by the defendant to the firm. These bills were indorsed and negotiated by the defendant, and at maturity were in the hands of the Adelphi Bank of Liverpool, and were dishonoured. Shortly afterwards Highton filed his petition under the Bankruptcy Act, 1869, for liquidation by arrangement. It was afterwards resolved that a composition of 10*s.* in the pound should be accepted in satisfaction of the debts due to the creditors of Highton. The Adelphi Bank voted in favour of the said resolution, and proved for an amount including the two bills, and received a dividend of 10*s.* in the pound in respect thereof. The defendant, Gray, afterwards filed his petition for liquidation by arrangement, &c., and a composition of 9*s.* in the pound was accepted and paid. The Adelphi Bank also proved under this liquidation, and received the said composition. The circumstances under which this composition was paid were as follows—a proposal was made by Gray to the committee of inspection, and made known to the creditors by notice, that 7*s.* 6*d.* and 6*d.* in the pound should be paid, and 1s. in the pound should be secured by promissory notes at twelve months, and in consideration that Gray should receive an immediate discharge, and should have handed over to him the books, &c., and that the trustee should be authorised to transfer to Gray any debts or other effects vested in him and not yet realised. A resolution was passed that if by the 1st of October the debtor should pay the 7*s.* 6*d.* and the 6*d.* in the pound, and secure the one shilling more in the pound by guaranteed promissory notes, the discharge of the debtor should forthwith be granted to him, and the trustee be thereupon authorised to transfer the debts owing or alleged to be owing by the persons whose names were set forth in the schedule annexed, and that the close of the liquidation should take place on or from the 1st of October. The plaintiff's liability in respect of the said bills of exchange was not inserted in the said schedule, because the Adelphi Bank was at that time the holder of the bills, and they were considered by the trustee of Gray's estate as of no value; but there was no intention of reserving to the trustee any right of action in respect of them. The bills were given up by the Adelphi Bank to the defendant in January, 1872. No claim has been made against the defendant in respect of them by the trustee. The case then set out an arranged summons in bankruptcy by the defendant against the plaintiff in respect of the balance due upon the said bills. The case stated that it was objected on behalf of the plaintiff that evidence was not admissible as to the proposal by Gray, and as to the reasons why the plaintiff's liability in respect of the bills was not inserted in the said schedule to the resolution, but which evidence was admitted, subject to the opinion of the Court as to its admissibility. The question for the opinion of the Court was, whether on the pleadings as they stood, or on any other state of them, the plaintiff was entitled to recover the said sum of 64*l.* 8*s.* 10d.

Upon this case it was argued for Megrath, the plaintiff in the first action, that his *prima facie* claim for 64*l.* 8*s.* 10*d.* was made out, and that there was no right of set-off, legal or equitable, proved against him; that if the Adelphi Bank had released Highton, it was by a release subject to the attributes of a common law release only, which had therefore released the plaintiff, for if there was a release it was by a discharge given in proceedings for liquidation by composition, under section 126 of the Bankruptcy Act, 1869; and such proceedings are not proceedings in bankruptcy, and such a discharge is not a discharge in bankruptcy, but a release at common law. It was further argued that if the plaintiff was not released from the debt in question by the discharge given to Highton, still the defendant could not set off against the plaintiff's claim; for that any interest which the defendant might have in the claim against the plaintiff passed to his, the defendant's, trustee under the proceeding in liquidation instituted by the defendant, and such interest, whether it was a joint one with Highton or his trustee, or a separate one in the defendant, had not been re-transferred to the defendant by his trustee; that this debt was omitted in the schedule to the resolution passed by the defendant's creditors, and therefore did not pass by such resolution or any deed executed under its authority; that no evidence could legally be admitted to shew the reason of such omission or the intention of the parties; that the Court was in effect asked to reform the resolution or deed upon such evidence, but that a common law Court cannot reform a document. It was further urged that if the defendant could set off the amount of the bills or any balance as mere holder of the bills, he had only become such holder after the maturity of the bills, and was therefore subject to the same equities as would have been applied against the Adelphi Bank, and could, therefore, recover or set off at the most only one shilling in the pound.

On behalf of the defendant, Gray, it was argued that the debt sought to be set off did at one time accrue to the defendant, for he had become liable to pay, and had paid in respect of it that which the plaintiff and Highton were in the first bound to pay; that such claim had been extinguished as against the pla by the proceedings between Highton his creditors, but, on the contrary, proceedings had left the debt origi due from the plaintiff and Highton joi to be a debt recoverable from the pla alone; that a discharge of Highton u proceedings in liquidation by compos was a discharge in bankruptcy, and t fore a discharge for Highton alone, lea the plaintiff solely responsible. It then argued that the right of the de ant to sue or set off was re-transferr him by the proceedings under his, defendant's arrangement in liquida or that, by reason of the intention of the defendant's, trustee, of his cred and himself, of which evidence was perly admitted, the trustee under liquidation was at most a mere truste him, the defendant, and that he, the fendant, could therefore set off the c by way of equitable set-off against plaintiff's demand. It was further u that if the defendant should be drive rely on his right as holder of the bill was not a mere holder by transfer maturity, but a holder by reason o being a party to the bills, and ha been obliged to meet liabilities u them.

Upon these arguments it appears Megrath's claim as plaintiff in the action is not disputed; that if the fendant in the first action can sup his claim of set-off, and if he relies it, he cannot maintain his claim as p tiff in the second action in respect o same matter on which he has so re that if he, the defendant in the first ac fails to maintain his set-off, it mus either on the ground that the relea Highton was a release of the plainti that the right of action against the p tiff was not re-transferred to the d dant; so that in the first of such no one could maintain an action ag the plaintiff, and in the second the defendant would be a wrong p tiff against Megrath; and in ne case could the defendant in the firs tion maintain his suit as plaintiff i second action.

uestion, therefore, is, whether t in the first action can there- his claim of set-off, and if to an amount equal to the aim. The questions for de- are, first, whether the dis- ghton in his liquidation by , which, it is to be observed, it both arguments assumed n given, was a release of the solvent co-debtor, or whether ge released only Highton, plaintiff to be the sole debtor; r, if the latter, whether the ne defendant in the right of it the piaintiff was re-trans- defendant under his liqui- rangement, or was still in r had lapsed, or was legally se, but held by him as trus- defendant. The answer to ons depends upon the true of the Bankruptcy Act, 1869. tatute is an "Act to conso- amend the law rèlating to " that is to say, that where mend it assumes only to con- existing law. It by new repetition gives power and hree kinds of settlement be- tor unable to pay his debts his creditors. First, by an of bankruptcy, ending in a assets; secondly, by a liqui- rangement, ending also in a assets, but without the form ication of bankruptcy; and liquidation by arrangement, acceptance by the creditors ition in lieu of a division of ng the debtor in possession and goods or assets. The may not improperly be called ruptcy. It is governed by ated of in the sections from section 124. Section 48 em- Court of Bankruptcy, under mstances and subject to cer- ns, to grant to the debtor an harge. Section 49 enacts or what such order shall not at it shall release the bank- on 50 enacts that the order shall release only the debtor.

The second mode is in the statute set forth in section 125. The third, in like manner, in section 126. Both these may be said to be as set forth in the statute, skeleton schemes, to be developed by rules. Such development is carried out in the rules commencing with rule 252. The first kind of settlement ends in a discharge of the debtor by order of dis charge given according to section 48. And so likewise do the other two kinds of settlement end in an order of discharge. They do so by and according to the rules 302 and 303, and in the forms 123 and 124. And the first question for decision seems to be, whether the enactments in sections 49 and 50 apply only to a discharge given in a pure bankruptcy or to all the discharges given under and by virtue of and according to the statute and rules. On the one side it is contended that the words used in sections 49 and 50, like those in all the earlier sections, confine their application of the sections to the case of a person *who is a bankrupt.* "When a *bankruptcy* is closed *the bankrupt* may apply to the Court for an order of discharge" (section 48). "An order of discharge shall not release *the bankrupt* from any debt," &c.; "but it shall release *the bankrupt* from all other debts," &c. (section 49). "The order of discharge shall not release any person who at the date *of the order of adjudication* was a partner with the *bankrupt*," &c. (section 50). And the arrangements spoken of in sections 125 and 126 are specifically declared "*not to be in bankruptcy.*" "A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may by a special resolution, &c., declare that the affairs of *the debtor* are to be liquidated by arrangement, and *not in bankruptcy*, &c. (section 125). "The creditors of a debtor unable to pay his debts may, *without any proceedings in bankruptcy*, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor" (section 126). And in section 125, sub-section 9, it is in terms enacted that "the provisions of this Act with respect to the discharge of a bankrupt shall not apply to the case of

a debtor whose affairs are under liquidation by arrangement."

On the other side it is said that the Act and rules are dealing in all these cases with a debtor who is insolvent; that by rule 253 the proceeding under sections 125 and 126 are both commenced by a petition of the debtor, which is to be according to the form No. 106 in the schedule, and which, therefore, is an allegation by the debtor that he is unable to pay his debts, and which is in effect that he is bankrupt; that such a declaration is an act of bankruptcy; that by the statute itself it is so treated, for by section 125, sub-section 12, and by the end of section 126, the Court may upon it adjudge the debtor a bankrupt; that by sub-section 7 of section 125 it is enacted that "with the modification hereinafter mentioned all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation, and the word "bankruptcy" included liquidation by arrangement; that sub-section 9 modifies only the mode in which and the time at which a discharge of the debtor shall or may be given in proceedings of liquidation by arrangement; that such modification is that mentioned in sub-section 7; that in the case of liquidation by arrangement under section 125, sub-section 10 clearly applies sections 49 and 50 to the discharge given under section 125; that the settlement under section 126 is no less a liquidation by arrangement than that under section 125; that the regulations in section 125 are made with respect to "liquidations by arrangement;" that the discharge therefore given under section 126, according to the rules 102 and 103, and in the forms 123 and 124, is made subject to those regulations, and has precisely the same effect as a discharge given under section 125; that the phrases "and not in bankruptcy" in section 125, and "without any proceedings in bankruptcy" in section 126, apply only to the forms of procedure; that the word "bankrupt" in sections 49 and 50 includes every debtor who is made subject to the bankruptcy laws, *i. e.* to the statute, w he is so made by his own act or t of his creditors. It is undoubte there is great force in both these argument. The question is, whic prevail.

Now it has always been a cardins of bankruptcy law that a discharg it of an insolvent debtor unable to debts in full does not release his solv debtor. This has been so ever since claratory Act, 10 Ann, c. 15. Each sive Bankruptcy Act has been in measure a Consolidation Act, a incorporated this principle. It is a argument in favour of the defe contention in this case that such nal principle would hardly be cu from any discharge of any insolven without express terms. It is also a argument that a Consolidation should be construed rather so as t tain than to alter the existing law. the Bankruptcy Act, 1861 (24 & c. 134, by section 161 it is stated th order of discharge shall upon takin discharge *the bankrupt*," &c., and tion 163 "the order of discharge s release or discharge any person wh partner with *the bankrupt*," &c. T of composition authorized by that is described in section 194 as a which a debtor *not being a bankr* veys, &c. It was therefore argue *drew* v. *Macklin* (6), that a rele composition deed of a debtor, bei lease not in bankruptcy, released solvent co-debtor. The case is but reported, but the arguments whi been urged as to the constructio statute now under discussion mu been obvious to the Court of Bench as applicable to that sim tute. Their decision, therefor ruled those arguments, and held that the word "bankrupt" in 161 and 163 of that Act covered th a release in a composition deed d in another part of that statute a not given by a bankrupt—that i given by a person not formally cated a bankrupt. That case see

(6) 6 B. & S. 201; s. c. 34 Law J. Q.B. 89.

a strong authority in favour of the preponderance of the argument on behalf of the defendant Gray in this case. In *ex parte Duignan* (7) the Court of Appeal in Bankruptcy held that the filing of the petition under rule 252 of the present statute was an act of bankruptcy. In *ex parte Bumboll* (8) the contention was that section 73 in the Act of 1869 did not apply to disputes arising in proceedings under a deed of composition, entered into in 1868, because it was said section 72 is confined to "proceedings in bankruptcy." But it was held that it was applicable. "The Act of 1869 gives to the Court of Bankruptcy," says Lord Justice James, "jurisdiction to determine all questions for the distribution of assets in bankruptcy and *extends to anything that might be fairly called a case in bankruptcy.*" "I am of opinion," he says, "that the Chief Judge was right in holding that he had jurisdiction in this case as *he would have in any ordinary case in bankruptcy.*" That case seems to be an authority for holding that the earlier sections in the statute are not confined to cases of pure bankruptcy, and that the words "proceedings in bankruptcy" are not necessarily confined to proceedings in pure bankruptcy. The minds of the Lords Justices, who are peculiarly the interpreters of Bankruptcy Law, seem to be, as disclosed in that case, impressed with the view that all the three proceedings, though different in form, are proceedings in bankruptcy, subject to the control of the Bankruptcy Court, subject to the laws of bankruptcy, and intended for the relief of insolvent debtors, and that the more general enactments in the earlier sections are applicable to the proceedings under sections 125 and 126. We cannot help thinking that the manner in which "the Debtors Act, 1869," deals with fraudulent debtors, gives strong countenance to the view that the negative enactments in section 49 of the Bankruptcy Act, 1869, are applicable not only to cases of pure bankruptcy but also to cases in liquidation. Frauds in both cases are in the later statute treated as criminal offences, which mode of treating such frauds has been always applicable to frauds in bankruptcy. In the result, therefore, we adopt the arguments urged on behalf of the defendant Gray, and in accordance with them and the considerations otherwise pointed out in this judgment, and with authority, we hold that all the three forms of proceeding in the case of an insolvent debtor contained in the Bankruptcy Act, 1869, are proceedings in bankruptcy, though different in form, that the general enactments in sections 49 and 50 apply to the discharges under sections 125 and 126, and the rules and forms relative to them; that the word "bankrupt" in sections 49 and 50 is to be read as applicable to any debtor obtaining an order of discharge under the statute; and consequently that an order of discharge in all these cases releases only the debtor in whose favour it is given, and leaves his solvent co-debtor liable to be sued separately by a joint creditor who has been a party to the release of the insolvent debtor. We are of opinion that in this case the discharge of Highton did not release the plaintiff, and that it left the plaintiff liable to a separate suit by the defendant.

As to the second question we think it unnecessary to determine, for the purposes of the first action, whether the right of action to be relied on as a set-off was at the commencement of this suit legally in the defendant, or whether it was legally in his trustee to hold in trust for him, because in either case the defendant might maintain his right of set-off in the first action.

We are of opinion that this right of action was either legally in the defendant or in law in the trustee to hold it in equity in trust for him. We think that in order to establish a trust, the evidence which was objected to was properly admitted, and we are of opinion, therefore, that the defendant in the first action has sustained his claim of set-off as against the plaintiff. The defendant has, in respect of the two bills of exchange paid to the Adelphi Bank under his composition arrangement with them and his other creditors, nine shillings in the pound, which upon the amount of the bills is more than the

(7) 40 Law J. Rep. (N.S.) Bankr. 68; s. c. Law Rep. 6 Chanc. App. 605.

(8) 40 Law J. Rep. (N. S.) Bankr. 82; s. c. Law Rep. 6 Chanc. App. 842.

plaintiff's claim. We are of opinion, therefore, that judgment in the first action should be for the defendant on the plea of set-off. In consequence of our decision being thus in favour of the defendant in the first action, the parties have agreed that the verdict for the plaintiff in the second action shall be reduced to 123*l.* 6*s.* 8*d.* The rule which was obtained in that action will therefore be made absolute to that effect.

Judgment and rule accordingly.

Attorneys—J. & R. Gole, agents for Evans & Lockett, Liverpool, for plaintiff; Chinery & Aldridge, agents for Nordon, Liverpool, for defendant; Torr & Co., for Gray.

1874. Jan. 21. } HORNE *v.* HOUGH AND ANOTHER.

Interrogatories—Breach of Contract—Payment into Court.

Where, in an action for breach of contract, the defendant admits himself to be liable to compensate the plaintiff, and intends to pay into Court a sum sufficient to cover the damage sustained, the defendant will be allowed to administer interrogatories in order to ascertain the extent of the loss which the plaintiff has incurred.

The declaration, which was dated the 12th day of May, 1873, stated that Frederick Horne, carring on business under the firm or style of Frederick Horne & Co. (the plaintiff), by John Morris, his attorney, sued Edward Jordan Hough, George Alexander Laws and Robert Watson Surtees, carrying on business under the firm or style of E. J. Hough & Co. (the defendants), For that it was agreed by and between the plaintiff and the defendants, by charter-party in the words and figures following, that is to say—

"CHARTER-PARTY.

"London, 12th October, 1872.

"It is this day mutually agreed between Messrs. E. J. Hough & Co., owner, captain or agent, of the good steamship or vessel called the *Adela*, ——— ı of the burthen of 600/650 tons c thereabouts, now at Bilbao repairi Messrs. F. Horne & Co., charterer

"That the said vessel being staunch, strong and every way fit the voyage, shall, with all con speed, load at Bilbao afloat in tl tomary manner, from the agent said freighter, as ordered on arriva and complete cargo of ore or oth ful merchandise (to be brought taken from alongside at merchan and expense), not exceeding what reasonably stow and carry ov above her tackle, apparel, provisio furniture, and being so loadec therewith proceed with all con speed to such dock or wharf a Hartlepool, as ordered, or so nea unto as she may safely get aflo deliver the same on being paid at the rate of 17*s.* 6*d.* sterling pe twenty cwt. delivered at West Har the freighter paying the cargo factor's accounts, and the shipov master the trimming, lights, l dues, pilotage, cranage and t during the said voyage (all and ev dangers and accidents of the s navigation of whatever nature ar soever excepted). The freight to be cash on the right and true deliver whole cargo; if required, sufficient be advanced at Bilbao for ship's o disbursements not exceeding 50*l.*, to one charge of three per cent. terest and insurance. The stea load and discharge at an average 200 tons per working day after is in discharging berth ready to dis Demurrage (if any) 20*l.* per day. duty (if any) payable in consequ the vessel not being British to b by her. The vessel to be addre the freighters or their agent at t of delivery. Bills of lading to be by the master (as soon as the c shipped) as presented, at any freight not below chartered rate, prejudice to this agreement; ca have a lien on the cargo for freigh freight and demurrage. The vess addressed for Custom House busi Bilbao, and on her return to the

Kingdom or Continent, to N. Griffiths, Tate & Co., or their agents, under a penalty of 50*l.* as agreed damages. Penalty for non-performance of this agreement, the estimated amount of freight. Subject to a telegram from Bilbao, that steamer is seaworthy.

"By authority of E. J. Hough & Co.,
(Signed) "N. Griffiths, Tate & Co.,
"*Per* C. H. Taylor, as agent,
(Signed) "F. Horne & Co., 12/10/72.
"Witness to the signature of both parties,
(Signed) W. J. Groome."

And the plaintiff says that the said E. J. Hough & Co. in the said charter-party are the defendants, and the said Frederick Horne & Co. is the plaintiff, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action; yet the defendants, although not prevented by the said excepted perils, did not load on board their said ship a full and complete cargo of ore and other lawful merchandise from the agent of the plaintiff at the said port, to the great loss and injury of the plaintiff.

The defendants on the 30th day of December, 1873, paid into Court the sum of 15*l.* in respect of the causes of action in the declaration mentioned. The plaintiff, by his particulars, claimed as damages the sum of 433*l.* 15*s.*, which was made up of two amounts, namely, 157*l.* 10*s.* and 276*l.* 5*s.* The former of these two amounts was composed of a variety of items, namely, rent on 650 tons of iron ore for thirteen weeks in wharf at Bilbao, warehousing charges, extra lighterage, extra labour, travelling expenses, loss of interest, insurance, messengers and correspondence. The latter sum represented the loss of the plaintiff's alleged profit on the sale of the cargo in England, if the charter-party had been fulfilled.

A rule was obtained calling on the plaintiff to shew cause why the defendants should not be at liberty to administer interrogatories.

The following were the proposed interrogatories—

1. When were you first informed that the *Adela* could not take on board the agreed cargo, and did you at any time, and when, take any and what measures to obtain another vessel to carry the agreed cargo, and did you offer any, and what freight, to any other, and what vessel or vessels to carry the said cargo?

2. Was not one Mr. Levison jointly interested with you in the *Adela's* intended cargo, and did not the said Mr. Levison, acting on behalf of himself and you, charter the steamship *Loreley*, to carry a cargo of iron ore from Bilbao to Hartlepool? Was not this charter made out at your office in Fenchurch Street, in the name of Mr. Janfret, who was at that time a clerk in Mr. Levison's office at Bilbao, and was it not made out after the breach of the *Adela's* charter, and what rate of freight was payable by the terms of the charter of the *Loreley*?

3. Was the cargo intended for the *Adela* shipped in any and what steamer or steamers, and when and for what port?

4. Was not the cargo shipped in the *Loreley* of the same description as that intended for the *Adela*?

5. Were not orders given by you or by Mr. Levison with your knowledge to the *Loreley* to proceed to Mostyn, and were not the said orders given on account of a better market at Mostyn than at Hartlepool, and was not the difference of market of sufficient importance to induce you to agree to indemnify the owner of the *Loreley* against the consequences of deviation from the chartered voyage, and did you not so agree?

6. What price did you obtain for the *Loreley's* cargo at Mostyn?

7. Where at Bilbao was the cargo intended for the *Adela* stored or placed, and what did you do with the same when you found the *Adela* refused to ship it? How long was it allowed to remain at Bilbao, and why was it allowed to remain there?

8. Did you pay any and what warehousing charges in respect of the cargo intended for the *Adela* at Bilbao, and to whom and what was the amount of such charges? What was the usual rate of charge per ton paid to the owner of the land for depositing iron ore in heaps near the loading places at Bilbao?

9. Were any lighterage charges incurred in respect of the *Adela's* intended cargo, and if so under what circumstances were they incurred, and from what place and to what place was the cargo lightered, and why was it so lightered, and what was the charge for lighterage?

10. Did not the market price for iron ore go up at Bilbao and at Hartlepool, or at either, and which of those places, after the breach of the charter-party complained of?

11. Was the *Adela* chartered for the purpose of fulfilling contracts for the delivery of ore at Hartlepool already entered into by you or by you and Levison, or was she chartered to carry ore to Hartlepool on speculation, or was the ore you intended to put on board her intended for any and what person or persons at Hartlepool or how otherwise?

12. Did you sell or deliver the *Adela's* intended cargo to any and what person or persons, and when and where and what price did you obtain for the same?

13. Have you in your possession, custody or power, or in the possession, custody or power of any, and what person or persons on your behalf, any letters, papers, books, documents, accounts or vouchers relating to the loss and damage claimed by you in this cause, or to the expenses incurred at Bilbao as to the chartering or attempting to charter other vessels in the place of the *Adela*, or to the sale of the cargo intended for the *Adela*, or to any of the items mentioned in the several particulars of damage delivered in this action? Give a list of the same, and say whether you object to produce any and which of them?

Maclachlan shewed cause.—These interrogatories are inadmissible. They are irrelevant to the question at issue between the parties, and are framed upon a wrong view as to the effect of the authorities—*Brandt* v. *Bowlby* (1), *Sedgwick on Damages*, 4th edit. 356. It is not denied that the defendants may upon cross-examination at the trial ask the plaintiff's witnesses the questions which ar tained in the proposed interrogat but it is contended that they cann tain the information sought for the trial (2). The defendants admi they have broken their contract, an seek to reduce the damage to the sm possible amount by obtaining ev from the plaintiff himself.

G. Bruce, in support of the rule. defendants are anxious to know wh they ought to pay into Court. Th ticulars are mere statements of wh plaintiff claims. They do not she amount he is entitled to.

LORD COLERIDGE, C.J.—The defe intend to pay more money into Cou we think that they ought to ha means of ascertaining how much ought to pay in. It is reasonable tha should be informed of the plaintiff loss. Our decision in this case will b an authority in those cases where t fendant does really intend to stay fi proceedings by paying into Court sufficient to cover the plaintiff's cla

KEATING, J., concurred.

DENMAN, J.—The interrogatories to be an attempt to put the pl upon his oath as to the truth of hi ticulars in the action. That is u objectionable, and as a rule interroga framed for that purpose ought to l allowed; but in this case the defen have paid money into Court, and w pay in a sum sufficient to stop the a They may obtain leave to amend th by paying in such further sum as m necessary.

HONYMAN, J., concurred.

Rule absol

Attorneys—Ashurst, Morris & Co., for the tiff; Johnson & Coote, for the defendar

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(1) 2 B. & Ad. 932; s. c. 1 Law J. Rep. (N.S.) K.B. 14.

(2) See *Wright* v. *Goodlake*, 34 Law J (N.S.) Exch. 82; *Jourdain* v. *Plamer*, 35 L Rep. (N.S.) Exch. 69; *Dobson* v. *Richard* Law J. Rep. (N.S.) Q.B. 261.

1874. Jan. 17. } NIELD *v.* BATTY.

Municipal Election—Amendment of—List of Objections not Delivered in Time—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60)—*Rule* 7.

A petitioner under the Corrupt Practices (Municipal Elections) Act, 1872, *having omitted to deliver a list of objections six days before the time of trial, as is required by the seventh of the General Rules made under the provisions of that Act, he applied to the Court for leave to give evidence against the validity of certain votes recorded at the municipal election, and to file a list of objections nunc pro tunc:*—Held, *that the Court had no jurisdiction to grant the application; for the power of amendment conferred by the seventh rule related only to petitions presented in due time, and did not relate to petitions delivered after the prescribed period.*

In this case a petition had been presented under the Corrupt Practices (Municipal Elections) Act, 1872, relating to a municipal election for the Exchange Ward, in the borough of Manchester. The following statements were contained in the affidavit upon which the rule hereafter mentioned was supported.

The petition was appointed to be tried on the 20th of January, 1874. On the 13th of January a clerk to the agent for the petitioner tendered the list of objections on behalf of the petitioner to the clerk in the Rule Office of the Court of Common Pleas for the purpose of being filed under the seventh of the General Rules issued under the Corrupt Practices (Municipal Elections) Act, 1872. The clerk in the Rule Office informed the clerk to the petitioner's agent, that the list was too late and that it should have been filed the day before. The clerk to the petitioner's agent thereupon took out a summons for liberty to file the list of objections, notwithstanding the time for filing had expired. Upon serving it on the 13th upon the respondent's agents, he then offered them a copy of the list of objections on their giving a consent to the summons, which they declined to do. On the 14th of January, the summons came on before Pollock, B., who did not make any order, but stated that he required it to be shewn to him, that he had authority to make such an order, and expressed his opinion that the six days under the said seventh rule meant six clear days. The list of objections on behalf of the petitioner was on the 14th of January left by the clerk to the petitioner's agent at the Common Pleas Office for the purpose of being filed, and on the same day he served a copy on the agents of the respondent. It was owing to a misconception as to the true meaning of the seventh rule, that the list of objections was not filed on the 12th of January. It was stated that unless the petitioner should be allowed to give evidence upon the trial against the validity of the several votes specified in the petitioner's list of objections, the petition would become abortive.

A rule was obtained calling upon the respondent to shew cause why the petitioner should not be at liberty upon the trial of this petition to give evidence against the validity of the several votes specified in the list, which was offered at the Rule Office, and to the respondent's, William Batty's, agents, on the 13th day of January instant, upon the several heads of objection specified in such list, in the same way as if such list of objections had been duly filed and delivered within the time required by the seventh rule, and why the said list of objections should not now be duly filed and delivered *nunc pro tunc.*

Herschel shewed cause.—The Court has now no power to allow the list of objections to be delivered: the provisions of the seventh of the General Rules as to amendment of the list, do not assist the petitioner (1).

(1) The seventh of the General Rules for the effectual execution of the Corrupt Practices (Municipal Elections) Act, 1872, provides as follows—"When a petitioner claims the office for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election shall, six days before the day appointed for trial, deliver to the master and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Master shall allow inspection and office copies of such

Ambrose was then called upon to support the rule.—The Court has jurisdiction to order the delivery of the list. The petitioner's agent was misled by the officer of the Court. The 13th of January was in time, although it was the last day, Sunday not being included for the purpose of computing the six days (see 35 & 36 Vict. c. 60. s. 25).

LORD COLERIDGE, C.J.—It is clear that in the events which have happened, we have no power to make this rule absolute. No list was delivered in due time. The 14th of January was too late. On behalf of the petitioner the latter portion of the seventh rule has been relied upon; but we do not think that it assists him, for it provides for the amendment of the list, that is, a list of objections which has been delivered in due time, and it does not contemplate the present case in which no list was delivered before the prescribed period. Even if we had jurisdiction to make the rule absolute, I should not feel disposed to encourage applications of this kind.

KEATING, J.—I agree that the parties must be compelled to fulfil the requirements of the rules in proper time. The object of the petitioner in delivering the list so late was probably to prevent enquiry by the respondent. It is said that the default has been occasioned by a mistake of an officer of this Court; but if that was a mistake, it was at the time acquiesced in by the petitioner's agent. Our decision will ensure greater promptitude.

DENMAN, J.—The question, whether the delivery of the list on the 13th was in time, has not been discussed; and I give no opinion upon it. We have now to decide whether we have power to recognise the delivery on the 14th, which in itself was clearly too late. The seventh rule does not apply where no list has been delivered at all. The power of allowing amendment was no doubt given Court in order to ensure complian the provisions of the rule; for if be delivered six days before th fresh evidence may be discovere sitating amendment. Our pow limited by the rule.

Rule disch

lists to all parties concerned; and no evidence shall be given against the validity of any vote nor upon any head of objection not specified in the list except by leave of the Court of Common Pleas or a Judge at chambers, upon such terms as to amendment of the list, postponement of the enquiry, and payment of costs as may be ordered."

Attorneys—Dangerfield & Fraser, agen Hall & Son, Manchester, for the p Cooke & Talbot, for the respondent.

1874. Jan. 19, 30. } PHILLIPS *v.* MIL

Sale of Land—Incumbrances—. Purchaser.

The defendants were devisees under a will of certain farms, an 11*th of May*, 1868, *they entered in ments with the tenants thereof, latter should, at the termination tenancies, receive a sum of mone lated at market value, for all the h and manure produced on the farm the last year of their tenancies. B date of this agreement the tenants the farms from year to year, pur verbal agreements. On the* 18*th the plaintiff agreed to purchase th He then had no notice of the agree the* 11*th of May, and on the* 8*th tember he first became aware of th the* 6*th of January*, 1869, *the pur the farms was completed, without to the right of the plaintiff (if an indemnity in respect of the claim tenants under the agreements of th May. At the expiration of the t the plaintiff paid to the tenants co tion, calculated at market value, to the terms of the agreements of of May. The defendants having r indemnify the plaintiff, he now sue cover the amount paid to the ten* Held, *that the plaintiff had no be indemnified by the defendant amounts paid to the tenants.*

This was a special case state action brought by the plaintiff to

compensation for the loss he alleged himself to have sustained by reason of claims made upon him by three persons, who were tenants of part of an estate purchased by him from the defendants.

The first count was based upon the breach of an alleged contract to convey the premises free from such incumbrances and claims as were specified in the contract and particulars of sale; the second on an alleged contract to convey the premises free from any right of the tenants to be paid for hay, &c., at a higher rate than fodder value; the third on the breach of contract to settle by arbitration the question of the plaintiff's right to be indemnified by the defendants against any loss he might sustain by the difference between market and fodder value; and the declaration also contained the common money counts. The parties afterwards agreed to state a special case for the opinion of the Court upon the first, second and fourth counts, the third count not being included in the case; but the defendants were not to set up as an answer to the plaintiff's claim the fact that no award had been made. The Court to have power to draw inferences of fact and to amend the pleadings, if necessary.

The material facts set forth in the special case were as follows—The defendants were the devisees for sale under the will of Sir Charles Miller, of the Wishanger estate, in the counties of Southampton and Surrey. Part of this estate consisted of three farms, one of which was held by Mr. Parker, and consisted of 553 acres in Hampshire and 45 acres in Surrey. The other two farms were held by Mr. Bettesworth and Miss Knight, and were wholly in Hampshire. In Hampshire it is usual, in the absence of special agreement, for valuations between outgoing and incoming tenants to be made at fodder value, while in Surrey they are made at market value, being a higher value than fodder value. At the death of Sir Charles Miller, the three tenants held under verbal agreements as tenants from year to year from Michaelmas, and on the terms of being paid valuation at fodder value only, and in all other respects according to the custom of Hampshire. In April, 1868, the defendants gave the three tenants notice to quit at Michaelmas, 1869; but they asserted that Sir C. Miller, before his death, had promised them leases; and ultimately, on the 11th of May, 1868, agreements were entered into between the defendants and the three tenants, by which, after reciting the alleged agreement to grant leases, the tenants agreed to give up possession at Michaelmas, 1869; and the defendants agreed to allow or remit to the tenants the half-year's rent payable at Michaelmas, 1868, and also to pay to them, at Michaelmas, 1868, a sum of money, and also to pay or allow to them, at Michaelmas, 1869, or at the termination of their tenancies, for all the hay, straw and manure, produced on the farms during the preceding year, at market value.

In June, 1868, the Wishanger estate was put for sale by auction. In the particulars and conditions of sale the three farms were described as follows—"Farm A., in the occupation of Mr. Parker till Michaelmas, 1869, at the low annual rent of 580*l.* Farm B., in the occupation of Miss Knight till Michaelmas, 1869, at a rent of 80*l.* per annum. Farm C., in the occupation of Mr. Bettesworth till Michaelmas, 1869, at the very low annual apportioned rent of 93*l.* 15*s.*" The particulars further specified certain incumbrances, subject to which the estate was sold, namely, land-tax and tithe-rent charge, and stated that the property was sold subject to all rights of way or other easements that might exist; but there was no express mention in any part of the particulars of the agreement of the 11th of May, 1868. The ninth, tenth and eleventh conditions of sale were as follows—"Ninth. The numbers and quantities of the property are taken from the tithe rent-charge apportionments and maps of the parishes of Headley and Frensham, and the enclosure maps for the said parishes; and the property shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all rents (if any), rights of way and water and other easements charged or subsisting thereon. And if any error, mis-statement or omission in the particulars or these conditions shall be discovered,

the same shall not annul the sale, nor shall any compensation be allowed or given by the vendors or purchaser in respect thereof. Tenth. The purchaser shall pay the remainder of his purchase-money and the amount of the valuations determined or to be determined, as provided by the particulars, of the timber and timber-like trees, tellers, pollards, saplings, underwood, plantations, fixtures, implements and other matters mentioned in the particulars as having been or to be valued, on the 29th day of September next at the office, No. 4, South Square, Gray's Inn, Middlesex, of Messrs. Ranken, Ford & Longbourne, the vendors' solicitors, to the vendors, or as they shall in writing direct; and upon such payment the vendors, and all other necessary parties, will execute a proper assurance of the property to the purchaser; but such assurance, and every other assurance and act, if any, which shall be required by the purchaser for getting in, surrendering or releasing any outstanding estate, right, title or interest, or for perfecting the vendors' title, or for any other purpose, shall be prepared, made and done by and at the expense of the purchaser, and every such assurance shall be left not less than ten days before the said 29th day of September next, at the office aforesaid. The vendors are the trustees and acting executors of the above-mentioned will of Sir Charles Hayes Miller, selling under a power of sale, and the concurrence of the persons beneficially interested shall not be required. And the purchaser shall not be entitled to any other covenant than several covenants by the vendors that they respectively have not incumbered. Eleventh. The rents or possession will be received or retained, and the outgoings discharged by the vendors up to the said 29th day of September next; and as from that day the outgoings shall be discharged, and the rents or possession taken by the purchaser; and such rents and outgoings shall, if necessary, be apportioned between the vendors and the purchaser for the purposes of this condition. If from any cause whatever the purchase shall not be completed on the 29th day of September next, the purchaser shall pay interest on the rem of his purchase-money, and on the of all the valuations above referre the rate of 5*l.* per cent. per annu that day until the purchase shall l pleted, and shall not be entitled compensation for the vendors' d otherwise."

At the auction, the auctioneer r a memorandum, written at the foo copy, of the particulars, which stat the three tenants were entitled to for their hay, straw and manure ket price; but this memorandum copied on the copies circulated bidders. The property was boug this sale, and on the 18th of July purchased by the plaintiff by priva tract, of which the following is a

"I, John Hawkins Phillips, of St. Helen's, hereby acknowledge have bought the property menti the foregoing particulars, subject foregoing conditions, at the p 47,000*l.*, including the timber, tions, fixtures and machinery me on page 12, and that I have p sum of 4,700*l.* by way of deposit, part payment of the said purchase to Messrs. Ranken & Co., and herel to pay the remainder of the said pu money, and complete the said pu according to the aforesaid conditi

"For John Rouse Phillips,

"(Signed) J. H. Phillips, purcl

"18th July

"As agents for the vendors, Miller and George Arthur Jervois Esq., we ratify this sale, and we a ledge the receipt of the said de 4,700*l.*, which we retain as stakeh

"(Signed) Ranken &

"18th July,

The foregoing contract was wri one of the printed copies of the lars and conditions already me At the time the plaintiff bought no knowledge of the existence agreements of the 11th of May, of the terms of the tenancies; bu admitted by the plaintiff that the c by the defendants from the pa and conditions of sale of any mention of the said agreemen

made under a *bona fide* belief that it was not necessary to mention them. The abstract of title did not allude to these agreements; and it was only when, on the 8th of September, 1868, the plaintiff enquired of the tenants whether their holdings were in accordance with the statements in the particulars, that he learnt that the tenants claimed to be paid their valuations at market price. Correspondence ensued between the plaintiff and the defendants, and the following documents may be noticed.

Requisition made by the plaintiff's solicitors, 12th of November, 1868:

"The vendors must bear and pay to the tenants the compensation agreed to be paid to them for giving up their tenancies, including the payment for hay, straw and manure at market price. These compensations were no part of the conditions of the tenancies. So much of the payments for hay, straw and manure as would be payable by the custom of the country will, however, be paid by the purchaser."

Reply by the defendants' solicitors, 24th of November, 1868, to the foregoing requisition:

"'Mr. Oakley" (the auctioneer) "assures us that the terms upon which the outgoing valuations are to be made to the tenants, namely, market price, are practically the same as fodder price, and that the purchaser will obtain the same rent for the farms at Michaelmas, 1869, whichever mode of valuation is adopted. If Mr. Oakley is mistaken, the vendors will make good to the purchaser any loss he may eventually sustain in consequence of the incoming tenants being obliged to pay market price instead of fodder price."

On the 6th of January, 1869, the purchase was completed, subject to the following agreement:

"The Wishanger estate.—In the matter of the purchase, by Mr. John Rouse Phillips, of this estate, from Sir Charles Hayes Miller's trustees. — In consideration of Mr. Phillips settling the above purchase this day, it is hereby mutually agreed by us, the undersigned solicitors for the respective parties, that such settlement shall be without prejudice to the claim made by Mr. Phillips for an indemnity, in consequence of the vendors having executed agreements to pay Mr. Parker, Mr. Bettesworth and Miss Knight, three of the tenants of the estate, at the expiration of their tenancies, market price instead of fodder price for all hay, straw and manure produced on their respective farms during the preceding year. The vendors deny that Mr. Phillips has any claim to an indemnity. If Mr. Phillips sustains any loss owing to the difference between market price and fodder price, it is hereby agreed that the question of Mr. Phillips's right to be reimbursed such loss shall be submitted in writing to some Queen's counsel to be agreed upon, such writing to be settled by the counsel of the respective parties in case they differ about the same, and the parties agree to be bound by the opinion of such Queen's counsel. And it is hereby agreed that, in the event of the opinion being in favour of Mr. Phillips, the vendors are to pay to him any loss he may sustain. The costs of the reference to abide the award. Dated this 6th day of January, 1869.

"(Signed) William Ford, solicitor for the vendors. C. & J. Allen & Son, solicitors for the purchaser."

The conveyance contained the usual covenant against incumbrances. At the expiration of the tenancies valuations were made between the plaintiff and the three tenants of the hay, straw, &c.; and the amount assessed as the market value of the said hay, straw, &c., considerably exceeded the fodder value of the same. To these valuations the defendants were no parties. The plaintiff did not again let the three farms to new tenants, but divided them differently, and kept part of the land in hand. Shortly after the valuations, the tenants applied to the plaintiff for payment, and were paid by him, the defendants having previously repudiated their liability for any part of such valuations (1).

A. M. Channell (on Jan. 19), for the plaintiff.—The plaintiff has not got what he contracted for, and, at the time of the contract to sell, he was entitled to receive

(1) The above statement of the facts in the case is taken from the judgment of the Court.

notice of the equities of the tenancies. A contract to sell means a contract to convey free from all incumbrances, save those which are disclosed to the buyer. The defendants contend that it is the duty of the buyer to enquire; but it is contended, on behalf of the plaintiff, that a seller is bound to disclose all incumbrances. A suppression of facts shewing the true value of land sold, may entitle a purchaser thereof to be discharged in equity—*Dimmock* v. *Hallett* (2).

[KEATING, J.—That case does not bear upon the present; there the vendor had wilfully suppressed facts material in estimating the value of the land sold.]

Daniels v. *Davison* (3) establishes in favour of a tenant that his possession is notice of his interest to a purchaser from the landlord, but it does not affect the rights of a buyer against a seller. The plaintiff would at least be entitled to compensation in equity—*Hughes* v. *Jones* (4). Notice to a contractee that the contract cannot be carried out does not relieve a contractor from liability—*Barnett* v. *Wheeler* (5). The plaintiff's case is supported by *Martin* v. *Cotter* (6), and *Linehan* v. *Cotter* (7). The plaintiffs would have been entitled to compensation in equity—*Seton* v. *Slade* (8), and the cases there cited. It is admitted that the liability of the plaintiff to compensate the tenants was only equitable, as they had no leases under seal; but he relies upon the common counts, for he has paid upon compulsion that which the defendants were bound to pay; he is therefore entitled to be indemnified by them.

Field (*C. S. C. Bowen* with him), for the defendants, was not called upon.

The judgment of the Court (9) was, on the 30th of January, delivered by

(2) 36 Law J. Rep. (N.S.) Chanc. 146; s. c. Law Rep. 2 Chanc. 21.
(3) 16 Ves. 249.
(4) 3 De Gex, F. & J. 307; s. c. 31 Law J. Rep. (N.S.) Chanc. 83.
(5) 7 Mee. & W. 364; s. c. 10 Law J. Rep. (N.S.) Exch. 102.
(6) 3 J. & La. T. 496.
(7) Irish Equity Rep. 176.
(8) 2 White & Tudor's L.C. in Eq. 513.
(9) Lord Coleridge, C.J.; Keating, J.; and Denman, J.

LORD COLERIDGE, C.J.—[After the above facts, his Lordship pr as follows.] This case was argue my brothers Keating and Hony last Easter term, and it has b argued, during the present term, my brothers Keating and Denm myself.

It was contended for the plaint upon the true construction of tl tract he, as purchaser, had not g the vendors had contracted to s and that he had, therefore, a r succeed on purely legal ground further that, if recourse were had doctrines of equity, notice in the p lars of sale that these farms were hands of tenants, was not notice equities of those tenants, and that fore, upon equitable grounds also, entitled to compensation. The c argued for the plaintiff, with al ingenuity, by Mr. Channell; but v arrived at a conclusion adverse plaintiff on both the legal and e considerations arising in the case.

In order to succeed in his leg tention, the plaintiff must establ the true construction of the co in the particulars of sale is, t farms are to be conveyed free f claim of the tenants to be paid, termination of their tenancies, at a rate than fodder value; and furth the arrangements with the tenant set forth, were not terms of the or incident to them, but were i independent or collateral agreem to the terms on which the te should be determined, or claims cumbrances other than any of specified in the particulars an ditions, and which, therefore, the tiff, if he paid them, had a right i form to recover from the vendors. proposition appears to us to be estal As to the first, the conditions and culars of sale are, no doubt, part contract; but there are certainly no in either particulars or conditions directly limit the claims of the to fodder value at the determina their tenancies. Neither are the words in the contract, nor any found in the case, from which it

gathered even by reasonable, far less by necessary inference, that such a condition as is suggested is to be incorporated into the contract and read as part of it. As to the second, the arrangements with the tenants seem to us, upon the true view of them, not to be, as to the question of market value, collateral agreements nor unspecified claims and incumbrances, but really terms of the holdings of the tenants and incident to the holdings. It was admitted, nor could it, indeed, be denied, that, in point of fact, the purchaser knew of the farms being in the occupation of tenants; and it was also admitted, nor could it be denied, that of these particular agreements with the tenants, the purchaser had no knowledge, in point of fact, at the time of the purchase. Under these circumstances it was contended that it was the duty of the vendors to have stated the particulars of these agreements, and that, if damage accrued to the purchaser in consequence of the non-fulfilment of this duty, he could recover compensation from the vendors on a count properly framed, and which the Court, under its power of amendment, might introduce. It is, perhaps, unnecessary, after the opinion we have expressed upon the contract itself, to decide this question. But we are not satisfied that there is any such duty as that contended for; for certain purposes and between certain parties, it is clear that notice of a tenancy is notice of a tenant's equities. In *Taym* v. *Stibbert* (10), Lord Loughborough held that, "whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to enquire into the estates these tenants have." Sir William Grant, in *Hall* v. *Smith* (11), and Lord Eldon, in the case of *Daniels* v. *Dawson* (12), both recognised and extended very far the doctrine of Lord Loughborough. These cases, and the doctrine contained in them, have been repeatedly recognised in later times, and may be considered as undoubted law. It has been argued, however, with truth, that they are all cases not between vendor and purchaser, but between a purchaser and a tenant of the vendor enforcing his equities against the purchaser, who was held bound by them, even in very strong cases, where he had notice of the existence of a tenancy. We find, however, that the same doctrine was applied by Lord Romilly in a case not appealed from, and with which, therefore, it is to be presumed that the parties were satisfied, though, in that case, they were purchaser and vendor. It is the case of *James* v. *Litchfield* (13). That was a case of a suit by the purchaser against the vendor for specific performance with compensation. It raised, therefore, the same point as would arise in an action at law for damages occasioned by the breach of duty, if it were one, suggested in the present instance. Lord Romilly held that the doctrine of *Daniels* v. *Dawson* (12) applied to a case between vendor and purchaser, and refused compensation. "Whatever," said he, "puts a purchaser upon enquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the extent of his interest. This was adopted by the Lord Chancellor (Lord Eldon), who decided accordingly; and I am unable to see any ground for a technical, and, as it appears to me, an arbitrary distinction, which should limit the application of the rule to one person, when the reason of it extends to all persons whatsoever." Upon this state of the authorities there would seem to be good ground for holding, if it were necessary, that there was here nothing to ground an action for damages against the vendors.

Upon the whole case, therefore, we give judgment for the defendants.

Judgment for the defendants.

Attorneys—Allen & Son, for the plaintiff; W. & A. Ranken Ford, for the defendants.

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(10) 2 Ves. 439.
(11) 14 Ves. 433.
(12) 16 Ves. 254; s. c. 17 Ves. 433.

(13) 39 Law J. Rep. (N.S.) Chanc. 248; s. c. Law Rep. 9 Eq. 51.

1874. Jan. 26. } WILLIAMS AND ANOTHER v. HEALES.

Executor de son Tort—Assignee of Lease.

The plaintiffs, being assignees of the reversion upon a lease, sued the defendant for breach of the covenants therein. The lease had been granted to H. G., who held the demised premises thereunder until his death. His widow, A. G., administered to his personal estate. At her death H. received the rents of the demised premises, which were let to under-tenants, and upon his death the defendant received the rents. The covenants in the lease granted to H. G. had been broken:—Held, *that the defendant was liable as executor de son tort upon the covenants.*

The plaintiffs were trustees under the marriage settlement of William Walton Williams and Mary Ann Dairs, and they sued as assignees of the reversion for the breach by the defendant of the two covenants set out in the declaration for not keeping in repair and for not paying two quarters' ground-rent of a house now called 381, City Road, but formerly known as 32, York Place, City Road.

By indenture of lease dated the 10th day of May, 1806, made between James Taylor of the one part, and William Dalby of the other part, the said James Taylor demised to the said William Dalby, his executors, administrators and assigns certain land, parcel of which was the land on which the house 381, City Road stood, to hold the same for the term of eighty years from the 25th of March, 1803, at the yearly rent in the said indenture mentioned.

By indenture of lease dated the 29th of August, 1810, being the lease containing the covenants set out in the declaration in this cause, and made between the said William Dalby of the first part, John Woods of the second part, and Henry Godden of the third part, the said William Dalby demised unto the said Henry Godden, his executors, administrators and assigns the ground and messuage then called 32, York Place, but now 381, City Road, for the term of sixty-one years and one quarter (wanting ten days) from the 29th of September, 1809, at the yearly rent of 12*l.* 12*s.*, quarterly. The said lease con[illegible] covenant by the said Henry God[illegible] executors, administrators and as[illegible] pay the said rent quarterly, an[illegible] covenant to keep the house and [illegible] in repair and deliver up the same [illegible] at the end of the lease.

By indenture of settlement of t[illegible] day of February, 1820, made betw[illegible] said William Dalby and Ann Dal[illegible] daughter of the said William I[illegible] the first part, Samuel Knight [illegible] second part, and Robert Pear[illegible] Joseph Stephenson of the thi[illegible] after reciting the said lease to [illegible] Dalby of the 10th of May, 1806, [illegible] William Dalby bargained, sold [illegible] signed to the said Robert Pear[illegible] Joseph Stephenson, their execut[illegible] ministrators and assigns, *inter a*[illegible] ground, messuage and premises [illegible] Place (now 381, City Road), dem[illegible] the said William Dalby to the sai[illegible] Godden by the said indenture [illegible] dated the 29th of August, 1810, [illegible] unto the said Robert Pearson and [illegible] Stephenson, their executors, adm[illegible] tors and assigns, upon certain t[illegible] the said settlements mentioned.

After the death of Joseph Ste[illegible] intestate, who survived his co[illegible] Robert Pearson, Sarah Stephen[illegible] widow, obtained letters of admin[illegible] to the goods and effects of her l[illegible] band Joseph Stephenson.

By indenture dated 24th of F[illegible] 1843, endorsed on the said settle[illegible] the 14th of February, 1820, an[illegible] between Ann Knight of the firs[illegible] Sarah Stephenson, the said widow [illegible] ministratrix of the said Joseph S[illegible] son, of the second part; William F[illegible] and Joseph Knight of the third p[illegible] Charles Williams and William Fo[illegible] the younger, of the fourth part—[illegible] Sarah Stephenson bargained, s[illegible] assigned unto the said Charles W[illegible] and William Fortescue, the young[illegible] executors, administrators and ass[illegible] the said premises mentioned and d[illegible] in the said indenture of lease of t[illegible] of May, 1806, and in the said in[illegible] of settlement of the 14th of F[illegible] 1820. The said William Fortes[illegible]

survivor, survived his co-trustee Charles Williams.

By indenture dated the 28th of September, 1867, made between William Walton Williams and Edwin Williams, trustees and executors of the will of Charles Williams, of the first part, the said William Fortescue, the younger, of the second part, the said William Walton Williams and Mary Ann, his wife (formerly Mary Ann Dairs), of the third part, and the said Edwin Williams and John Williams, the plaintiffs, of the fourth part, the said William Walton Williams and Edwin Williams, as such executors as aforesaid, and the said William Fortescue, the younger, bargained, sold and assigned unto the plaintiffs, the said Edwin Williams and John Williams, their executors, administrators and assigns, the several messuages, lands and premises comprised in the said indenture of the 14th of February, 1820, which were then vested in them, the assigning parties, or any or either of them, to hold to the said Edwin Williams and John Williams, their executors, administrators and assigns upon the trusts therein expressed or referred to, and the reversion upon the lease of the 29th of August, 1810, before mentioned, thereby vested, and has ever since continued in the plaintiffs.

The defendant, Alfred Heales, is the grandson, through his mother, of Henry Godden, the lessee under the said indenture of lease dated the 29th of August, 1810.

The said Henry Godden, the lessee, was in possession of the said house up to the time of his death, and died intestate, leaving his widow, Ann Godden, and two daughters, Jane Cecilia and Sarah Ann, him surviving; his said widow obtained administration to his effects on the 28th of January, 1814, and was possessed of the said lease up to the time of her death, and died intestate on the 16th of January, 1843. During her lifetime she received the rents of the house 381, City Road, and paid the ground-rent reserved by the lease of the 29th of August, 1810. The said Jane Cecilia married George Samuel Heales, and was the mother of the defendant. The said Sarah Ann married William Taylor, and died in September, 1818.

No other administration has ever been obtained to the effects of the said Henry Godden, the lessee, other than that to his widow Anna Godden.

On the death of the said Anna Godden, George Samuel Heales, the father of the defendant, took possession by his tenants of the said house 381, City Road, and paid the ground-rent reserved by the lease of the 29th of August, 1810, and remained in such possession up to the time of his death, on the 17th of December, 1856. From the time of the death of his father, the said George Samuel Heales, the defendant, Alfred Heales, received the rent of the said premises, and after paying the ground-rent, paid over the balance to his said mother, regarding her as entitled to receive the same as her own; he also from that time let the said premises to several tenants, from whom he received the rent as aforesaid. The defendant continued so to receive the said rent and pay over the balance to his said mother in the manner aforesaid up to the time of her death, which happened on the 16th of April, 1863.

In the year 1859 the defendant let the said house to a Miss Wilkinson at the annual rent of 60*l.*, and she continued his tenant until her death, in the year 1867. After the death of Miss Wilkinson her executor, Mr. Goudge, paid the quarter's rent due for the said house up to Midsummer, 1867; and before another quarter's rent became due the said executor gave up possession of the house to the defendant on the payment of 20*l.*, and the defendant acknowledged the same in a letter, of which the following is a copy—

"1, Bell Yard, Doctors' Commons,
"16th September, 1867.

"Dear Sir,—I have to acknowledge the receipt of your cheque for 20*l.* in discharge of all claims which I have against you in respect of house No. 381, City Road, under the agreement upon which I let it to the late Miss Wilkinson.

"Yours truly,
"Alfred Heales.

After the decease of the widow of the said George Samuel Heales, the mother

of the defendant, he continued to receive the rent of the said premises, and the same, after payment by him of the ground-rent, was divided by him in equal proportions between himself and his two sisters, on the assumption that they were entitled to receive the same, in such proportion, as their own.

From the year 1857 the defendant has paid to the plaintiffs, through their agent, William Walton Williams, the rent of the said house as it accrued due of 12*l.* 12*s.* per annum reserved under the lease granted to the said Henry Godden dated the 29th of August, 1810, except the two quarters' rent, for which a breach is alleged, for non-payment thereof, in the declaration. On the determination of the said lease, the defendant having up to that date received the rent of the said premises, and divided the same between himself and his said sisters as before mentioned, delivered up possession of the said house and premises to the plaintiffs out of repair. The agreed amount of damages for such non-repair was 60*l.*, and that sum, with 6*l.* 6*s.* for the two quarters' rent, made up 66*l.* 6*s.* for which the verdict was taken. The defendant was the executor of his father, the said George Samuel Heales. It was agreed that the Court should be at liberty to draw any inferences or find any facts which in the opinion of the Court a jury ought to have drawn or find.

The question for the opinion of the Court was, whether the defendant was liable in this action, and if the Court should be of that opinion, the verdict was to stand, but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

The declaration in the action stated that William Dalby being possessed of the premises hereinafter mentioned to be demised by him for an estate greater than and including the term granted by him, and which estate still continued, by an indenture dated the 29th of August, 1810, between the said William Dalby of the first part, John Woods of the second part, and Henry Godden of the third part, let to the said Henry Godden a messuage described therein, to hold for the term of sixty-one years and one quarter (wanting ten days) from the 29th of September, 1809, at the yearly rent of 12*l.* : able during the said term qua the usual quarter days. And Henry Godden for himself, his e administrators and assigns ther nanted with the said William I executors, administrators and that he, the said Henry Goc executors, administrators and should and would yearly and e during the said term thereby pay or cause to be paid to William Dalby, his executors, trators and assigns the said y or sum of 12*l.* 12*s.* in manne before mentioned. And further the said Henry Godden, his administrators and assigns sh would, at his and their own charges, well and sufficiently r hold, sustain, maintain, empty glaze, amend and keep the said or tenement and premises th mised, and every part thereo with all needful and necessar tions and amendments when an as need or occasion should be c during the said term, and the s mises, with the appurtenances, well and sufficiently repaired sustained, maintained, emptied, amended and kept at the end sooner determination of the s should and would peaceably an leave, surrender and yield up said William Dalby, his exec ministrators and assigns, with locks, keys, bars, bolts, windows partitions, dressers, shelves, clos ney-pieces, hearths, slabs and oth alterations and improvements th be thereunto affixed or belong virtue of which demise the s entered on the said demised and became possessed thereof said term; and afterwards by a and acts in the law all the estat version whatsoever of the said Dalby of and in the said den mises, subject to the said term and was vested in the plaintiff the estate and term of the sa Godden of and in the said den mises became and was vested i fendant. And the said term effluxion of time, and all condit

fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to recover in respect of the matters herein stated, yet, and after the plaintiffs and the defendant had become respectively entitled as aforesaid, the sum of 6*l.* 6*s.* of the rent aforesaid became due by the defendant to the plaintiffs, and is in arrear for two payments of the said rent which became due before suit for portions of the said term elapsed whilst the plaintiffs and the defendant were respectively entitled as aforesaid. And, further, whilst the plaintiffs and the defendant were respectively entitled as aforesaid and during the said term, the defendant omitted, as often as occasion required, to well and sufficiently repair, uphold, sustain, maintain, empty, cleanse, glaze, amend and keep the said demised messuage or tenement and premises, and every part thereof, by and with all needful and necessary reparations and amendments whatsoever. And the defendant at the end of the said term, the plaintiffs and the defendant being respectively entitled as aforesaid, left, surrendered and yielded up to the plaintiffs the said messuage, and tenement, and premises out of repair, and contrary to the conditions contracted for as aforesaid.

Udall, for the plaintiffs.—The facts stated in the case leave no doubt that the plaintiffs are assignees of the lease granted in 1810. The question to be determined in this case is whether the defendant can be held liable, either as executor *de son tort*, or as assignee. It is contended for the plaintiffs, that upon the death of the lessee's widow, administration *de bonis non* ought to have been taken out to his personal estate, and the lease would have vested in the administrator under such a grant. In *Williams on Executors*, vol. i. p. 915, 7th ed., it is stated that "an administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie, and were not administered by the first executor or administrator." *The Mayor, &c., of Norwich* v. *Johnson* (1) is a strong authority for the plaintiffs. Further, it is contended that the defendant is liable to be treated as assignee.

S. Prentice (*G. Francis* with him), for the defendant.—It is submitted that the defendant is not liable in this action, either as executor *de son tort* or as assignee. He cannot be held liable as executor of his father, "for an executor of an executor *de son tort* is not liable at law" (2). In *Paull* v. *Simpson* (3) it was decided that a party, who knowingly receives a chattel from an executor *de son tort*, and deals with it as his own, does not himself become thereby executor *de son tort*; there, the widow of an intestate possessed herself of a lease, part of his estate, without taking out administration, and handed it to another party, who kept it, and occupied the premises for the residue of the term, with the landlord's assent; but it was held that he was not liable for the rent. In *Hill* v. *Curtis* (4) it was held that a person who receives assets from an executor *de son tort* does not thereby become executor *de son tort*.

Udall was not called upon to reply.

KEATING, J.—We all are of opinion that we need not trouble the plaintiffs' counsel to reply. This is an action upon the covenants of a lease granted in the year 1810 to Henry Godden. The hereditaments were demised to him for a term of rather more than sixty-one years, and he held the lease during his lifetime; his widow administered to his effects. At her death she left two daughters, one of whom married George Samuel Heales, who did not take out administration *de bonis non* to the estate of the original lessee, Henry Godden. He received the rents to his own use, and upon his death the defendant entered upon the possession of the demised premises, and paid over the rent to his mother during her lifetime; after her death he received the rents, and divided the proceeds with his sisters. It has been argued that the defendant is liable as assignee and as executor *de son tort*; and I think that he is

(1) 3 Lev. 35, which was affirmed in error, 3 Bod. 90.

(2) Anonymous, 2 Mod. 293.

(3) 9 Q.B. Rep. 365; s. c. 15 Law J. Rep. (N.S.) Q.B. 382.

(4) 35 Law J. Rep. (N.S.) Chanc. 133; s. c. Law Rep. 1 Eq. 90.

liable to the plaintiffs in this action. One question is whether he could be charged as executor *de son tort*, in respect of acts done during his mother's lifetime. *Paull* v. *Simpson* (3) seems to shew that he is not personally liable for what he did before his mother's decease, and that he cannot be deemed to have at that time acted as executor. But then he afterwards took the rents, in part for his own use, and there was nothing to prevent him from becoming at that time executor *de son tort*, and he continued to be an executor of this kind until the expiration of the lease. To hold the defendant free from liability would produce this result: Upon the death of a lessee, to whose personal estate no administration has been taken out, a person might claim a lease for years belonging to the deceased, take possession of the demised hereditaments, and yet might escape from liability to pay rent and perform the covenants contained in the lease. The plaintiffs are entitled to our judgment.

BRETT, J.—This action is brought upon the covenants of a lease, and this is to be borne in mind when the facts of this case are considered. It is not an action brought by the assignees of a lease against the lessor or his assignees, in which the plaintiffs would have to prove their title, and to shew that the term of years had vested in them by lawful conveyances. The lease was granted to Henry Godden, his executors, administrators and assigns; his widow took possession of the lease when he died, and dealt with it during her lifetime. At her death George Samuel Heales became executor *de son tort* in respect of the lease. By the facts stated in the case we gather that, during his mother's lifetime, the defendant received the rent of the demised property; but it may be that, at that time, he was merely acting as her agent, and that he did not become executor *de son tort* until his mother's death. But there is evidence that he was not acting as a mere agent of his mother, for, in her lifetime, he let the house to a Miss Wilkinson. But, at all events, he so dealt with the lease after her death as to make him liable as executor *de son tort;* and I think that he must be regarded as if he had held upon the terms of the lease. It is said that we are not to treat him as ex *son tort*, because his father and h might likewise have been suec capacity. This is an argument confess myself unable to understi

DENMAN, J.—I think that th ant was liable as executor *de* Possibly, if it were necessary the question, we should be o that he was also liable as assig *Buckworth* v. *Simpson* (5), it that, under some circumstar executors of a lessee may be their personal character. That to have been the case of tenancy, while the facts here that Godden was grantee of term of years. However that the defendant is liable as execu *tort*. The cases as to the law subject are collected in 1 *Willia cutors*, p. 257, 7th ed., and it foll them that the plaintiffs ought t in this action.

HONYMAN, J.—I am of opi judgment ought to be given plaintiffs. If it were necessary the defendant as assignee, I s cline to think that the facts of shew him to be liable in that I think that, by payment of re superior landlord, he is estop denying his liability to fulfil the contained in the lease to Henry

Judgment for the pl

Attorney—Thomas, for the plaintiffs; for defendant.

1873. Nov. 20, 21. 1874. Jan. 21. } MILLER *v.* D.

Action — Defamation — Words famatory in themselves.

It is not actionable to say o mason that he is the ringlead nine hours' system, and that he h a town by bringing about the ni system, and he has stopped several from being carried out by being

(5) 1 Cr. M. & R. 834; s. c. 4 L (N.S.) Exch. 104.

leader of the nine hours' system; nor is it material that the person alluded to has suffered special damage, if such damage is not intended as a consequence when the words are uttered.

The first count of the declaration stated that the plaintiff was, at and during the times of the committing by the defendant of the grievances in the several counts of this declaration mentioned, a working stonemason, residing at Llanelly, in the county of Carmarthen, and sought and earned his livelihood by working as a stonemason, for wages, as servant of builders and others employing masons in Llanelly and the neighbourhood of Llanelly, and was, at the time of the committing of the grievances in this count mentioned, so employed in certain works carried on under the management of a person surnamed Mayberry; and before the said times of the committing of the grievances in the several counts of this declaration mentioned, three public meetings had been held in Llanelly aforesaid, of divers persons, with the object of promoting the adoption in Llanelly aforesaid, of a system of labour amongst the masons employed there, called the nine hours' system, consisting in, amongst other matters, the diminution of the hours of labour per week theretofore established in use for masons in Llanelly aforesaid; and the said nine hours' system was at the said times considered by the defendant and the said Mayberry and divers employers of masons in Llanelly aforesaid, as inexpedient and prejudicial to divers trades carried on in Llanelly aforesaid, and injurious to the public welfare in Llanelly aforesaid; and, at the said times, persons known or suspected to be ringleaders or agitators of the said movement in favour of the said nine hours' system, were looked upon with disfavour and suspicion by such employers, who would not readily employ them, and such persons found their means of obtaining employment diminished; all which the defendant at the said times well knew; yet the defendant falsely and maliciously spoke and published of the plaintiff to the said Mayberry the words following, that is to say—"He (meaning the plaintiff) was the ringleader of the nine hours' system," whereby and by the means of which said premises the plaintiff was injured in his occupation of a stonemason, and was discharged from his employment at the said works, to wit, the Old Castle Iron and Tin-plate Works, and was without and could not obtain employment for a considerable time, and could get no employment but one of less value to the plaintiff, the place of employment being distant from his place of abode, and his necessary meals thereby becoming more costly, and such place of employment being exposed to wet weather.

The second count, after reaffirming the inducement in the first count, stated that defendant falsely and maliciously spoke and published of the plaintiff to one Rees Jenkins, an employer and stonemason as aforesaid, the following words, that is to say—"He (meaning the plaintiff) has ruined the town by bringing about the nine hours' system; and he (meaning the plaintiff) has stopped several good jobs from being carried out by being the ringleader of the system at Llanelly;" whereby the plaintiff was injured in his occupation of a stonemason; and the plaintiff was without and could not obtain employment for a considerable time, and suffered great loss, and could get no employment but one of less value, &c. (as above).

Demurrer and joinder.

H. Giffard (*B. T. Williams* with him), (on Nov. 20 and 21, 1873), in support of the demurrer.—The action does not lie. The words spoken are not of a defamatory nature, and therefore no action for defamation will lie, even though damage ensued to the plaintiff from their being spoken. The plaintiff is described in the declaration as a stonemason, but it is not alleged that the words were spoken of him in respect of his trade, nor is there anything to connect them with his trade. The description given of the plaintiff is only to point to how the damage alleged accrued to him. The words must be defamatory; otherwise the speaking them will not be actionable even with damage either implied or in fact. In *Ayre* v. *Craven* (1), the Court, in giving judgment, relied

(1) 2 Ad. & E. 2; s. c. 4 Law J. Rep. (N.S.) K.B. 35.

on the doctrine laid down by Bayley, B., in *Lumby* v. *Allday* (2), that "Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business." Then the special damage must be the natural consequence of the words, as was said by Patteson, J., in *Kelly* v. *Partington* (3)—"I have always understood that the special damage must be the natural result of the thing done. . ." "It is said that the words are actionable because a person, after hearing them, chose, in his caprice, to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful they must in their nature be defamatory." In *Foulger* v. *Newcomb* (4) the words were defamatory, imputing a breach of duty by the plaintiff in his employment, so that the damage was the natural consequence of the words. The only authority which appears to be against the proposition now contended for on behalf of the defendant, is the dictum of Heath, J., in *Moore* v. *Meagher* (5), that "all words are actionable if a special damage follows." But that must be taken to be applicable to the case in which it was delivered, in which the words imputed a moral delinquency, and the damage sustained was the natural consequence thereof.

Bray, contra.—Even though the words be not defamatory they are actionable if they have caused damage in fact. In *Comyn's Digest*, tit. Action on the case for Defamation, D. 30, it is said that an action will lie for "any words by which the party has a special damage." In *Green* v. *Button* (6), the defendant made a false claim of lien on certain patterns, by which the persons with whom they were deposited refused them to the plaintiff, and the da held to be so connected with th ant's act as to support the actic Wensleydale in *Lynch* v. *Knight* "I strongly incline to agree tha the words actionable by reason damage, the consequence must b taking human nature as it is wi firmities, and having regard to tionship of the parties concern fairly and reasonably have bee pated and feared would follow speaking of the words, not wh reasonably follow or we might th to follow." Next, the words in t are defamatory. They impute m on the part of the plaintiff. "ringleader" is capable of bei stood in a defamatory sense, an the jury to determine that.— *A'Beckett* (8). In *Lumley* v. Crompton, J., appears to have be nion that an action will lie for n inducing another to break a c any description, whereby damag to the party with whom the co been made. In this case the d avers that the plaintiff was c from his employment, and thi taken as an averment that by the words complained of the employer was induced to brea tract with him, and although th may have a remedy against his for the wrongful discharge, he theless entitled to sue the defe compensation for the injury whi sustained; for "the defendan false practice hath created a tr grace and damage to the plai this is sufficient to maintain the *Newman* v. *Zachary* (10).

Giffard in reply.

The judgment of the Court (on Jan. 21, 1874) delivered by

(2) 1 Cr. & J. 301.

(3) 5 B. & Ad. 645.

(4) 36 Law J. Rep. (N.S.) Exch. 169; s. c. Law Rep. 2 Exch. 327.

(5) 1 Taunt. 39.

(6) 2 Cr. M. & R. 707.

(7) 9 H.L. Cas. 600.

(8) 41 Law J. Rep. (N.S.) Q.B. 1 Rep. 7 Q.B. 11.

(9) 22 Law J. Rep. (N.S.) Q.B. 463.

(10) Aleyn, 3.

(11) Lord Coleridge, C.J.; Keatin J.; and Denman, J.

LORD COLERIDGE, C.J.—In this case time was taken to consider our judgment from the wish entertained by at least one member of the Court to hold, if there were authority for the proposition, that a statement false and malicious, made by one person in regard to another, whereby that other might probably under some circumstances and at the hands of some persons suffer damage, would, if the damage resulted in fact, support an action for defamation. No proposition less wide in its terms than this would support the present declaration. For to call a man "the ringleader of the nine hours' system," and to say of him that he "had ruined a place by bringing about that system," would not, under many circumstances, and at the hands of many people, do the subject of such statements any damage at all. But we are unable to find authority for a proposition so wide and general in its terms as would alone support this action. The rule as laid down by De Grey, C.J., in *Onslow* v. *Horne* (12), that words are actionable if they be of probable ill-consequence to a person in a trade, or a profession, or an office, is expressly disapproved of by the Court of Exchequer in *Lumby* v. *Allday* (2). Bayley, B., there says, "Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity or the like, or connects the imputation with the plaintiff's office, trade or business." In that case the words proved were a very strong imputation on the morality of the plaintiff, who was a clerk to a gas company; but the Court held them not actionable, because the imputation conveyed by them did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his credit as clerk. That case, and the language of Baron Bayley in delivering the judgment of the Court, have since been repeatedly approved of, and are really decisive of this case.

The words before us are not actionable in themselves. No expression in them was argued to be so except the word "ringleader;" and as to that, it is sufficient perhaps to say that Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import, for, amongst other authorities, he cites Barrow as calling St. Peter "the ringleader" of the Apostles. Neither are the words connected with the trade or profession of the plaintiff, either by averment or by implication, so that on neither ground can the declaration be supported. There is no averment here that the consequence which followed was intended by the defendant as the result of his words, and therefore it is not necessary to consider the question which was suggested on the argument, whether words, not in themselves actionable or defamatory, spoken under circumstances and to persons likely to create damage to the subject of the words, are when the damage follows ground of action. The judgment of Lord Wensleydale in *Lynch* v. *Knight* (7) appears in favour of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it, and upon this demurrer there must be judgment for the defendant.

Judgment for the defendant.

Attorneys—Stretton, agent for Snead, Llanelly, for plaintiff; Cowdell, Grundy & Browne, agents for Home, Llanelly, for defendant.

1874. Jan. 31. } OULTON *v.* RADCLIFFE.

Practice — Palatine Court — Service of Process out of Jurisdiction of Court—Appearance—Waiver.

The Court of the County Palatine of Lancaster, being a superior Court of record, has jurisdiction in an action where the cause of action arises outside the county, and if the defendant voluntarily enters an appearance to such action he comes within the jurisdiction of the Court, and cannot then object that he does not reside within the county, and that the writ was served beyond the jurisdiction of the Court.

This was an action brought in the Court of the Common Pleas at Lancaster. The cause of action arose, and the defendant resided, in the county of Salop, out of the jurisdiction of that Court. The

(12) 3 Wils. 186; s. c. W. Black. 753.

writ of summons was sent by the plaintiff's attorneys at Liverpool to the defendant's attorney at Stone, in the county of Staffordshire, also out of the jurisdiction of the Court, with a request that he would give an undertaking to appear for the defendant. He accordingly gave such undertaking, with a statement endorsed by him on the writ that he accepted service thereof on the defendant's behalf, and in due course he caused an appearance to be entered for the defendant in the proper office of the Court. At the same time that the defendant's attorney instructed his agent at Liverpool to enter the appearance, he directed him to take out a summons to set aside the writ on the ground that the defendant resided out of the jurisdiction of the Court of Common Pleas at Lancaster. Such summons was accordingly taken out and heard by the district prothonotary, who refused to make any order. An appeal from this having been made to Martin, B., at chambers without success, a rule was obtained in this Court, calling on the plaintiff to shew cause why service of the writ and all subsequent proceedings should not be set aside on the ground that the service of the writ was a nullity, and that the Court of Common Pleas at Lancaster had no jurisdiction to issue the writ or entertain the suit. Against this rule,

R. G. Williams now shewed cause.—The Court of the county palatine of Lancaster, in which this action has been brought, is a superior Court, and therefore has jurisdiction, although the cause of action arose beyond its limits, and in that respect it resembles any of the superior Courts at Westminster. It is thus stated in *Bacon's Abridgment*, title "Courts Palatinate"—"The palatinate Courts are superior Courts of Record, which exercise a jurisdiction within their own precincts in as ample a manner as the Courts of Westminster," and in a note thereto it is said, "therefore if a debtor goes from a foreign into a palatinate jurisdiction his obligation goes along with him as much as if he removed from one kingdom into another, and he may be sued there although the cause of action arose not within such palatinate jurisdiction," citing *Peacock* v. *Bell* (1). So in *Gilbert's Histo Common Pleas*, 189, after pointing effect of the limited jurisdiction rior Courts it is stated, "therefore book of Saunders, 74, in the case *con and Best*" (meaning *Peac Bell*) (1), "makes a true distinc tween Counties Palatine and o ferior Courts; for the County Pa a General Court for all the sub that palatinate, and not merely causes arising within the palatina a debtor goes from the foreign i latine his objections go along wit much as if he went from one kin another, and if it were otherwise tinate jurisdiction would be a she asylum to debtors; for no process supreme prerogative process run and therefore it is truly determined the cause of action be out of the j tion, yet if the party be a subject palatine, as he is by coming i dominion, that the action there brought against him." All that i sary to give the palatinate Court tion is that the defendant shoul within the county so that the wri be served within its jurisdiction; only object of the writ is to con defendant to appear, and if he voluntarily that is sufficient, thou be no service at all. The appearan any irregularity in this respect— *Pract.* 218 (12 ed.); *Day's Comm Procedure Acts* (4 ed.) p. 50; *Smith* (2); *Stanniford* v. *Richm* There was no nullity in any proceedings, and when the def attorney instructed his agent t the appearance he instructed h to take out the summons to s the proceedings, shewing that aware at the time he appeared cause of action arose out of th diction. He therefore chose vol and with knowledge of the f bring himself within the jurisdi the Court.

Gully, in support of the rul cases which have been cited as to ance operating as a waiver of c

(1) 1 Saund. 74.
(2) 10 Exch. Rep. 717; s. c. 24 L (N.S.) Exch. 167.
(3) 13 W. R. 724.

isdiction apply only to cases under mmon Law Procedure Act, 1852, enables actions to be brought against subjects abroad. In those cases vice was not a nullity, and all vas sought by the defendant o set aside the appearance on und of irregularity. In the prese the County Palatine Court has isdiction where the cause of action outside its limits, unless the writ ed within its jurisdiction. Service the jurisdiction is a nullity, and be cured by waiver. That dishes the present case from *Forbes th* (2), where the service was not ty. *Morgan* v. *Johnson* (4), dethat service of notice of declara- a Sunday could not be waived by fendant accepting it.

MAN, J.—The Act of 29 Car. 2. c. es service on the Lord's Day void egal.]

he Act of 4 & 5 Will. 4. c. 62. s. 1, that the writ for the commence- f personal actions in the County e of Lancaster shall be served in ounty, and "shall not be served ere." Therefore, if the writ be elsewhere in violation of this sta- is a nullity.

TT, J.—In *Taylor* v. *Phillips* (5) vice of the writ on a Sunday was t capable of being cured by waiver, the statute of Charles enacts that rvice "shall be void to all intents rposes." KEATING, J.—Suppose it had been only issued in the prese, and the defendant had gone e County Palatine, and had apthere to the action without service.] might perhaps be considered a ctive service within the county.

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was said only with reference to se, which was that of a British residing out of the jurisdiction, which the writ issued was regular according to the statute, and had been properly served.

[KEATING, J.—Do you say the writ in the present case was void?

Not in its being issued, but in its being taken out of the county, it was then void. *Comyn's Digest*, title "Franchises," D 3, shews, in the instances there given, that the jurisdiction of the County Palatine of Lancaster is with respect to matters arising within the County Palatine.

KEATING, J.—I am of opinion that this rule should be discharged. The facts are that a writ was issued out of the Court of the County Palatine of Lancaster, and sent to the defendant's attorney, who resided out of the County Palatine, and the attorney being duly authorised to do so, as we must assume to be the case, entered an appearance for the defendant to the writ, and the question is whether the writ having been sent out of the County Palatine, and having not been served within the County Palatine makes the subsequent proceedings wrong? In other words does the appearance in the Court of the County Palatine waive objection to the jurisdiction, even though the service of the writ was such that the defendant was not bound to have appeared? I am of opinion that it does. It appears that the Court of the County Palatine is a superior Court, and has all the privileges of such within its jurisdiction, and this has been laid down in the passage which has been cited from *Bacon's Abridgement*, and in *Peacock* v. *Bell* (1), where the Court is put on the footing of a superior Court and within the rule, "that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which especially appears to be so." Now the case of *Forbes* v. *Smith* (2), which arose under the Common Law Procedure Act, 1852, s. 18, was the case of a British subject who had been served abroad, and having appeared to the action objected to the jurisdiction on the ground that the cause of action did not arise within the jurisdiction, and it was held that the appearance had waived any irregularity in the proceeding. There Martin, B., anticipates the distinction taken here by Mr. Gully, and says, "I think that even if a foreigner came before the Court and

(4) 1 Hy. Black. 628.
(5) 3 East 155.

stated that being in ignorance what course to pursue he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance." In the present case the writ seems to have been duly issued, and it was difficult for Mr. Gully to have given any answer to the question put to him during the argument, whether the objection to jurisdiction would not have been waived if, supposing the writ to have been properly issued, the defendant had said to the plaintiff's attorney, you need not take the trouble to serve me I will appear, and he had accordingly appeared. I think that in effect was what was done here, and that when the defendant's attorney entered the appearance he waived any irregularity of service.

BRETT, J.—Every Court must have jurisdiction over both the subject matter and the person brought before it. The objection taken on the part of the defendant in the present case amounts to this that the Palatine Court had no jurisdiction over either the subject matter or the person, on the ground that that Court has no jurisdiction over what does not arise within the County Palatine. If it could have been made out that the Palatine Court was an inferior Court Mr. Gully would have made out that the subject matter was not within its jurisdiction, but it must be taken on the authority of Saunders supported by *Bacon's Abridgement*, that the Court of the County Palatine is a superior Court. It has jurisdiction over what does not arise within its jurisdiction, and that shews it is a superior Court. Had it been proved that it had jurisdiction only over what arose within its jurisdiction, I should have thought that it had been made out that it was an inferior Court. Then the objection as to the want of jurisdiction over the subject matter having failed, it was contended that the Court had not jurisdiction over the person, because the writ was served out of the County Palatine, but in *Forbes* v. *Smith* (2) the Court of Exchequer adopted the argument of Willes, J., then counsel at the bar, that the Court may have jurisdiction over the person without service of the writ. that the person may not be co come before the Court if he h duly served, but if having no writ, although the service be i voluntarily appears, he waives larity in the mode by which he before the Court. I do not the Court had no jurisdictio subject matter at all the appear defendant would have given j Indeed I think it would not, b necessary to determine that point arises in this case.

DENMAN, J.—I also am of o this rule should be disch on both points. The case v. *Johnson* (3) is not applic decision in that case must ha the ground that the service day was not only an irregular illegality. Mr. Gully relied o Will. 4. c. 62. s. 1, as shewin service of a writ outside t Palatine was also an illegality I consider the statute and l matter with the light thro effect of appearance by the ca v. *Smith* (2) I do not think th out of the County Palatine illegal act as to prevent a wai a subsequent appearance. I a service of the writ is not ess that if the party appears it Court jurisdiction provided matter of the action is one the Court has jurisdiction. T case here, and therefore I c the Court that this rule sho charged.

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Rule d

This and the previous page, being only a single leaf, are published here temporarily, to ments in the case of Oulton *v.* Radcliffe. *They will be reprinted as the first two page signature* N *in the May Number.*

to jurisdiction apply only to cases under the Common Law Procedure Act, 1852, which enables actions to be brought against British subjects abroad. In those cases the service was not a nullity, and all that was sought by the defendant was to set aside the appearance on the ground of irregularity. In the present case the County Palatine Court has no jurisdiction where the cause of action arises outside its limits, unless the writ be served within its jurisdiction. Service outside the jurisdiction is a nullity, and cannot be cured by waiver. That distinguishes the present case from *Forbes* v. *Smith* (2), where the service was not a nullity. *Morgan* v. *Johnson* (4) decided that service of notice of declaration on a Sunday could not be waived by the defendant accepting it.

[DENMAN, J.—The Act of 29 Car. 2. c. 7, makes service on the Lord's Day void and illegal.]

So the Act of 4 & 5 Will. 4. c. 62. s. 1, enacts that the writ for the commencement of personal actions in the County Palatine of Lancaster shall be served in such county, and "shall not be served elsewhere." Therefore, if the writ be served elsewhere in violation of this statute it is a nullity.

[BRETT, J.—In *Taylor* v. *Phillips* (5) the service of the writ on a Sunday was held not capable of being cured by waiver, because the statute of Charles enacts that such service "shall be void to all intents and purposes." KEATING, J.—Suppose the writ had been only issued in the present case, and the defendant had gone into the County Palatine, and had appeared there to the action without service.]

That might perhaps be considered a constructive service within the county.

[BRETT, J.—Would it not be a waiver of service? KEATING, J.—In *Stanniford* v. *Richmond* (3) Crompton, J., put his decision on the ground that the defendant having appeared could not be allowed to object to the jurisdiction.]

That was only with reference to the particular case, which was that of a British subject residing out of the jurisdiction, and in which the writ issued was regular according to the statute, and had been properly served.

[KEATING, J.—Do you say the writ in the present case was void?]

Not as regards its issue, but being taken out of the county, it then became void. *Comyn's Digest*, title "Franchises," D 3, shews, in the instances there given, that the jurisdiction of the County Palatine of Lancaster is with respect to matters arising within the County Palatine.

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if a foreigner came before the Court, and stated that, being in ignorance what course to pursue, he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance." In the present case the writ seems to have been duly issued, and it was difficult for Mr. Gully to have given any answer to the question put to him during the argument, whether the objection to jurisdiction would not have been waived if, supposing the writ to have been properly issued, the defendant had said to the plaintiff's attorney, you need not take the trouble to serve me I will appear, and he had accordingly appeared. I think that in effect was what was done here, and that when the defendant's attorney entered the appearance he waived any irregularity of service.

BRETT, J.—Every Court must have jurisdiction over both the subject matter and the person brought before it. The objection taken on the part of the defendant in the present case amounts to this, that the Palatine Court had no jurisdiction over either the subject matter or the person, on the ground that that Court has no jurisdiction over what does not arise within the County Palatine. If it could have been made out that the Palatine Court was an inferior Court Mr. Gully would have made out that the subject matter was not within its jurisdiction, but it must be taken, on the authority of Saunders supported by *Bacon's Abridgement*, that the Court of the County Palatine is a superior Court. It has jurisdiction over what does not arise within its jurisdiction, and that shews it is a superior Court. Had it been proved that it had jurisdiction only over what arose within its jurisdiction, I should have thought that it had been made out that it was an inferior Court. Then the objection as to the want of jurisdiction over the subject matter having failed, it was contended that the Court had not jurisdiction over the person, because the writ was served out of the County Palatine, but in *Forbes* v. *Smith* (2) the Court of Exchequer adopted the argument of Willes, J. (then counsel at the bar), that the Court may have jurisdiction over the person without service of the writ. that the person may not be co come before the Court if he ha duly served, but if having no writ, although the service be in voluntarily appears, he waives larity in the mode by which he before the Court. I do not s the Court had no jurisdiction ov ject matter at all, the appearan defendant would have given ju indeed I think it would not; bu necessary to determine that a point arises in this case.

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Rule dis

Attorneys—Neal & Philpott, agents Lockett, Liverpool, for plaintiff; Cl agents for G. W. Hodgkinson, Stone, f

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1874. Jan. 14. } FREETH AND ANOTHER *v.* BURR.

Contract—Rescission, by one Party refusing to perform his Part—Sale of Goods to be delivered and paid for in Parcels.

The defendant contracted for the sale and delivery to the plaintiffs of 250 tons of pig iron at a certain price per ton; the iron to be delivered in two parcels of 125 tons each, and payment to be made fourteen days after delivery of each parcel. The whole of the first parcel was delivered, but only by instalments, and after repeated applications for it by the plaintiffs. As the price of iron was rising in the market, the plaintiffs refused to pay for the price of the first parcel until the rest contracted for was delivered, but there was no inability on their part to pay for the same:—Held, *that such refusal to pay, though it rendered the plaintiffs liable to an action, did not under the circumstances amount to a refusal to perform the contract so as to free the defendant from his obligation to deliver the rest of the iron.*

This was an action for breach of contract in not delivering to the plaintiffs the remaining half of 250 tons of pig iron, which they bought of the defendant, who traded under the name of Messrs. D. M. Burr & Co., according to the terms of the following bought note—

"London, E.C., November 28, 1871.

"Bought this day of Messrs. D. M. Burr & Co. 250 tons of pig iron, at 56*s.* per ton, alongside our wharf, Millwall. Half to be delivered in two weeks; remainder in four weeks. Payment, nett cash fourteen days after delivery of each parcel."

It appeared that the time for the delivery of the iron, as originally fixed by the contract, was waived by the plaintiffs, but the other terms of the contract remained in force. No iron was, however, delivered until the 18th of February, 1872, when the plaintiffs received from the defendant about ten tons. They wrote to the defendant complaining of the smallness of this lot, and requesting him to "give in a definite time for delivery of at least fifty tons, which must be delivered at once." In March two other lots were delivered, but not until after several applications had been made by the plaintiffs for delivery of the iron; and on the 12th of May, the balance of the 125 tons, the first half of the contract quantity, was delivered. On the 18th of May, the plaintiffs wrote to the defendant: "Do you intend to deliver the remainder, or shall we buy against you?" and the defendant replied to this on the 21st of May: "It is our intention to deliver remainder of pig iron, and do not wish you to buy against us."

Shortly afterwards the defendant applied to the plaintiffs for 352*l.* 15*s.* 10*d.*, the amount of the first half of the iron, according to the contract, but the plaintiffs refused to pay the same until the defendant had delivered the whole of the iron. Thereupon the defendant sued the plaintiffs for this sum, which they ultimately paid. No further iron, however, was ever delivered, and the defendant having refused to deliver any more, the present action was brought for the damages sustained by such non-delivery. The price of iron constantly rose from the time of the contract, and at the end of May, 1872, it was 80*s.* a ton and upwards.

The cause was tried before Brett, J., at the London Sittings after Hilary Term, 1873, when that learned Judge ruled that the refusal by the plaintiffs to pay for the first half of the iron contracted for did not relieve the defendant from his liability to deliver the residue, and a verdict was entered for the plaintiffs for 148*l.* 16*s.*, with leave to the defendant to move; pursuant to which leave a rule *nisi* was obtained, in Easter Term, 1873, to set aside such verdict, and to enter instead a verdict for the defendant, on the ground that the refusal of the plaintiffs to pay for the first parcel justified the defendant in breaking the contract and exonerated him from performing it; and further, that the non-payment of the price of the first parcel was ground for assuming that the plaintiffs were unwilling to perform their contract altogether.

Against this rule,

Watkin Williams and *E. Clark* appeared to shew cause, but the Court called on

Garth to support the rule.—The plaintiffs were by the terms of the contract to

pay the price of the parcel of 125 tons (half of the entire quantity) in fourteen days after it had been delivered, and their refusal to do so was a distinct refusal to perform their part of the contract, and entitled the defendant to treat the contract as rescinded. This is within the principle of *Hoare* v. *Rennie* (1), where the defendants agreed to buy of the plaintiffs 667 tons of iron, to be shipped in the months of June, July, August and September, in about equal portions each month, and to an action for not accepting the iron it was held a good defence that in the month of June the defendant shipped only twenty-one tons. In *Withers* v. *Reynolds* (2) the defendant had agreed to supply the plaintiff with straw till a certain time at the rate of three loads in a fortnight at 33*s*. per load, and the plaintiff had agreed to pay the defendant 33*s*. per load "for each load of straw so delivered on his premises." Several loads were delivered, and on the defendant demanding payment, the plaintiff paid for all but the last load, saying he should always keep one load in hand. Thereupon the defendant refused to supply any more straw; and in an action for the non-delivery the Court held that the true effect of the agreement was that each load was to be paid for on delivery, and that on the plaintiffs' refusal to pay for them the defendant was not bound to send any more. Those cases are precisely in point, and though in this case there was an extension of the time originally fixed by the contract for the delivery of the iron, the contract was not varied as to the right of the defendant to be paid for the price of half the quantity of iron contracted for in fourteen days after it had been delivered, and the plaintiffs' refusal to pay this was as unqualified as the refusal of the plaintiff in *Withers* v. *Reynolds* (2), and therefore justified the defendant in refusing to deliver the residue of the iron. *Hoare* v. *Rennie* (1) is recognised as law in *Bradford* v. *Williams* (3).

(1) 5 Hurl. & N. 19; s. c. 29 Law J. Rep. (N.S.) Exch. 73.
(2) 2 B. & Ad. 882.
(3) 41 Law J. Rep. (N.S.) Exch. 164; s. c. Law Rep. 7 Exch. 259.

[DENMAN, J.—In *Withers* v.
(2) there was that which was co
to amount to a statement by th
tiff that he would not perform
tract. Is there anything here m
non-payment, and is there any
that that justifies a rescission of
tract by the other side?]

Surely in saying that they wil
in fourteen days according to the
the contract, the plaintiffs do in
that they will not perform the
The case of *Simpson* v. *Crippin* (
to be against what is now conte
on behalf of the defendant. T
defendants had agreed to su
plaintiffs with from 6,000 to 8,0
coal, to be delivered into the
waggons, in equal monthly
during the period of twelve mo
plaintiffs having during the fir
sent waggons for 158 loads only
fendants treated the contract as
but the Court of Queen's Bench
the breach of the plaintiffs in ta
than the stipulated quantity du
first month did not entitle the de
to rescind the contract. That ca
ever, is distinguishable from the
as there there was a partial per
by the plaintiffs of the contract,
is very different from a refusal to
it at all.

LORD COLERIDGE, C.J.—The
arises on a contract relating to th
iron, which is as follows—"Bou
day of Messrs. D. M. Burr & Co.
of pig iron, at 56*s*. per ton, along
wharf, Millwall. Half to be del
two weeks; remainder in fou
Payment, nett cash fourteen d
delivery of each parcel." Now
of the case were these, namely, t
was no delivery in the terms of
tract of either parcel of the iron,
in fact the time for the delive
first parcel, namely, 125 tons, was
and such delivery did not take p
the 12th of May, 1872, and du
time the correspondence shews
plaintiffs were pressing the defe
delivery of the iron, and the

(4) 42 Law J. Rep. (N.S.) Q.B. 28
Rep. 8 Q.B. 15.

was constantly making excuses for its non-delivery. That the purchasers were anxious to have the iron is plain, both from the correspondence and from the fact that the market was rising. The first 125 tons were ultimately delivered by the 12th of May, 1872, and afterwards there was a demand by the defendant for payment of what was due for those 125 tons, and a refusal on the part of the plaintiffs with an application by them for the delivery of the other 125 tons. The defendant refused to deliver more, and this action has been brought for damages for such non-delivery. The question argued before us has been whether the refusal to pay for what was due in respect of the 125 tons on the 12th of May was such a refusal as to set the vendor free of the contract. It is true the matter was taken shortly at Nisi Prius, and we have not a full detail of all the circumstances, but this at all events appears, that there was an extension of time to the 12th of May, and a pressure by the purchasers for a completion of the contract on the part of the vendor. I mention this because I think that in cases of this sort where the question is whether one party to a contract has been set free by the other the real point is whether the conduct of the party relied on as setting the other free, does or not amount to an abandonment and refusal on his part to perform the contract, and I refer to this to explain what I believe is the true ground on which the cases on this subject have been decided. Non-delivery or non-payment may be evidence of such an act as to indicate an intention to refuse to perform the contract. That I think is the true ground on which *Hoare* v. *Rennie* (1) was decided. The Court of Exchequer thought that in that case where time was of the essence of the contract, and where by the non-delivery of part of the goods the whole object of the contract had been frustrated, such non-performance amounted to a rescission of the contract, and set the other party to it free. And that case was so put by the great authority of Crompton, J., in the subsequent case of *Jonassohn* v. *Young* (5), where he says it is to be supported on the ground that the breach frustrated the whole contract. Then in *Withers* v. *Reynolds* (2), where the action was for non-delivery of hay, a non-payment was held to put an end to the contract, because, as was said by Patteson, J., such non-payment was under the circumstances of that case an intimation that the purchaser did not intend to complete the contract, and on that ground the case was upheld by Wightman, J., in *Jonassohn* v. *Young* (5). There have been subsequent cases, but I do not propose to refer to them, because each depends on its own circumstances, but the true principle which governs them all is whether the act relied on as a rescission of the contract amounts to a refusal by the person doing the act to perform his part of the contract. In the present case my brother Brett held that this single act of refusal to pay, unattended by other circumstances, did not put an end to the contract, though it gave the other party a remedy by action, which remedy in the present case had been taken, and successfully. I think that such ruling of my brother Brett was right, and that, therefore, the rule which has been obtained should be discharged.

(5) 4 B. & S. 296; s. c. 32 Law J. Rep. (N.S.) Q. B. 385.

KEATING, J.—I agree with the judgment of the Lord Chief Justice. It is not the mere omission or even refusal to do something which by the terms of the contract one of the parties was bound to do that absolves the other party to the contract, but there must be an absolute refusal to perform his part of the contract. Looking to the circumstances of the present case, a rising market, a non-delivery by the defendant, then a delivery or rather a series of deliveries by him after the time contracted for the delivery had passed, a refusal by the plaintiffs to pay, but accompanied with remonstrances against the failure to deliver and requiring the defendant to deliver within a certain time to be fixed by them, I think one cannot assume an intention on the part of the plaintiffs not to perform the contract. They ought to have paid, and their not doing so rendered them liable to an action which was successfully brought, and under it the money was paid. On the refusal to pay there was not only no refusal by the plaintiffs to perform the contract, but

no inability to do so, and the defendant had no right to treat the contract as rescinded. The rule in this case must be discharged.

DENMAN, J.—I am of the same opinion. What my brother Brett ruled at the trial was that the refusal to pay for the first parcel did not put an end to the contract and exonerate the defendant from delivering the rest of the iron, and he gave leave to the defendant to enter a verdict for him if such ruling was wrong. Now was that ruling wrong? I apprehend that it was quite right on the authority of the case of *Withers* v. *Reynolds* (2). That case did not expressly decide that a single act of non-payment might be evidence of a refusal to perform the contract. According to Patteson, J., in that case, "if the plaintiffs had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw." What were the facts in that case? The plaintiff, who was to pay for each load of straw delivered, was in arrear for several loads, and upon the defendant asking for the amount the plaintiff tendered the price of all the straw delivered except the last load, saying that he should always keep one load in hand. That was an express refusal to perform his part of the contract, because the contract gave him no such power. Here there was no such refusal, and according to *Withers* v. *Reynolds* (2) the learned Judge was right in holding at the trial of the present case that the refusal to pay for the first parcel of iron did not prevent the right of the plaintiffs to have the rest of the iron delivered. I think the defendant was still bound to perform his part of the contract notwithstanding the isolated refusal by the plaintiffs to pay for the first parcel.

Rule discharged.

Attorneys — Payne & Nelson, for plaintiffs
Evans & Co., for defendant.

1874. Jan. 29. } NEWELL *v.* VAN PRAAGH.

Debtor and Creditor—Bankruptcy [illegible] 1869, 32 & 33 *Vict. c.* 71. *s.* 126—*C*[illegible] *position—Revivor of Creditor's Rights* [illegible] *Non-payment of Composition—Debtors* [illegible] 1869, 32 & 33 *Vict. c.* 62. *s.* 5—*Comm*[illegible]

The non-payment by a debtor of a [illegible] *position according to the terms of a re* [illegible] *tion, passed pursuant to section* 126 *o*[illegible] *Bankruptcy Act*, 1869, *revives not onl*[illegible] *debt but also the rights and remedies* [illegible] *creditor in respect thereof as they* [illegible] *have existed if no such composition* [illegible] *been agreed to.*

Therefore, where after a Judge's [illegible] *had been made under the Debtors Act*, 1[illegible] 86[illegible] *for the payment of a judgment debt b*[illegible] *stalments, the judgment debtor took pro*[illegible] *ings for liquidation under the Bankr*[illegible] *Act*, 1869, *and a resolution binding o*[illegible] *judgment creditor was passed accordi*[illegible] *s.* 126 *to accept a composition, an*[illegible] *debtor subsequently failed to pay the* [illegible] *position according to the terms of th*[illegible] *solution, it was held that the judg*[illegible] *creditor was entitled to proceed upon* [illegible] *Judge's order for the payment of the* [illegible] *by instalments as if there had been no* [illegible] *position, and accordingly to apply u*[illegible] *s.* 5 *of the Debtors Act*, 1869, *for* [illegible] *debtor's committal in case of his not* [illegible] *ing such instalments when he had* [illegible] *means of paying.*

The plaintiff was a judgment cre[illegible] of the defendant, and there bein[illegible] balance of 84*l.* 5*s.* 6*d.* of the judg[illegible] debt owing to the plaintiff on the 4t[illegible] July, 1872, an order was made on [illegible] day by Cleasby, B., under the Deb[illegible] Act, 1869, for the defendant's payme[illegible] such balance by monthly instalmen[illegible] 7*l.* 10*s.* each. After paying three of t[illegible] instalments the defendant on the 11t[illegible] October, 1872, filed a petition in [illegible] London Bankruptcy Court for the liq[illegible] tion of his affairs under the Bankru[illegible] Act, 1869. On the 9th of Novembe[illegible] first general meeting of the defend[illegible] creditors was held, when they pas[illegible] resolution agreeing to accept a comp[illegible] tion of 2*s.* in the pound payable by [illegible] instalments at four and eight mo[illegible]

respectively after the registration of such resolution. This resolution was duly confirmed at a second meeting, and was registered on the 25th of November, 1872. The plaintiff's debt was inserted amongst those of the other creditors in the statement of debts produced at the meeting. The first instalment became due on the 26th of March, 1873, but was not paid or tendered to the plaintiff, and a summons was afterwards heard by Martin, B., at chambers, for the committal of the defendant under the Debtors Act, 1869, for non-payment of the instalments ordered to be paid by the said order of Cleasby, B., some proof being given of the ability of the defendant to pay. The learned Judge referred the matter to the Court, upon which in the course of this Term a rule was accordingly obtained calling on the defendant to shew cause why he should not for default in payment of 61*l.* 15*s.* 6*d.*, the amount remaining of the instalments so ordered to be paid by the order of Cleasby, B., be committed to prison for six weeks, or until he should pay the said instalments with costs, &c.

Against this rule,

Croome now shewed cause.—The 126th section of the Bankrupt Act, 1869 (32 & 33 Vict. c. 71), makes the provisions of a composition, accepted as this was by a resolution of creditors, binding on all the creditors whose names and debts are shewn in the debtor's statement, and as the plaintiff's name with the amount due to him was so shewn the resolution became binding on him.

[*F. M. White*, for the plaintiff, admitted this.]

Then the only other point is whether in default of payment of the composition the creditor is remitted to all the rights he would have had if there had been no such composition. After *Edwards* v. *Coombe* (1) and *Re Hatton* (2), it must be admitted that the original right of action is revived where the debtor has failed to pay or tender the composition within the time agreed on, but that is all that those cases decide. The Judge's order under the Debtors Act, 1869, was not suspended but was gone by the agreement to accept a composition, and though the right of action may exist, so as to be capable of being revived, that is not the case with the order, and the creditor can no longer proceed upon it. [He then argued that the ability of the defendant to pay was not sufficiently shewn by the affidavits.]

F. M. White, in support of the rule.—Provided that it be shewn that the defendant has the means of paying, which the affidavits do here, then the order for committal ought to be made. *Edwards* v. *Coombe* (1) and *Re Hatton* (2) shew that default in non-payment of the composition revives the debt.

[BRETT, J.—Did the order of Baron Cleasby transfer the judgment debt into a debt payable by instalments? and if so, was that the debt or was it the judgment debt which ought to have been scheduled by the debtor?]

Whether it was the judgment or the debt founded on the Judge's order which ought to have been scheduled, it was equally revived in the event which has occurred. The 5th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), enables any Court to "direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments;" and then the early part of that section gives power to commit to prison "any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court." Then the proceedings by way of composition under section 126 of the Bankruptcy Act, 1869, operate as a suspension of the creditor's rights; but on default of the debtor to comply with the terms of the composition the debt, as it has been held, is revived, then why not the order for the payment of it? The order for the payment by instalments is one made for the benefit of the debtor, for he was liable in the judgment to pay it all at once. The latter part of the 5th section of the Debtors Act, 1869, states that no imprisonment under it is to

(1) 41 Law J. Rep. (N.S.) C.P. 202; s. c. Law Rep. 7 C.P. 519.

(2) 42 Law J. Rep. (N.S.) Bankr. 12; s. c. Law Rep. 7 Chanc. App. 723.

"operate as a satisfaction or extinguishment of any debt," or to deprive the creditor of his right to issue execution against the goods. If the imprisonment for not obeying the order is not to satisfy the debt, *a fortiori*, the order does not. Both debt and order remain.

He was then stopped by the Court.

LORD COLERIDGE, C.J.—I am of opinion that Mr. White is entitled to have this rule made absolute. The facts of the case are these: The plaintiff having recovered a judgment against the defendant for a debt which was owed to him, Baron Cleasby made an order that the amount of the judgment debt should be paid by monthly instalments of 7*l.* 10*s.* each. Three of such instalments were paid, and afterwards proceedings were taken by the defendant for the liquidation of his affairs under section 126 of the Bankruptcy Act, 1869. A meeting of his creditors was held, at which the plaintiff attended; and a resolution was come to, from which, however, the plaintiff dissented, that a composition of 2*s.* in the pound on his debts should be paid by the defendant by two instalments. Now as regards the plaintiff, default was made in the payment of the first instalment, and immediately afterwards hostile proceedings were taken by the plaintiff, and the course which has resulted in the present rule was set in motion. I state this because if, before anything had been done by the plaintiff, payment of the instalment had been tendered to him, though after it was over due, it might have been contended that the composition was still available; but it is unnecessary to determine this point because here these proceedings were immediately taken on the non-payment of the first instalment, and Baron Martin has referred to the Court the question whether the Court should make an order for enforcing the payment of the rest of the instalments ordered to be paid by Baron Cleasby.

The question before us is whether, under these circumstances, the right of the creditor was revived so as to enable him to pursue the remedy he previously had, but which had been gone for the time by his being a party (though an unwilling one) to the com This depends on the true con of section 5 of the Debtors A (32 & 33 Vict. c. 62), and sec of the Bankruptcy Act, 1869 (Vict. c. 71). That latter enactm down the proceedings to be liquidating the affairs of a de composition, and the 7th parag that section is as follows—"T visions of a composition accept extraordinary resolution in purs this section shall be binding o creditors whose names and a and the amounts of the debts whom are shewn in the statemen debtor produced to the meetings the resolution has passed, but affect or prejudice the right of a creditors." Therefore, by the r accepting the composition the pl the present case was bound. Th says that the provisions of t position shall be binding on t tor, but I cannot find that it a says that the composition sha guish the rights of the creditor asmuch as it is binding on rights are, at all events, suspende ever, the terms of the composit not pursued by the debtor; an cases which have been decided, *Edwards* v. *Coombe* (1), and in (2), it has been held that it is mere agreement to accept a con but the payment of such con which extinguishes the rights a dies of the creditor. In *Edwards* (1), where there had been an ment to liquidate the debtor's a composition payable by inst and failure had been made by t in the payment of one of the inst it was distinctly held by this C the right of the creditor to ma action for his debt, which had b pended by the agreement for position, was revived. That ca under the consideration of th Justices in the case of *In re H* In that last case a resolution passed by the creditors, agreein cept a composition payable by stalments, and default having be in payment of the second instal

of the creditors brought an action for the balance of his debt, and thereupon an application was made to restrain such action by an injunction, which came before the Lords Justices by way of appeal. The point, therefore, in that case was identically the same as that in *Edwards* v. *Coombe* (1). In *Edwards* v. *Coombe* (1) this Court held that the action might be brought, and in *In re Hatton* (2) the Lords Justices refused to restrain the action, and approved of the decision in *Edwards* v. *Coombe* (1). The result of those two cases is, that, as far as the right of action is concerned, a default in payment of the composition remits the creditor to such right. The question which is now before us is not exactly the same as it was in those two cases, but I apprehend that the principle which governs them carries our decision in the present case.

Now the first part of the 5th section of the Debtors Act, 1869, enacts that "subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court;" and proviso 2 of that section provides "that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." Further on in that 5th section, there is a clause that "any jurisdiction by this section given to the superior Courts may be exercised by a Judge sitting in Chambers, or otherwise in the prescribed manner;" and a clause that "for the purposes of this section, any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments." Now here there had been an order for the payment of the judgment debt by instalments, which order the Judge was, by the distinct words of the Act, empowered to make. Such debt was due, and a statutable remedy was prescribed by this section. But the remedy, as well as the debt, was suspended by the agreement to accept a composition, and it would have continued suspended if the terms of the composition had been pursued. They were not, however, pursued, and consequently the creditor was, I think, remitted to the state in which he would have been if there had not been any agreement for a composition.

I may observe also that the 5th section of the Debtors Act, 1869, provides that "no imprisonment under this section shall operate as a satisfaction or extinguishment of the debt," "or deprive any person of any right to take out execution against the lands, goods," &c. In the present case, supposing no order had been made for payment of the debt by instalments, and the judgment had remained unsatisfied, it would seem from the two cases of *Edwards* v. *Coombe* (1) and *re Hatton* (2), that after default in payment of the composition the creditor would have had a right to issue execution for the full amount, and it seems to follow that he cannot be the less entitled to enforce his statutable remedy because the judgment is to be satisfied, not by one payment but by several payments. With respect to the debtor having the means of paying, that is a matter of fact only, and being satisfied from the affidavits that he had abundant means of paying these instalments, I am of opinion, both on the law and facts, that this rule should be made absolute.

KEATING, J.—I am of the same opinion, and the reasons for our judgment having been so fully expressed by the Chief Justice, in which I entirely concur, I do not desire to add anything.

BRETT, J.—The first question seems to me to be this, namely, under the circumstances of this case, can a Court or Judge on proof of ability to pay make an order for the defendant's committal? and the second question is, should the Court in this case make such an order?

The first question depends on what is the true construction of the Bankruptcy

Act, 1869, and the Debtors Act, 1869. The circumstances are that the plaintiff had become a judgment creditor of the defendant for a debt, of which there was due the balance of 84*l.* 5*s.* 6*d.*, and that the plaintiff went before a Judge and got an order from him ordering the defendant to pay such balance by instalments. Some of these were paid, and then the defendant called a meeting of his creditors under the provisions of the Bankruptcy Act, 1869, for liquidation by arrangement, and an agreement to accept a composition of two shillings in the pound payable by instalments was entered into, which was binding on all the creditors. When the first instalment of the composition became due the defendant did not pay it, at all events he did not pay it to the present plaintiff, and thereupon the plaintiff went again before a Judge and applied for the committal of the defendant, on shewing at that time an ability on the part of the defendant to pay the overdue instalments ordered to be paid by the order of Baron Cleasby. Now, as to the construction of the Bankruptcy Act, 1869, it seem to me that the case of *Edwards* v. *Coombe* (1) shews that when a resolution for a composition has been come to by the creditors, under the 126th section of that Act, the creditor cannot for a time sue the debtor on the original debt, but that when there has been a failure to pay the agreed composition he can proceed on the original debt. That is what was said in that case was the construction of that statute, and in *In re Hatton* (2) the Lords Justices acted on that case, and also expressed their opinion that that was the true construction of the statute. I should not have said this, especially after the full manner with which my Lord has dealt with the matter, if it had not been for the case of *Slater* v. *Jones* (3), which has been handed up to me since the argument had concluded, and which was a more recent case than those which have been cited. In *Slater* v. *Jones* (3) there had been a resolution to accept a composition passed by the creditors under this 126th section of the Act, and before the time for the payment of the composition the creditor brought his action against the debtor for the original debt, and the debtor pleaded the resolution for the composition in ba The Court of Exchequer held that a go plea, and the Judges of that Court see to have been of opinion that if *Edwar* v. *Coombe* (1) decided that the remedy the original debt was suspended by the solution, then it would follow according the Common Law doctrine that the rem for such debt was entirely gone. But those Judges said that they did not th it necessary to differ from *Edwards* *Coombe* (1) because they took it as a cision on the Bankruptcy Act, 1869, Bramwell, B., said—"I think, there we can assent to these two decisions," is to say, *Edwards* v. *Coombe* (1) and *In* *Hatton* (2), "and yet hold the pleas go thus—either the resolution is equivale to an accord and satisfaction defeasib by matter subsequent, and when t event happens whereby it is defeate (*i.e.* the debtor's default) a cause of actio accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that in case he fails to pay the composition at the time agreed, he will pay the whole debt." It seems to me that we need not disagree with *Slater* v. *Jones* (3), and that we may take *Edwards* v. *Coombe* (1) as a decision only on the construction of the Bankruptcy Act, 1869, and not on the suspension of a right of action at common law, and that according to it the construction of that statute is that the creditor is not able to sue until the composition be due, and that the debt is barred when the composition is paid, but that if it be not paid when due the creditor is remitted to his right to the original debt as if there had been no composition resolution at all. If that be so, then on non-payment of the composition the parties are in the same position as if the resolution had not been passed. Now what was that in the present case? The plaintiff was a judgment creditor with a right to issue execution against the goods of the debtor for the amount, but he had also another remedy,

(3) 42 Law J. Rep. (N.S.) Exch. 122; s. c. Law Rep. 8 Exch. 186.

which was to apply to a Judge for an order to commit the debtor to prison, and he had so applied, and the Judge had ordered the debtor to pay the debt by instalments. Now, both that last-mentioned order and the judgment were in force at the time the composition resolution was passed, and therefore if the creditor be remitted to his former rights it follows that he is remitted to his right to act on that Judge's order. There is the provision in section 5 of the Debtors Act, 1869, that no imprisonment under it is to operate as a satisfaction or extinguishment of the debt, by which, as I understand it, though the debtor be imprisoned under this section, yet if he has property the imprisonment is not to prevent an execution being issued against his goods. It follows, then, that both the judgment debt and the remedy for its recovery are revived, and that being so, that the creditor has a right to go before a Judge, and on shewing the ability of the debtor to pay to ask for an order to commit. Therefore on such ability being shewn I think this Court has power to make the order to commit.

Then, next, should the Court do so? That depends on a question of fact upon which I entertain no doubt, and as to that I think the Court should make the order, for the reasons which have been given by my Lord.

DENMAN, J.—The defendant in this case made default in paying the judgment debt, and a learned Judge made an order for the payment of such debt by instalments, which order is still in force except so far as anything shewn in this case may have had the effect of rescinding it. There is before us an affidavit of means, and the defendant in the absence of anything to the contrary ought to be committed for not complying with the terms of that order. It is said on the part of the defendant that he should not be committed because there had been a composition resolution passed according to the 126 section of the Bankruptcy Act, 1869, binding on the creditors, and that the plaintiff as such creditor was bound by it. It is true that there was such résolution, and that the same was so binding on the creditors, but it is equally true that it was binding on the debtor, and that there were reciprocal duties by both parties. Now one of the terms of the resolution was that an instalment of the composition should be paid on a certain day. That was not paid, and under such circumstances it has been held by this Court in a case which was approved of in the Court of Chancery, that the right of action is revived, and I do not collect from the case of *Slater* v. *Jones* (3), that those two cases are overruled by that of *Slater* v. *Jones* (3). Now the question is whether the principle in *Edwards* v. *Coombe* (1) and *In re Hatton* (2) applies here, and I apprehend that it does. Whether it is strictly a remitter to or a revival of the rights of the creditor, I think it is immaterial to consider, for I think the doctrine of estoppel applies, and that when the defendant neglects to perform his part of the composition resolution it does not lie on him to say that he can by the composition resolution defeat the right of the plaintiff. There is an order in force, and for not obeying that order the defendant is liable to be committed unless he can take advantage of the composition resolution. I do not think he can do so under the circumstances which have occurred, and that therefore this rule should be made absolute.

After the foregoing judgments had been delivered,

LORD COLERIDGE, C.J., added.—In consequence of my attention having been called to *Slater* v. *Jones* (3), I wish to say that I do not differ from the decision in that case, because, as I understand it, the Court of Exchequer do not put its judgment on the ground that the composition resolution so suspends the remedy as to extinguish the original right of the creditor, but on what they think is the true construction of the Bankruptcy Act, 1869, by which, if the terms of the composition resolution are not adhered to, the creditor is remitted to his rights. That seems to be the view of the Chief Baron, who says—"I see no difficulty, therefore, in holding that the present actions will not lie, although in a certain event the original debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for

the debt, and yet the same debt could be afterwards sued for if the certificate were set aside for fraud; or again, just as no action can be successfully brought for the price of goods for which a bill of exchange has been given whilst the bill is running, and yet the price can be sued for after the bill has been dishonoured."

KEATING, J.—I also may add that there is nothing in *Slater* v. *Jones* (3) which at all conflicts with the cases of *Edwards* v. *Coombe* (1) and *In re Hatton* (2).

Rule absolute (4).

Attorneys—Arkcoll & Jones, for plaintiff; F. E. Brown, for defendant.

1874. Jan. 17. { AUSTIN *v.* THE BOARD OF GUARDIANS OF THE PARISH OF ST. MATTHEW, BETHNAL GREEN.

Corporation — Board of Guardians — Contract not under Seal—Master's Clerk—Inferior Servant—Immediate Necessity.

The clerk to the master of a workhouse is not an inferior servant, nor is his nomination a matter of immediate necessity, and therefore his appointment by a board of guardians being a corporation by 5 *&* 6 *Will.* 4. *c.* 69. *s.* 7, *ought to be under their common seal.*

The defendants, who were a corporate body under 5 *&* 6 *Will.* 4. *c.* 69. *s.* 7, *appointed the plaintiff clerk to the master of a workhouse; during his tenure of office he was discharged; his appointment was not by deed. He then sued for a wrongful dismissal, and the jury found in his favour:* —Held, *that the action would not lie, and that the defendants were entitled to verdict entered for them on the gro the plaintiff's appointment was n seal.*

The first count of the declarati that in consideration that the would enter into the service of fendants, and serve therein for a y October 28, 1872, in the capacity ter's clerk, at the wages of 52*l.* pe with board and lodging, the de promised the plaintiff to retain hi said service in the capacity an terms aforesaid during the said y the plaintiff entered into the saic in the capacity and on the tern said, and so continued therein fo of the said year, and until the l the said promise hereinafter alle was always ready and willing to in the same service during the re of the said year, whereof the de always had notice. Yet the de before the expiration of the s dismissed the plaintiff from the vice and refused to retain the therein for the remainder of the s Whereby the plaintiff was depriv wages and profits and board and which he would have derived fro retained in the said service, and and will be obliged to provide with board and lodging in lieu which the defendants had so as agreed to give him, and was o put to and incurred great expe remained for a long time une and was and is greatly damni injured.

The second count stated that deration that the plaintiff wou into the service of the defenda serve them until the service shou termined as hereinafter mentione capacity of master's clerk, at tl of 52*l.* per annum, with board a ing, the defendants promised the to retain him in the said servic capacity and on the terms afores the expiration of a reasonable not given by the plaintiff or the defe the other or others of them to d the said service; and the plaintif into the said service in the cap

(4) It may be observed that in *Goldney* v. *Lording* (42 Law J. Rep. (N.S.) Q.B. 103), the Court of Queen's Bench expressly acted on and followed the cases of *Edwards* v. *Coombe* and *In re Hatton*, but by some oversight *Goldney* v. *Lording* was not brought to the attention of the Court in *Newell* v. *Van Praagh*.

in the terms aforesaid, and so continued therein for a long time, and until the breach of the said promise hereinafter alleged, and was always ready and willing to continue in the said service until the said service should be determined as aforesaid, whereof the defendants always had notice. Yet the defendants without any such notice as aforesaid having been given by either the plaintiff or the defendants to the other or others of them to determine the said service, dismissed the plaintiff from the said service, and refused to retain the plaintiff therein until the said service should be so determined as aforesaid. Whereby the plaintiff was deprived of the wages and profits and board and lodging which he would have derived from being retained in the said service, and has been and will be obliged to provide himself with board and lodging in lieu of that which the said defendants agreed to give him, and was otherwise put to and incurred great expense, and remained for a long time unemployed, and was and is otherwise greatly damnified and injured.

The defendants traversed the promises alleged in the first and second counts; and the plaintiff joined issue thereon.

The cause was tried before Denman, J., at the Guildhall, in the city of London, and, owing to the decision of the Court, it is necessary to state only the following facts—

The defendants were a corporation, constituted under 5 & 6 Wm. 4. c. 69. s. 7, and 5 & 6 Vict. c. 57. s. 16, and the plaintiff alleged that he had been nominated by them to the office of clerk to the master of Bethnal Green Workhouse. The duties attached to it consisted in keeping the books of the master, and the salary was to be 52*l.* a year, with board and lodging. The plaintiff failed to prove that he had been appointed under the defendants' common seal.

The jury found a verdict for the plaintiff for 22*l.* 10*s.*, leave being reserved to the defendants to move to enter the verdict for them on the ground that the plaintiff was not nominated by deed.

A rule having been obtained accordingly,

Warton and Poulter shewed cause.—It was unnecessary for the plaintiff to be appointed under seal. The old doctrine, that corporations can contract only under their common seal, has been much restricted in modern times—*The South of Ireland Colliery Company* v. *Waddle* (1). The plaintiff was merely a servant, and in *Horn* v. *Ivy* (2), "it was agreed that a corporation might employ one in ordinary services without deed, as to be butler." In *Com. Dig.*, Franchises, F. 13, it is said that "a corporation, which has a head, may give a personal command, and do small acts without deed; as it may retain a servant, a cook, butler, &c." The same doctrine is stated in *Smith's Master and Servant*, 18 (3rd ed.). The operation of this exception to the general rule is not confined to actions of contract, for in *The Eastern Counties Railway Company* v. *Broom* (3) Patteson, J., with the concurrence of the other Judges sitting in the Court of Exchequer Chamber, said—"It has been decided many years ago that a corporation may be liable in tort for the acts of their servants, although their authority be not under seal." In *Dyte* v. *The St. Pancras Board of Guardians* (4), the Court of Exchequer held that the appointment by a corporation, such as a board of poor-law guardians, of a person to be medical officer to the corporation for any fixed or definite period of time, ought to be under seal; but a medical officer cannot be considered an inferior servant; he is a man of superior education, and holds a much more important position than a clerk to the master.

Dixon in support of the rule.—It is admitted that a corporation may nominate an inferior servant without seal; but the plaintiff was to hold a position of some importance in the defendants' service, and therefore he ought to have been appointed by deed—*Arnold* v. *The Mayor of Poole* (5), *Diggle* v. *The London and Blackwall*

(1) 37 Law J. Rep. (N.S.) C.P. 211: in Ex. Ch. 38 Law J. Rep. (N.S.) C.P. 338.
(2) 1 Vent. 47.
(3) 6 Exch. Rep. 314; s. c. 20 Law J. Rep. (N.S.) Exch. 196.
(4) 27 Law Times Rep. N.S. 342.
(5) 4 Man. & G. 860; s. c. 12 Law J. Rep. (N.S.) C.P. 97.

Railway Company (6), *Finlay* v. *The Bristol and Exeter Railway Company* (7). The appointment of the plaintiff was not a matter of immediate necessity: his office could not be created without the consent of the Local Government Board, which is now substituted for the Poor Law Commissioners and the Poor Law Board by the statutes 12 & 13 Vict. c. 103. s. 21, and 34 & 35 Vict. c. 70. s. 2. By the provisions of 4 & 5 Will. 4. c. 76. s. 15, the Poor Law Commissioners had power to make rules and orders; and the consolidated order as to parishes, dated December 8, 1847, art. 153, directs the appointment by the guardians of certain officers, including the master of the workhouse, "and also such assistants as the guardians, with the consent of the Commissioners, may deem necessary for the efficient performance of the duties of any of the said offices." The condition, that the Local Government Board shall consent to the creation of the office, shews that the appointment thereto is not a matter of urgent necessity. The duty of the master's clerk was to keep the master's books: he must therefore be a man of education and skill.

[He was then stopped.]

Lord Coleridge, C.J.—The plaintiff sues for a wrongful dismissal, and according to the evidence he was nominated by the defendants as assistant to the master of Bethnal Green workhouse, and his duties consisted in keeping the books of the master of the workhouse. This employment required the exercise of a considerable amount of skill and ability. At the trial before my brother Denman the objection was taken that the plaintiff was nominated without a deed to the office which I have mentioned, and that the action could not be sustained without proof of an appointment under the defendants' common seal; and although other matters might be relied upon, it is only necessary to consider this question.

The defendants are a corporate body under 5 & 6 Wm. 4. c. 69. s. 7, and pur-

(6) 5 Exch. Rep. 442; s. c. 19 Law J. Rep. (N.S.) Exch. 308.

(7) 7 Exch. Rep. 409; s. c. 21 Law J. Rep. (N.S.) Exch. 117.

suant to that statute they ma common seal, by which it is com them to express the determin which they have arrived, and th proper mode of signifying their a contract. The defendants re this doctrine, and on their behal been argued that a deed was instrument whereby they cou themselves to employ the plaint the terms stated in the declaratio general rule is clear, and for m poses a corporation can contract its common seal, but upon this rule certain exceptions have been the principles upon which these ex rest are conveniently stated in v. *The Imperial Gas Light and Co pany* (8). The judgment of the Queen's Bench was delivered b Denman, C.J., and he specifies tainer by parol of an inferior serv exception to the general rule, a act which need not be authentic the common seal. The statemen doctrine by the Court of Queen's was afterwards approved by the Exchequer in *The Mayor of Ludlow ton* (9). The two Courts were a to both the rule of law and the ex and their decisions are entitled weight. The question is, are we sider the plaintiff an inferior serv may be retained by a corporation deed? He was clerk to the m the workhouse, and his appointm quired him to discharge the attached to an office of some imp for it could not be constituted wit consent of the Local Governmen It is very difficult to lay down a ral rule determining who is or an inferior servant. Many cas been brought under our notice, services mentioned in all the cas have been different from those to formed by the plaintiff in the action. The question, whether t to the master of a workhouse oug appointed under seal, does not a have been ever decided. It is unn to say more than this, namely, th

(8) 6 Ad. & E. 846; s. c. 7 Law J. Q.B. 118.

k we ought to hold that the plain-
ce falls within the exception which
nentioned.

NG, J.—I concur in the judgment
ny Lord has pronounced, and I
wish to refer to *The Mayor of Lud-
harlton* (9) as a conclusive autho-
our decision. That case appears
proved of in 1 *Wms. Saund.* 616
1), where it is stated that "the
f Exchequer laid down that the
ns to the general rule that a cor-
can only bind itself by deed are
to—First. Cases so constantly re-
or of so small importance, or so
mitting of delay, that to require,
such case, the previous affixing
al, would be greatly to obstruct
ry day ordinary convenience of
corporate, without any adequate
n which instances the head of the
ion is considered as delegated by
of the members to act for them.
The instances above mentioned of
corporations." I think that this
binds us, and in my opinion a
guardians, being a corporation,
point a clerk to the master under

N, J.—At the trial I should have
d the plaintiff if the defendants'
had insisted upon this objection;
never preferred to take their
f getting a verdict. But although
have found for the plaintiff, I
defendants entitled to succeed
tion; the defendants being a cor-
are in most cases able to contract
deed, and I think that the ap-
nt of a clerk is not an instance
corporation can act without its
seal. There would have been
difficulty in nominating the
by deed.

Rule absolute.

—T. J. Holmes, for the plaintiff; W.
rd, for the defendants.

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e. & W. 815; s. c. 10 Law J. Rep. (N.S.)

1874. Jan. 23. } MAUDE *v.* LOWLEY (NO. 1).

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60)—*Rule* 6—*Form of Particulars—Time for Delivery of Particulars.*

A petition having been presented on the ground of corrupt practices against the election of the respondent as town-councillor, and the 3rd of February having been fixed for the trial thereof, an order was made on the 16*th of January at chambers directing the petitioners within one week to deliver particulars of the persons alleged to have been bribed and treated, "by whom, when and where;" of the persons alleged to have been retained and employed as canvassers, "by whom, when and where;" and of persons to whom money was paid on account of conveyance of voters to the poll, "by whom, when and where:"*—Held, *that the order ought to be varied by extending the time for the delivery of the particulars to the* 27*th of January, one week before the trial, and by inserting the words, "as far as is known," before the words, "by whom, when and where," wheresoever the latter words occurred in the order.*

This was a petition under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), arising out of an election of a councillor for the North Ward of the municipal borough of Leeds.

The following were the material paragraphs—

"2. And your petitioners state that the election was holden on the 4th day of December A.D. 1873, when James Lowley and Thomas Greene were candidates, and that James Lowley has been, in the usual manner, declared to be duly elected.

"3. And your petitioners say that the said James Lowley was, by himself and by his agent or agents, guilty of bribery before, during and after the said election, whereby the said election of the said James Lowley was void.

"4. And your petitioners further say that the said James Lowley was, by himself and by his agent or agents, guilty of treating before, during and after the said

election, whereby the election of the said James Lowley was void.

"5. And your petitioners further say that the said James Lowley did personally retain and employ persons who were included in the register for the said ward of the said borough as burgesses for payment and reward at the above election as canvassers for the purpose of the said election, whereby the election of the said James Lowley was void.

"6. And your petitioners further say that the agents or agent of the said James Lowley did, with his knowledge and consent, retain and employ persons who were included in the register of the said ward of the said borough as burgesses for payment and reward at the above election as canvassers for the purpose of the said election, whereby the election of the said James Lowley was void.

"7. And your petitioners further say that the said James Lowley did personally pay and agree to pay money on account of the conveyance of voters to and from the poll at the said election, whereby the election of the said James Lowley was void.

"8. And your petitioners further say that the agents or agent for the said James Lowley did, with his knowledge and consent, pay and agree to pay money on account of the conveyance of voters to and from the poll at the said election, whereby the said election of the said James Lowley was void.

"9. And your petitioners further say that there was such general corruption, bribery and treating at the said election as would by the common law of Parliament avoid an election of members to serve in parliament for a Parliamentary borough."

On the 16th of January, 1874, Pollock, B., ordered, "That the petitioners or their attorney or agent do within a week deliver to the respondent or his attorney or agent particulars of all the persons alleged to have been bribed and treated, by whom, when and where; and of all the persons alleged to have been retained and employed as canvassers, and by whom, when and where; and of all persons to whom money was paid or agreed to be paid on account of the conveyance of voters to the poll, and by whom, and where such moneys were p agreed to be paid" (1).

The trial of the petition was fix the 3rd of February, 1874.

A rule having been obtained t the above order,

Arthur Charles shewed cause.— the petitioners complain that the directs them to deliver the parti at an unreasonably early time the trial; for the respondent, it i tended, that this is a matter upon the learned Baron, sitting at cha has exercised his discretion, which not to be interfered with by the Secondly, the petitioners complai they are by the order to be compel state, "by whom, when and where illegal practices have been comm But the order is perfectly regula within the discretion. *Beale* v. *Smi* may be relied upon by the petiti but it is in truth an authority fo respondent, for it shews that a J discretion ought not to be over The order made by Pollock, B., conformity with previous decisions the *Hastings' Petition* and the *S Petition* (3). Blackburn, J., made for particulars giving the names persons subjected to corrupt pra and of the persons guilty of those tices, as far as practicable, and the and places at which the alleged ing took place. *The Salford Pe Anderson* v. *Cawley* (4) may be upon by the petitioners, but it do

(1) The order was made under the 6th General Rules made pursuant to 35 & whc. 60 (see the Rules, Law Journal New 1872, Vol. 7, p. 875), which provides as fo

"Evidence need not be stated in the p but the Court of Common Pleas or a J chambers may order such particulars as necessary to prevent surprise and unne expense, and to insure a fair and effectual the same way as in ordinary proceedings Court of Common Pleas, and upon such ter costs and otherwise as may be ordered."

(2) 38 Law J. Rep. (N.S.) C.P. 145.

(3) 20 Law Times N.S. 180.

(4) 19 Law Times N.S. 500.

seem quite consistent with *The Borough of Londonderry Petition* (5). The order in *Brett* v. *Robinson* (6) was framed in very wide terms, and the principle of that case applies here.

Field and *Lockwood* in support of the rule.—The time for delivering the particulars was too short, and the terms of the order are too stringent.

PER CURIAM (7).—The time for delivering the particulars will be extended to the 27th of January; for, in our opinion, one week before the day of trial is a proper period to enable the respondent to prepare his defence. The order must be varied by inserting the words, "as far as is known," before the words, "by whom, when and where," wherever the latter occur. The rule is made absolute to vary the order, without prejudice to an application at chambers by the petitioners to add further charges to those contained in the particulars, if after the delivery thereof and before the day of trial fresh charges should be discovered.

Rule absolute to vary the order.

Attorneys—Paterson, Snow & Burney, agents for J. Walker, Leeds, for the petitioners; Darley, agent for Newstead & Wilson, Leeds, for the respondent.

1874. Jan. 30. } MAUDE *v.* LOWLEY (No. 2).

Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *ss.* 7, 13, 21—*Municipal Election Petition—Amendment.*

L. is a borough divided into wards, and on the 4th of December, 1873, *the respondent was elected a town councillor for the North Ward. A petition was presented against his return within twenty-one days from December the 4th, which alleged that the respondent employed persons "who were included in the register for the said ward of the said borough as burgesses for payment and reward at the above election as canvassers for the purpose of the said election." On the* 16*th of January,* 1874, *an order was made at chambers amending the petition by inserting the words "and other wards" after the words "who were included in the register for the said ward." A rule having been obtained to set aside the order,*—Held, *that before the insertion of the words the petition charged only corrupt practices with voters at the election for the North Ward, and that after the insertion it charged corrupt practices with those who were not voters at that election; that the effect of the alteration was to make a new petition after twenty-one days from the date of the election; that there was no jurisdiction to make the amendment, and that the rule to set aside the order must be made absolute.*

This was a petition under the Corrupt Practices (Municipal Elections) Act, 1872, against the election of the respondent as councillor for the North Ward of the municipal borough of Leeds, holden on the 4th day of December, A.D. 1873. The election was on account of a vacancy occasioned by the death of a councillor during his term of office. The following were the material paragraphs:

"5. And your petitioners further say that the said James Lowley did personally retain and employ persons, who were included in the register for the said ward of the said borough as burgesses, for payment and reward at the above election, as canvassers for the purpose of the said election, whereby the election of the said James Lowley was void.

"6. And your petitioners further say that the agents or agent of the said James Lowley did with his knowledge and consent retain and employ persons who were included in the register of the said ward of the said borough as burgesses for payment and reward at the above election as canvassers for the purpose of the said election, whereby the election of the said James Lowley was void."

The petition was presented on the 29th

(5) 19 Law Times N.S. 573.
(6) 22 Law Times N.S. 487.
(7) Lord Coleridge, C.J.; Keating, J.; and Honyman, J.

of December, 1873, and on the 16th of January, 1874, Pollock, B., made an order upon an affidavit by the solicitor and agent for the petitioners stating as follows—" I have become aware since the presentation of this petition, and believe that persons included in the register for wards of the municipal borough of Leeds, other than the North Ward thereof, as burgesses, were retained and employed for payment and reward by or on behalf of the respondent as canvassers for the purposes of the election."

The order of Pollock, B., dated the 16th of January, 1874, was in the following terms:

" Upon hearing counsel I do order that the petitioners shall be at liberty to amend their petition by inserting the words " and other wards " after the words " the said ward " in the fifth and sixth paragraphs of the said petition upon payment of the costs of and incidental to the amendment."

A rule having been obtained to set aside the order of Pollock, B.—

Cave and *Lockwood* shewed cause (1).

—The petition itself was presented the period prescribed by 35 & 36 60. s. 13. sub-section 2, for in con the twenty-one days Sundays and mas-day are not taken into (25th section). The amendme rightly made under the general of section 21 sub-section 5. tion relating to municipal elect drawn in general language, and trial may be supported by evidence does not come to the knowledge petitioner until long after the pr tion. That evidence is disclosed the particulars, which are usually to be given to the respondent un sixth of the General Rules, and t ticulars may be amended if it be necessary. In the *Cheltenham Petition* (2) the propriety of an the particulars at the trial was dis and Martin, B., intimated that if a case should be made out, possi might grant an application to ame the Court has jurisdiction to ame particulars, it is difficult to see w should not have power to ame petition. In the present case the is unnecessarily precise; it wou been sufficient simply to allege petition that the respondent ha guilty of an offence against the Practices (Municipal Elections) Ac whereby the election was void, sixth rule provides that evidenc

(1) The Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 7, enacts as follows—" No person who is included in a register for a borough or ward thereof, as a burgess or citizen, shall be retained or employed for payment or reward, by or on behalf of a candidate at an election for such borough or any ward thereof as a canvasser for the purposes of the election."

Section 13—" The following provisions shall have effect with reference to the presentation of a petition complaining of an undue election (hereinafter in this act referred to as a petition). First. A petition may be presented either by four or more persons who voted, or who had a right to vote at the election, or by a person alleging himself to have been a candidate at the election. A petition shall be in the prescribed form and shall be signed by the petitioner or petitioners, and shall be presented to the superior Court in the prescribed manner, and the prescribed officer shall send a copy thereof to the town clerk of the borough to which it relates, who shall forthwith publish it in the borough. Second. A petition shall be presented within twenty-one days after the day on which the election was held, unless it complain of the election on the ground of corrupt practices, and specifically allege a payment of money or other reward to have been made or promised since the election by a person elected at the election, or on his account, or with his privity in pursuance or furtherance of such corrupt practice, in which case it may be presented at any time within twenty-eight days after th the alleged payment or promise, whethe any other petition against such person previously presented or tried. Third. time of presenting a petition, or within th afterwards, the petitioner shall give sec all costs, charges and expenses which ma payable by him to any witness summone behalf or to any respondent. The secu be to the amount of five hundred pou shall be given in the prescribed manner a deposit of money, or by recognizance into by not exceeding four sureties, or one way and partly in the other.

Section 21. " The following provisions s effect with respect to jurisdiction and t rules. Fifth. The superior Court shall, the provisions of this Act, have the sam jurisdiction and authority with referen election petition and the proceedings th it would have if the petition were an cause within its jurisdiction."

(2) 19 Law Times, N.S. 820.

not be stated in the petition. In that case an application would probably have been made for particulars, and if they had stated that the respondent employed as canvassers voters in the North Ward only, it would have been open to the Court to amend the particulars by stating that he had employed voters in other wards. A statement of the class of voters employed is merely a matter of evidence, and the petitioners may include any instance which they can discover before the time arrives for the delivery of the particulars. If the Court make this rule absolute, it will become necessary to state evidence in the petition. If the petitioners had omitted the words "of the said ward" in the fifth and sixth paragraphs, they would have been in the same position as they will be if the alteration is allowed. It is a mere matter of detail whether the canvassers employed are upon the register of any specified ward: the offence really charged is the employment of voters upon the register for the borough. The propriety of the amendment was decided by the Judge at chambers in the exercise of his discretion. The Court has the same power to amend as if the petition were an action at law, and from 1 *Chitty's Arch. Pract.* 238 (12th edit.), citing *Maddock* v. *Hammet* (3), it is clear that the Court has power to amend even in penal actions; it has, therefore, jurisdiction to make the order asked for.

Tennant, in support of the rule.—The order cannot be upheld. First, the 35 & 36 Vict. c. 60. s. 7, is applicable to both a borough divided into wards and a borough not divided into wards; if the fifth and sixth paragraphs in their original shape had omitted the words "of the North Ward," the petition might have been good upon its face, but it would have been inapplicable to a borough such as Leeds which is divided into wards. Where wards exist, a burgess is entitled to vote only in that ward in respect of which he is enrolled (4), and the enactment only forbids the employment of burgesses upon the register for the ward in which the election is taking place.

[LORD COLERIDGE, C.J.—That construction cannot be maintained. The words are general, and forbid the employment of a burgess even at an election for a ward in which he is not enrolled.]

As the Court overrule the first objection on behalf of the respondent, it is contended, secondly, that the petition, being good upon its face, charges in its former shape the employment of voters as canvassers, but if the alterations are permitted it will likewise charge the employment of burgesses who are not voters; this is manifestly a different offence from that originally alleged in the fifth and sixth paragraphs, for as this is a bye-election the other wards may be treated as if they were distinct boroughs. To allow the amendment would be tantamount to giving leave to present a new petition after the twenty-one days. It is necessary to draw the petition with some precision; if it had been framed in the wide terms suggested during the argument against the rule, it would have been bad. No express power to amend the petition has been given, and only in *The Youghal Case* (5) has the question of the power of amendment been raised. This is an argument that the power to amend does not exist in point of fact.

[KEATING, J.—The Norwich Election Petition, *Stevens* v. *Tillett* (6), related to the power to strike out; it did not touch the present question.]

It is conceded on behalf of the respondent that the Court has jurisdiction to strike out immaterial averments, but it has no power to strike out material words so as to constitute a fresh petition. The scope of the 13th section seems to forbid the alterations suggested. One of the objects of the 1st sub-section is to ensure the publication when the petition is presented, and that publication is to give final notice of the contents. The 3rd sub-section compels the petitioners to give security. A person may be willing to become surety in the well-grounded belief that the petition contains statements which are capable of being proved, and it would be unfair to him if, after entering

(3) 7 Term Rep. 55.
(4) Municipal Corporations Act, 5 & 6 Will. 4. c. 76. s. 44.
(5) O'M. & H. (E.P.) 295, 296.
(6) 40 Law J. Rep. (N.S.) C.P. 58.

Act, 1869, and the Debtors Act, 1869. The circumstances are that the plaintiff had become a judgment creditor of the defendant for a debt, of which there was due the balance of 84*l.* 5*s.* 6*d.*, and that the plaintiff went before a Judge and got an order from him ordering the defendant to pay such balance by instalments. Some of these were paid, and then the defendant called a meeting of his creditors under the provisions of the Bankruptcy Act, 1869, for liquidation by arrangement, and an agreement to accept a composition of two shillings in the pound payable by instalments was entered into, which was binding on all the creditors. When the first instalment of the composition became due the defendant did not pay it, at all events he did not pay it to the present plaintiff, and thereupon the plaintiff went again before a Judge and applied for the committal of the defendant, on shewing at that time an ability on the part of the defendant to pay the overdue instalments ordered to be paid by the order of Baron Cleasby. Now, as to the construction of the Bankruptcy Act, 1869, it seem to me that the case of *Edwards* v. *Coombe* (1) shews that when a resolution for a composition has been come to by the creditors, under the 126th section of that Act, the creditor cannot for a time sue the debtor on the original debt, but that when there has been a failure to pay the agreed composition he can proceed on the original debt. That is what was said in that case was the construction of that statute, and in *In re Hatton* (2) the Lords Justices acted on that case, and also expressed their opinion that that was the true construction of the statute. I should not have said this, especially after the full manner with which my Lord has dealt with the matter, if it had not been for the case of *Slater* v. *Jones* (3), which has been handed up to me since the argument had concluded, and which was a more recent case than those which have been cited. In *Slater* v. *Jones* (3) there had been a resolution to accept a composition passed by the creditors under this 126th section of the Act, and before the time for the payment of the composition the creditor brought his action against the debtor for the original debt, and the debtor pleaded the resolution for the composition in bar. The Court of Exchequer held that a good plea, and the Judges of that Court seem to have been of opinion that if *Edwards* v. *Coombe* (1) decided that the remedy for the original debt was suspended by the resolution, then it would follow according the Common Law doctrine that the remedy for such debt was entirely gone. But those Judges said that they did not think it necessary to differ from *Edwards* *Coombe* (1) because they took it as a decision on the Bankruptcy Act, 1869, Bramwell, B., said—"I think, therefore, we can assent to these two decisions," that is to say, *Edwards* v. *Coombe* (1) and *In re Hatton* (2), "and yet hold the pleas good thus—either the resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the event happens whereby it is defeated (*i.e.* the debtor's default) a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that in case he fails to pay the composition at the time agreed, he will pay the whole debt." It seems to me that we need not disagree with *Slater* v. *Jones* (3), and that we may take *Edwards* v. *Coombe* (1) as a decision only on the construction of the Bankruptcy Act, 1869, and not on the suspension of a right of action at common law, and that according to it the construction of that statute is that the creditor is not able to sue until the composition be due, and that the debt is barred when the composition is paid, but that if it be not paid when due the creditor is remitted to his right to the original debt as if there had been no composition resolution at all. If that be so, then on non-payment of the composition the parties are in the same position as if the resolution had not been passed. Now what was that in the present case? The plaintiff was a judgment creditor with a right to issue execution against the goods of the debtor for the amount, but he had also another remedy,

(3) 42 Law J. Rep. (N.S.) Exch. 122; s. c. Law Rep. 8 Exch. 186.

which was to apply to a Judge for an order to commit the debtor to prison, and he had so applied, and the Judge had ordered the debtor to pay the debt by instalments. Now, both that last-mentioned order and the judgment were in force at the time the composition resolution was passed, and therefore if the creditor be remitted to his former rights it follows that he is remitted to his right to act on that Judge's order. There is the provision in section 5 of the Debtors Act, 1869, that no imprisonment under it is to operate as a satisfaction or extinguishment of the debt, by which, as I understand it, though the debtor be imprisoned under this section, yet if he has property the imprisonment is not to prevent an execution being issued against his goods. It follows, then, that both the judgment debt and the remedy for its recovery are revived, and that being so, that the creditor has a right to go before a Judge, and on shewing the ability of the debtor to pay to ask for an order to commit. Therefore on such ability being shewn I think this Court has power to make the order to commit.

Then, next, should the Court do so? That depends on a question of fact upon which I entertain no doubt, and as to that I think the Court should make the order, for the reasons which have been given by my Lord.

DENMAN, J.—The defendant in this case made default in paying the judgment debt, and a learned Judge made an order for the payment of such debt by instalments, which order is still in force except so far as anything shewn in this case may have had the effect of rescinding it. There is before us an affidavit of means, and the defendant in the absence of anything to the contrary ought to be committed for not complying with the terms of that order. It is said on the part of the defendant that he should not be committed because there had been a composition resolution passed according to the 126 section of the Bankruptcy Act, 1869, binding on the creditors, and that the plaintiff as such creditor was bound by it. It is true that there was such resolution, and that the same was so binding on the creditors, but it is equally true that it was binding on the debtor, and that there were reciprocal duties by both parties. Now one of the terms of the resolution was that an instalment of the composition should be paid on a certain day. That was not paid, and under such circumstances it has been held by this Court in a case which was approved of in the Court of Chancery, that the right of action is revived, and I do not collect from the case of *Slater* v. *Jones* (3), that those two cases are overruled by that of *Slater* v. *Jones* (3). Now the question is whether the principle in *Edwards* v. *Coombe* (1) and *In re Hatton* (2) applies here, and I apprehend that it does. Whether it is strictly a remitter to or a revival of the rights of the creditor, I think it is immaterial to consider, for I think the doctrine of estoppel applies, and that when the defendant neglects to perform his part of the composition resolution it does not lie on him to say that he can by the composition resolution defeat the right of the plaintiff. There is an order in force, and for not obeying that order the defendant is liable to be committed unless he can take advantage of the composition resolution. I do not think he can do so under the circumstances which have occurred, and that therefore this rule should be made absolute.

After the foregoing judgments had been delivered,

LORD COLERIDGE, C.J., added.—In consequence of my attention having been called to *Slater* v. *Jones* (3), I wish to say that I do not differ from the decision in that case, because, as I understand it, the Court of Exchequer do not put its judgment on the ground that the composition resolution so suspends the remedy as to extinguish the original right of the creditor, but on what they think is the true construction of the Bankruptcy Act, 1869, by which, if the terms of the composition resolution are not adhered to, the creditor is remitted to his rights. That seems to be the view of the Chief Baron, who says—"I see no difficulty, therefore, in holding that the present actions will not lie, although in a certain event the original debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for

The statute allows the return of a candidate to be questioned, but the petition impeaching it must be presented within twenty-one days; and it follows from this that a petition which is itself presented in due time, cannot after the twenty-one days be so altered in its terms as to amount to a fresh petition. If we were to hold otherwise, I think that we should be annulling the enactment as to the prescribed period. We must consider, therefore, whether the alterations are tantamount to a new petition. It has been contended in support of the order that the petition might in the first instance have been so framed as to allow the petitioners to give evidence as to the employment of burgesses in every ward of the borough. But the petitioners have not adopted this course, and have presented a petition alleging the employment of voters in the ward in which the election took place. It seems to me that the alterations alleging the employment of burgesses in other wards do amount to a fresh petition, and that if we were to permit them to be made, we should in effect allow a petition to be presented after twenty-one days have elapsed from the election.

With the greatest respect to the doubts of my brother Denman, I am clearly of opinion that my brother Pollock had no jurisdiction to make this order.

Rule absolute.

Attorneys—Paterson, Snow & Burney, agents for J. Walker, Leeds, for the petitioners; J. J. Darley, agent for Newstead & Wilson, Leeds, for the respondent.

1874. Jan. 27. { *Re* THE EXETER ELECTION PETITION. CARTER AND ANOTHER (*petitioners*) *v.* MILLS, *respondent.*

Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125)—*Dissolution of Parliament—Petition dropping—Return of Deposit.*

Where Parliament was dissolved before the day appointed for the trial of an election petition presented under the Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *the Court ordered the money which had been deposited as security for costs pursuant to section* 6 *of that Act, to be returned to the petitioners.*

Parliament having been dissolved before the day appointed for the trial of the election petition which had been presented against the return of the respondent for the city of Exeter, the petitioners applied to Bramwell, B., at Chambers, for the return of the 1,000*l.* which had been deposited as security for costs pursuant to section 6 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125). The learned Judge referred the matter to the Court.

Chandos Leigh now moved accordingly for a rule ordering such return of the deposit-money.—The 35th section of the Parliamentary Elections Act, 1868, provides for the dealing with the security which has been given for costs when a petition is withdrawn and a new petitioner substituted, but it does not apply to such a case as the present, and the 19th section enacts that the trial of an election petition is to proceed notwithstanding the prorogation of Parliament. The Act, however, makes no provision for the case of a dissolution of Parliament, and therefore in such an event the old law and practice of Parliament must prevail, and according to such the petition would have dropped. Then rule 2 of Reg. Gen. Additional Rules, 26th of March, 1869, made under the Act, applies; it is as follows—"Money so deposited shall (if and when the same is no longer needed to secure payment of such costs, charges and expenses) be returned or otherwise disposed of, as justice may require by rule of the Court of Common Pleas or order of a Judge."

Petheram appeared for the respondent, and consented to the return of the deposit-money.

LORD COLERIDGE, C.J.—I am of opinion that the order applied for should be granted. The Court will take judicial notice of the dissolution of Parliament,

and such dissolution having occurred, a case has arisen which is not provided for by the Parliamentary Elections Act, 1868. We must therefore be guided in the matter by what was the old Parliamentary practice in the case of such an event. In that case, as is well known, the election petition dropped. We therefore think that the same must be the case now, and that we should make an order that the money deposited as security for costs should be returned.

KEATING, J.—I agree that by the dissolution of Parliament this election petition, which had been presented, dropped, and the only question then is whether the money deposited pursuant to the Elections Act should be returned. I think that rule 2 of the rules 1869, which has been referred to, applies, and as the respondent appears and consents, the money should be returned.

DENMAN, J., concurred.

Rule accordingly.

Attorneys—Wyatt, Hoskins & Hooker, for the petitioners; Philbrick, for the respondent.

1874. Jan. 30. { BROWN *v.* THE THAMES AND MERSEY MARINE INSURANCE COMPANY.

Discovery of Documents—Officer of Body Corporate—Attorney—Common Law Procedure Act, 1854, *s.* 50.

The attorney of a body corporate is not an officer thereof within the meaning of the Common Law Procedure Act, 1854, *s.* 50, *and therefore cannot be compelled to make a discovery of documents in an action to which the body corporate is a party.*

This action was brought to recover for a total loss under a policy of marine insurance effected with the defendant company upon the ship *Knight Templar.*

Upon the 21st of July, 1873, the plaintiffs obtained the usual order for the discovery of documents. On the 22nd of November an affidavit was made secretary of the defendant comp compliance with the order. On t of November the plaintiffs' attorne out a summons to shew cause w defendants should not, by their se or other officer able to depose the by their attorneys, make a furth better affidavit of documents. By a of Martin, B., dated the 29th of N ber, it was, amongst other things, d that Mr. Hollams, the attorney defendants on the record, should m affidavit of documents.

A rule having been obtained to so much of the order of Martin, B. lated to the defendants' attorney an affidavit—

W. G. Harrison shewed cause. order of the 29th of November w perly made. An attorney to a ration, such as the defendants' co is an officer thereof within the m of the Common Law Procedur 1854, s. 50.

Lanyon in support of the rule called on to argue.

LORD COLERIDGE, C.J.—We all opinion that our brother Martin jurisdiction to make that part of th which has been appealed against. argument against this rule were an attorney for a party to an action be orally examined under the C Law Procedure Act, 1854, s. 53; fact that such an examination has taken place, is an argument agai validity of the order. We cannot that the attorney upon the record to be deemed an officer of a body rate who can be called upon to discovery.

KEATING, J., DENMAN, J., and H J., concurred.

Rule abo

Attorneys—Clarke, Son & Rawlins, for p Hollams, Son & Coward, for defenda

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(Appeal from Revising Barrister's Court.)

1873. Nov. 18. } DURANT (*appellant*) *v.* WITHERS (*respondent*).

Parliament—Borough Vote—Payment of Poor-rate—30 & 31 Vict. c. 102. s. 3, sub-sec. 4—Composition Rate.

By an agreement between a landlord and tenant the poor-rates were to be paid by the former and included in the rent. The landlord compounded with the overseers for the poor-rates, and accordingly the premises occupied by the tenant were assessed to a composition of 4s. 8d. in respect of a poor-rate, instead of to the amount of 6s. 8d. as they would have been had they been assessed to an equal amount in the pound to that payable by other occupiers in respect of such rate. The landlord duly paid such 4s. 8d., and he afterwards paid two shillings so as to make up the full rate of 6s. 8d.:—Held, that there had not been such a payment of an equal amount in the pound to that payable by other occupiers in respect of the poor-rate, as is required by 30 & 31 Vict. c. 102. s. 3, sub-sec. 4, to qualify the occupier for the borough occupation franchise.

Appeal from the decision of the revising barrister appointed to revise the list of voters for the borough of New Windsor. The appellant duly objected to the name of the respondent being retained in the list of persons entitled to vote in respect of a house occupied by him in the parish of New Windsor, at the election of a member for the said borough. The following facts were established by the evidence.

An agreement had been entered into previously to the qualifying year between the respondent and the owner of the house that the poor-rates in respect of the house should be paid by the owner and included in the rent paid by the respondent. Previously to the qualifying year an agreement had also been entered into between the owner and the overseers of the parish (as stated by the overeers, under 59 Geo. 3. c. 12), by which the owner was to pay a composition in respect of the poor-rates upon the house occupied by the respondent. The case set out an extract from a poor-rate made on the 2nd of May, 1872, in which the names of the owner and occupier appeared, but the amount of rate assessed (4s. 8d. in respect of a rate of 5d. in the pound) was stated to be assessed upon and to be payable by the owner instead of the occupier.

Under the said last mentioned agreement the owner paid to the overseers in respect of the said rate of the 2nd of May, 1872, the sum of 4s. 8d., being the full amount of the composition in respect of the rate upon the said house. After this had been done, it was considered that the said payment was insufficient, inasmuch as no such agreement for composition could legally have been entered into, and the owner therefore paid in September, 1872, the sum of two shillings, that sum being, together with the 4s. 8d. previously paid by him as a composition, sufficient to make up an equal amount in the pound to that payable by other ordinary occupiers in respect of the said rate made on the 2nd of May, 1872. The payment of the said sum of two shillings was made by the owner of his own accord. It was contended on behalf of the respondent that, under the above circumstances, the provision in the 4th sub-section of section 3 of 30 & 31 Vict. c. 102, was complied with. It was contended by the objector that the said provision in the said 4th sub-section had not been complied with, and reliance was placed upon section 30 of 2 Will. 4. c. 45, which provides for occupiers claiming to be rated to the relief of the poor in respect of the premises occupied by them, and further reliance was placed upon section 49 of 30 & 31 Vict. c. 102.

The revising barrister was of opinion that, under the circumstances above stated, there had been a sufficient payment of the rate of the 2nd of May, 1872, to entitle the said respondent to vote; that there was nothing to satisfy him the said two sums had been paid by the owner corruptly or not *bona fide*, and that there was nothing to satisfy him that anything had been done contrary to the provisions of section 49 of 30 & 31 Vict. c. 102, and he retained the name of the respondent on the said list.

Kingdon, for the appellant.—The 59 Geo. 3. c. 12, under which the agreement between the owner of the house and the

overseers is stated in the case to have been made, empowers the overseers in certain cases to assess the owner instead of the occupier to the poor-rate. The 4th sub-section of section 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), has not been complied with, and therefore the respondent was not qualified to be on the list of voters. That 4th sub-section requires as a qualification for the occupation franchise that the occupier should have "*bona fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th of January."

[BRETT, J.—You say that the occupier has neither been rated to nor paid the poor-rate in respect of the premises?]

Yes. The owner and not the occupier was here rated, and the Poor-rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), does not apply to this case, there being no agreement between the owner and overseers within the meaning of that Act—*Cross* v. *Alsop* (1). That alone would disqualify the respondent; but further, he can in no sense be said to have paid the same rate payable by the other occupiers, for the rate imposed and which the owner paid was only a composition, and though it is true the owner afterwards paid the difference between that and the full rate, such last was only a voluntary payment, and not a payment of rate at all.

Gorst, for the respondent.—No question of rating is raised by the case. The only point stated for the opinion of the Court is, whether there has been a sufficient payment of the rates to satisfy the 4th sub-section of section 3 of 30 & 31 Vict. c. 102. It must be assumed, therefore, that the respondent was properly rated.

[KEATING, J.—What rate do you say he paid which had become payable by him in respect of the premises?]

He paid through the hands of his landlord 6*s.* 8*d.*, being the full amount in the pound payable in respect of the premises in respect of the May rate.

(1) 40 Law J. Rep. (N.S.) C.P. 53; s. c. Law Rep. 6 C.P. 315.

[BRETT, J. — The objection i neither he nor his landlord was obl pay that sum, as the only amount a on the house was 4*s.* 8*d.*]

It was a mistake that the amc rate was only assessed at 4*s.* 8*d.*, it have been 6*s.* 8*d.* The agreeme tween the respondent and his 'la was that the latter should pay poor-rates and include them in the

KEATING, J.—I think it is plain th has been no payment of the poor-r the respondent within the meaning 4th sub-section of section 3 of the sentation of the People Act, 1867 circumstance of the payment by the of the 2*s.* so as to make, with the p payment of 4*s.* 8*d.*, the amount would be equal in the pound to th able by the other occupiers, does n the respondent, as when it was so pai not a sum which was payable by a Mr. Gorst has argued that it was p as between the landlord and his under the agreement of letting, but not payable by the occupier, and t says it must have been payable by

BRETT, J.—I think the tenant w assessed to the rate, but assuming was it was to pay only 4*s.* 8*d.* Th landlord paid, and if that had been rate upon the premises it would ha a payment by the respondent wit meaning of the Act, but it was not because it was not equal in the po that payable by the other occup respect of the rate which had been Two shillings more was required f purpose, and the landlord subse paid such two shillings, but such p cannot be said to be the paymen rate for the tenant.

DENMAN, J., concurred.

Decision reversed

Attorneys—T. Durant, agent for B. C. Windsor, for appellant; C. T. Phi London and Windsor, for respondent.

(2) In a subsequent case—*Durant (a* v. *Fletcher* (*respondent*), in which *Kingdon* the appellant and *Gorst* for the responden admitted that the facts were not disting from those in the above case, and the deci therefore reversed without argument.

(Appeal from Revising Barrister's Court.)

1874. Jan. 22, 26, 31. } BOON (*appellant*) *v.* HOWARD (*respondent*).

Parliament—Borough Vote—30 & 31 Vict. c. 102. ss. 3, 61—"Dwelling-house"—Part of a House separately rated.

The premises in respect of the occupation of which, as a dwelling-house, a borough franchise was claimed consisted of two rooms, which were not structurally separated from the rest of the house of which they formed part, and were connected by a staircase and passages used by the voter in common with the tenants of the other rooms of the house, which were let out in a similar manner, the landlord not living in the house, and the outer door being under the sole control of the several tenants. These two rooms, and the voter in respect of them, were rated separately to the relief of the poor in all the rates made during the qualifying year, but until the first rate made after the commencement of the qualifying year these rooms had not been separately rated from the rest of the house, and there was therefore a part of the qualifying year during which the rooms were not separately rated. The revising barrister found as a fact that the two rooms were occupied by the voter as a separate dwelling, and were separately rated to the relief of the poor:—Held, *by* KEATING, J., *and* DENMAN, J., *that the rooms constituted "a dwelling-house" within the meaning of section 3 of the Representation of the People Act,* 1867 (30 & 31 *Vict. c.* 102); *and by* BRETT, J., *and* HONYMAN, J., *that they were not "a dwelling-house" within the meaning of that section.*

At a Court held by the barrister appointed to revise the list of voters for the city of Exeter William Henry Boon duly objected to the name of George Howard being retained on the list of voters for the said city. The following facts were established by the evidence.

George Howard did, on the 31st of July, 1873, occupy, and had occupied for the preceding twelve calendar months, part of a house consisting of two rooms, which were not structurally separate from the rest of the house.

The two rooms were connected by a staircase and passages, which were used by the said George Howard in common with the persons who occupied the rest of the said house.

The said George Howard and his family lived entirely in these two rooms, sleeping and cooking, and having their meals therein.

The landlord did not live on the premises or retain any control over them, but the other rooms in the house were let out in a similar manner to other tenants.

[There was an outer door to the house over which the tenants only had control (1).]

Two rates were made in the parish of Allhallows on the Walls, in which the said rooms were situated, during the twelve months ending the 31st of July, 1873, namely, in the month of November, 1872, and the month of May, 1873, and in both the said rates the said two rooms were rated separately from the rest of the said house and at the sum of 3*l.* 10*s.*, and the said George Howard was rated in respect of them.

At the time of the passing of the Representation of the People Act, 1867, there was no Act in force in the said parish, or in the city of Exeter, authorising the rating of the owner instead of the occupier in the case of small tenements, but it was usual in the case of such tenements for the owner to pay to the collector the rates instead of the occupier, and where this was done the overseers usually rated each whole house as one tenement, placing in the occupiers' column the name of one of the persons so occupying part of the house, and the words "and others" to represent the remainder of the occupiers, the rating being the same as if the whole were joint occupiers of the whole house instead of separate occupiers of different parts of it. It seldom happened that the occupier of a separate part of a house was separately rated for that part.

In consequence of an opinion expressed

(1) The words between the brackets were inserted in the case by agreement of the parties during the argument.

The revising barrister held, as far as it was a question of fact for his decision, and as far as he was justified in so holding consistently with the facts above stated, that the said two rooms were occupied by the said voter as a separate dwelling, and were separately rated to the relief of the poor, and he decided that the voter was entitled to have his name retained on the list of voters for the said city of Exeter, and he accordingly retained his name on the said list.

The names of nineteen other persons, whose names were set out in a schedule thereunto attached, were objected to under similar circumstances.

Due notice of appeal was given in each of the cases, and the appeals were ordered to be consolidated.

The question for the opinion of the Court was whether the said George Howard was entitled to have his name retained on the list of voters for the said city of Exeter.

Lopes for the appellant.—The rooms in question do not constitute a "dwelling-house" within the meaning of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102. ss. 3 and 61). The facts here are almost identical with those in *Thompson* v. *Ward* (3), and though the Court in that case were equally divided, the result was to affirm the decision of the revising barrister against the franchise being acquired by the occupation of such rooms. The revising barrister in the present case ought to have followed such decision, and this Court will not decide otherwise, unless it be satisfied that such decision was obviously wrong—*Webster* v. *The Overseers of Ashton-under-Lyne; Hadfield's case* (4). The appellant in the present case relies on the judgments of Willes, J., and Brett, J., in *Thompson* v. *Ward* (3), and contends that "dwelling-house" in the Representation of the People Act, 1867, has no larger meaning than "house" had before that Act. The respondent was in the situation only of a lodger or occupier of apartments in a house wholly let out in apartments—*Stamper* v. *The Overseers of Sunderland* (2). Next, it was necessary, in order that "dwelling-house" should include part of a house, that the respondent should have been separately rated in respect of these rooms during the whole of the qualifying year, and here he was not, for the rooms were not separately rated until November, 1872, and the May rate, in which they had not been separately rated, remained after July, 1872, and remained, therefore, during part of the qualifying year.

[KEATING, J., referred to 2 Will. 4. c. 45. s. 27, and *Flatcher* v. *Boodle* (5).]

The words of that 27th section are different from those in section 3 of the Representation of the People Act, 1867. This 3rd section does not say rated to all rates *made* during the year.

Next, the respondent could not have been separately rated in respect of these rooms, so as to be entitled to the franchise, for the house being wholly let out in apartments, the owner and not the occupiers ought to be rated, as was decided in *Stamper* v. *The Overseers of Sunderland* (2).

[BRETT, J.—There was no Small Tenements Act applicable to Exeter, and the owner could not have been rated at the time of the passing of the Representation of the People Act, 1867. Does the exception in section 7 as to the owner being rated apply where the first part of the section does not apply?]

In *Thompson* v. *Ward* (3) Bovill, C.J., doubted whether, as the house was wholly let out in apartments, the occupiers could properly be so rated unless the apartments were separately rated at the time of the passing of the Act of 1867; and he thought if the question of rating had been raised in that case, it would not have been improbable that it would have come within the decision of the Court in *Cross* v. *Alsop* (6).

Kingdon for the respondent.—The last point has been already answered, for the 7th section of the Act of 1867 only ap-

(4) 42 Law J. Rep. (N.S.) C.P. 146; s. c. Law Rep. 7 C.P. 306.

(5) 18 Com. B. Rep. N.S. 152; s. c. 34 Law J. Rep. (N.S.) C.P. 77.

(6) 40 Law J. Rep. (N.S.) C.P. 53; s. c. Law Rep. 6 C.P. 315.

plies where the owner was rated at the time of the passing of that Act, and in the present case he could not have been rated, as it is expressly found that there was no statute in Exeter by which the owner could have been rated instead of the occupier. The respondent in the present case was properly rated, but at all events he was rated in fact, and the revising barrister had no power of examining into the validity of the rate, and if the rate was wrong the proper remedy was an appeal to the quarter sessions.

Next, with regard to the objection that there was no separate rating during the whole of the qualifying year, the Legislature, as shewn by sub-sections 2 and 3 of section 3 of the Act of 1867, meant only that the voter should have been rated to all rates made during the qualifying year. By the 59th section the Act is to be construed with the Reform Act, 2 Will. 4. c. 45, and therefore the 27th section of the Reform Act is to be considered as incorporated with section 3 of the Act of 1867.

Next, as to the main question. The two rooms constituted a separate dwelling, and as such were occupied by the respondent—See the judgments of Bovill, C.J., and Keating, J., in *Thompson* v. *Ward* (3).—The intention of the Legislature by the Act of 1867 was to make part of a house a separate tenement, and to get rid of the anomaly which allowed a person to vote in respect of part of a house, if such part were an office or shop, but which did not otherwise allow him to do so except in the case of flats or rooms in the Inns of Court.

Lopes, in reply, referred to *Bushell* v. *Luckett* (7).

Cur. adv. vult.

The following judgments were delivered on Jan. 31.

HONYMAN, J.—In this case, which was an appeal against the decision of the revising barrister for the city of Exeter, I am of opinion that the decision is erroneous, and ought to be reversed.

(7) 2 Com. B. Rep. 111; s. c. 15 Law J. Rep. (N.S.) C.P. 89.

The question turns on the pro
struction of sections 3 and 61 c
31 Vict. c. 102.

It appears that the voter ha
from the 31st of July, 1872, the
of two rooms in a house which
found by the barrister were no
turally separate from the rest
house, such two rooms being co
by a staircase and passage used
voter in common with the person
pying the rest of the house. T
rate made for the parish before t
mencement of the electoral year
ning on the 31st of July, 1872, w
in the month of May, 1872, and
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rately from the rest of the house.

During the electoral year be
31st July, 1872, two rates onl
made, viz., one in November, 18
the other in May, 1873, and i
the two rooms were rated separate
the rest of the house, the voter
rated for them, so that in fact th
no separate rating of the premis
the 31st of July, 1872, to the m
November, 1872.

It was objected to the voter,
other things, that the qualificat
insufficient, because, assuming t
two rooms constituted a dwellin
within section 61 of the Act o
they had not been separately rated
the whole of the electoral yea
revising barrister was of opinion
voter was duly qualified, and retai
name on the list.

Before the Act of 1867 it h
settled by the decisions that th
pier of part of a house used n
counting-house but as a dwelli
not entitled to vote unless the
the house was so actually sever
the rest of the house as to be a
itself—*Cook* v. *Humber* (8); *Hen*
Booth (9).

What, then, is the effect of t
Act? To ascertain this we must
section 3. This section contains f

(8) 11 Com. B. Rep. N.S. 33; s. c. 3
Rep. (N.S.) C.P. 73.

(9) 15 Com. B. Rep. N.S. 500; s. c. 3
Rep. (N.S.) C.P. 61.

sections differently worded (see *Cull* v. *Austin* (10)), and directed to different subjects. The 1st relates to the personal capacity of the voter; the 2nd to the subject matter of occupation and the length of it; the 3rd to the rating of the voter; and the 4th to the payment of rates. The 2nd sub-section requires that the voter should, during *the whole* of the twelve months preceding the 31st of July in any year, have been an inhabitant occupier of a "dwelling-house" within the borough. Now the 61st section of the Act says that unless there be something in the context repugnant thereto the word "dwelling-house" shall include "any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." Now let us read the 2nd sub-section of the 3rd section as if these words were incorporated in it, so as to see what the Legislature intended to say should be a sufficient occupation, and it will read, "has been during *the whole* of the twelve months preceding the 31st of July an inhabitant occupier of any dwelling-house, or any part of a house occupied as a separate dwelling and separately rated to the relief of the poor."

It has been argued that the object of the Legislature in the 61st section was to do away with the distinction between a part of a house structurally severed from the rest and one not so severed, provided it be occupied as a separate dwelling, and probably this was the intention. But it must be borne in mind that the Legislature has further required that it should be separately rated, and it seems to me that where the part occupied by the voter has not been separately rated during the whole of the electoral year, the voter has not for the whole twelve months occupied the thing described by the Legislature.

It is clear that, before the Act of 1867, the voter had no sufficient qualification unless the rooms occupied by him had been structurally severed during the whole year, and it seems to me that if the Legislature intended to do away with the doctrine as to structural severance, the intention was to substitute for structural severance a separate rating for the same period.

It was contended on behalf of the respondent that it was impossible that part of a house used as a separate dwelling should be separately rated, as a house cannot be rated (the rate being imposed on the occupier not on the house), but we must, if possible, read the 61st section so as to give some meaning to it, and this I think can only be done by reading the words as if they were "*and the occupiers of which are separately rated.*"

If, however, it be true, that the part of the house cannot be separately rated, the result would, I think, follow that the voter is not in occupation of any such thing as that specified by the 61st section, and therefore is not the occupier of a dwelling-house within section 3, sub-section 2.

It was further contended for the respondent that by section 3, sub-section 3, it was only necessary that *a voter* should be separately rated to all rates made during the electoral year, and that the 61st section only required the separate rating of the rooms to the rates to which it was necessary that the voter should be rated, but I think that so to hold would be to confound the definition of the thing occupied with the provision defining the rating of the voter, and that, though it may be enough within sub-section 3, that the voter should have been rated to all rates *made* during the electoral year, it does not affect the provisions of the second sub-section, as explained by the 61st sub-section, that the premises should have been the subject of a separate rating during the *whole* of the electoral year.

Unless I am right in this view, the consequence would follow that if no rate be made in the borough within the electoral year, so that the voter himself need not be rated, the franchise would be acquired by the occupier of part of a house occupied as a separate dwelling, although it had not been separately rated at any time during the year; nay more, supposing that the house had before the electoral year been jointly rated in the name of its owner, and that there had been no rate

(10) 41 J. Law Rep. (N.S.) C.P. 153; s. c. Law Rep. 7 C.P. 227.

made during the electoral year, so that the rooms had never been separately rated at all, the franchise would be acquired without any separate rating, contrary to the language of the 61st section.

As I think that on this ground the decision of the revising barrister is wrong, it becomes unnecessary for me to pronounce any opinion as to whether the rooms in question did constitute part of a house occupied as a separate dwelling within section 61, or whether, in consequence of the whole house being let out as mentioned in this case, we should be compelled by the construction put on section 7 by this Court in *Stamper* v. *The Overseers of Sunderland* (2), to hold that the owner alone could be properly rated for the house, and consequently that the voter was disqualified as not being properly rated.

DENMAN, J.—The appellant in this case has duly objected to the name of the respondent being retained on the list of voters for the city of Exeter. Upon the state of facts, as found by the revising barrister, it was contended on the part of the objector, that the respondent was not entitled to have his name retained on the list of voters—first, because the rooms occupied by him were not structurally separate from the rest of the house; secondly, because the portion of the house occupied by the respondent included the staircase and passages, and the staircase and passages were occupied by him jointly with the other tenants of the house; thirdly, because, until the first rate made after the 31st of July, 1873, the said rooms were not separately rated, and therefore they did not constitute a "dwelling-house," the occupation of which would qualify the voter during the part of the electoral year preceding the making of the said rate; fourthly, because, according to the decision of *Stamper* v. *The Overseers of Sunderland* (2), and the judgment of the late Chief Justice Bovill in *Thompson* v. *Ward* (3), the said rooms ought not to have been separately rated, and the rating of them illegally by the overseers did not constitute them a dwelling-house within the meaning of the Representation of the People Act, 1867.

The revising barrister held *as far as was a question of fact for his decision*, that the said two rooms were occupied by the respondent as a separate dwelling, and were separately rated to the relief of the poor, and retained the name of the respondent on the list, and the question for the Court is whether his name and that of nineteen other persons similarly circumstanced ought to be retained on the list.

Though the argument upon the case involved the consideration of more than one statute, and of several cases decided before the passing of the 30 & 31 Vict. c. 102, I am of opinion that the decision of the question raised upon this appeal, depends entirely upon the construction to be placed upon three sections of that statute, and that previous statutes and cases are only important so far as they throw light upon the probable intention of the legislature in passing the enactments upon which the present case turns.

The first section to which our attention was called is section 3 of the Act, which enacts as follows—[The learned Judge here read this section].

The first part of this section which it is necessary to discuss critically is sub-section 2. This sub-section is intended to secure—first, that the voter be the inhabitant occupier as owner or tenant of a dwelling-house within the borough; and secondly, that this occupation should not be one of a few weeks or months' duration, but that it should have extended over the whole of twelve months, ending on the 31st of July in the year of registration.

Taking the case of an ordinary dwelling-house wholly and exclusively occupied by one person, this is a clause easily understood and applied, and it is only when the word dwelling-house is contemplated under different circumstances from those that any real difficulty arises.

It must, however, be here observed that this sub-section relates wholly to the subject of occupation—first, as to the thing occupied (the dwelling-house); secondly, as to the kind of occupation (as inhabitant owner or tenant); and thirdly, as to the time of occupation (one whole year, &c.) requisite for the attainment of

paid. I can find nothing in the statute requiring the voter to get his name placed upon the rate book in respect of rates made upon other persons before the commencement of the qualifying year, and paid by them.

Before stating my opinion upon the more important and difficult question in this case, it will be as well to dispose of the objections raised to the vote in respect of non-compliance with sub-sections 3 and 4 of section 3. The facts have been already stated. And first, as to sub-section 3. It was contended that the voter had not been rated to all rates made for the relief of the poor during the qualifying period, because, in a rate which had been made in the month of May, 1872 (which was the last rate made before the commencement of the qualifying year), the rooms were not rated separately from the rest of the house, and that a rate so made remained a rate made in respect of the premises during the part of the qualifying year, and being made in respect of the qualifying premises, was a rate to which the respondent ought to have been rated.

I can find no authority for holding that upon the true construction of this section there is any necessity for the rating of the voter to any rates, except those made during the year. The cases cited above seem to me to dispose of this objection, so far as sub-section 3 is concerned. I will therefore pass on to the objection raised upon sub-section 4.

It was argued for the appellant that, assuming the rate of May, 1872, was not *made* during the qualifying year, still it was payable by the respondent, and was not paid by him to the extent and in the manner provided for by sub-section 4. But it does not appear from the case that this objection was raised in this shape before the Revising Barrister, and no facts are stated from which it can be inferred that if this rate was in any sense a rate payable by the respondent in respect of the premises, it remained unpaid during any part of the qualifying year, either by him or anybody.

It may consistently with the facts of the case have been fully paid by him or the owner, or any one, before the 20th of July, 1872. I think, therefore, th assuming the respondent to have occup a "dwelling house" within the meani of sub-section 2 of clause 3, there is ground for saying that he does not br himself within both of the sub-secti 3 and 4.

I now come to the main quest discussed in the case. It was tended for the appellant that the spondent was not entitled to vote, because he did not fall within description of sub-section 2 as a per who "was on the last day of July, 18 and had during the whole of the preced twelve calendar months been an inhabit occupier, as owner or tenant, of a 'dw ing house' within the borough." T objection was, in fact, a series of ob tions, some of them raising very diffi and important questions.

In order to state these properly necessary to refer to section 61 of Act, upon which the respondent and appellant both relied, and which en that "the word 'dwelling house' s *include* any part of a house *occupied separate dwelling*, and separately rate the relief of the poor." It is also n sary to bear in mind the proviso at end of section 3, which provides "th man shall, under this section, be ent to be registered or to vote by *reason being a joint occupier* of any dwel house."

The appellant contended that th spondent did not, under the circ stances of the case, occupy a dwelli house. That the premises occupied by not being structurally severed from house of which they formed part, *Ca Humber* (8) applied. That if resort had to section 61, still the words of section, "as a separate dwelling," not complied with. That even rooms occupied by the respondent be considered a separate dwelling section 61, they were not a s dwelling which had been separate to the relief of the poor during t qualifying year, and therefore sub 2 had not been complied with. occupation of the respondent wa occupation of a dwelling ho therefore within the proviso of

That the respondent occupied as a lodger and not as owner or tenant, and that the premises in question were part of a house wholly let out in lodgings, and therefore not properly the subject of a separate rateability of the occupiers of such lodgings or apartments, but such as the owner ought to be rated for within the decision of *Stamper* v. *The Overseers of Sunderland* (2).

Mr. Lopes, in his argument for the appellant, relied mainly upon the decision of Willes, J., and Brett, J., in the case of *Thompson* v. *Ward* (3); but inasmuch as the Court was there equally divided upon the question raised, it becomes necessary to consider the case as one of the first impression, and to look at the reasons given on both sides in the different judgments in that case rather than to the result of it, which was merely an affirmance of the rejection of the vote by the Revising Barrister. In the present case the Revising Barrister has allowed the vote, and I do not think that it would be reasonable to complain of that course having been taken under the circumstances.

The facts in *Thompson* v. *Ward* (3) were extremely similar to those in the present case, but not identical. The existence of an ashpit and a privy and other conveniences used in common by the occupiers of the rooms inhabited, appears to have been a material consideration in inducing one member of the Court to hold that the *room* occupied by the claimant was not the whole subject matter of occupation; that, therefore, there was a joint and not a separate occupation in that case. In the present case, however, it appears clear that the only part of the house in respect of which the respondent was rated as for a "dwelling house" was the two rooms in which he dwelt, and the question is therefore much more distinctly raised whether those two rooms could or could not constitute a "dwelling-house" for which a vote could be acquired. I am of opinion that they could, and that it having been found by the Revising Barrister, so far as it was a question of fact for him, that they did, there is no ground for holding the contrary. For the purpose of the present case I think it may be conceded that the occupation of the rooms in question would not have conferred a vote, though all other requisites existed, as being the occupation of a "house," within the meaning of section 27 of 2 Will. 4, but in considering the meaning of sections 3 and 61 of the 30 & 31 Vict. c. 102, I think it must be borne in mind that extremely difficult questions had arisen as to what does constitute a house, which would make it peculiarly desirable for the legislature to adopt some definition which would prevent the recurrence of similar difficulty, when the franchise was to be conferred for the first time in respect of the occupation of a "dwelling house," independently of its value.

It was, as it seems to me, entirely with the view of preventing similar questions to those which had arisen in *Cook* v. *Humber* (8) and other cases that the legislature introduced into the Act of 1867 the 61st clause so far as it relates to the word "dwelling-house." The effect of *Cook* v. *Humber* (8) cannot be better stated than in the words of Brett, J., in *Piercy* v. *Maclean* (15): "all that *Cook* v. *Humber* (8) decides is that the occupier of part of a house not structurally severed from the rest confers no vote, because house in section 27 of 2 Will. 4. c. 45 means a whole house," but in deciding what was a whole house questions of great doubt and difficulty arose; see *Henrette* v. *Booth* (9).

After the most careful study of all the arguments used in the case of *Thompson* v. *Ward* (3), and in the present, and of the very elaborate judgments in that case, I have come to the conclusion that the law and its application to that case as well as to this, and even *a fortiori* to this, cannot be more correctly stated than in the following passage from the judgment of Bovill, C.J.,—"Upon that question it seems to me that the legislature intended to make '*any part of a house*' as distinguished from a whole house (in the sense in which the term 'house' had been previously interpreted by the Court), a sufficient subject of occupation, provided it was occupied

(15) 39 Law J. Rep. (N.S.) C.P. 115; s. c. Law Rep. 5 C.P. 252.

for the purpose of a dwelling and as a separate dwelling in the sense of the occupation not being a joint occupation with others of that particular part of the house, and provided there was a wholly independent occupation as distinguished from that of a mere lodger, and the part of the house was separately rated. The room of the present claimant was part of a house, and the nature of his occupation in this case seems to me to fulfil the other conditions, and it being found that he was separately rated, I am of opinion that he must for the purposes of this appeal be considered the occupier of a dwelling-house, and that his premises must be considered a dwelling-house within the meaning of the Act of Parliament." This view of the matter disposes of several of the specific objections raised upon the construction of sections 3 and 61. The objection founded upon the proviso at the end of section 3 fails because the "dwelling-house" here being the two rooms which the respondent solely occupies as a separate dwelling, there is no joint occupation in respect of this dwelling-house by reason of his joint occupation of something else, viz., the staircase and passages. The objection founded upon the want of structural severance also fails because, according to the view of Bovill, C.J., which I adopt, that is not essential, provided there be a separate dwelling separately and not jointly occupied. The objections founded upon the argument that the occupation was that of a lodger and not of a tenant, also fail if the words of the sections 3 and 61 are large enough, as I think they are, to include the case, and to confer the franchise upon the respondent.

A more formidable argument remains. It was contended by the appellant that section 61 itself, in defining the cases in which a "part of a house" shall be included in the word "dwelling-house," adds a limitation which is fatal to the respondent's case, for that it must be a "part of a house separately rated to the relief of the poor" and that if this limitation be read in, as it was contended it ought to be when applying section 3, sub-section 2, to the case of part of a house, it becomes clear that the "part of a house" which is to qualify as a d
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in section 61, merely to apply the word "dwelling-house" in section 3 to the case of a "part of a house" where occupied as a separate dwelling, and where separately rated as other dwelling-houses are required to be rated for the purposes of the franchise, viz., to all rates made during the qualifying year.

One further point was made by the appellant. It was said that these rooms occupied by the respondent were such that, according to the authority of *Stamper* v. *The Overseers of Sunderland* (2), the owner ought to have been rated instead of the occupier.

I greatly doubt whether this point was really open to the appellant. The respondent was in fact rated in respect of the rooms in question, and I think very great inconvenience would result if the revising barrister were to take upon himself in such cases, there being no appeal against the rate, to decide whether the claimant was properly rated or not, but I do not think that the case of *Stamper* v. *The Overseers of Sunderland* (2) applies. In that case each occupier occupied one room only. The case found that a water-closet and other conveniences were used in common by the occupiers of the house, and the Court drew the conclusion that the exception in section 7 of the Act applied, for that the house was wholly let out as apartments or lodgings not separately rated, and therefore that the owner and not the occupier ought to be rated. In the present case the revising barrister has found, and that upon facts upon which I think he might reasonably find, that the rooms occupied were occupied as a separate dwelling, and he states that the overseers have separately rated the occupiers of parts of houses *in respect of the parts occupied by them* except when such persons occupied only as *lodgers*, from which I think it must clearly be inferred that the revising barrister, so far as it was a question of fact for him, was of opinion that the present respondent was *not* occupying as a lodger. I think, therefore, that the objection taken under section 7 of the Act fails, and that sub-section 1 of that section applies, and the occupier was here properly rated.

For these reasons I am of opinion that the revising barrister was right in retaining the votes objected to, and that our judgment ought to be for the respondent.

BRETT, J.—It seems to me to be a material fact that at the time of the passing of the Representation of the People Act, 1867, there was no Act in Exeter authorising the rating to the relief of the poor of owners of houses instead of occupiers. The claimant is stated in the case to have occupied part of a house; that seems to me to be a conclusive finding, by the revising barrister, that the whole building was a house, and that what the claimant occupied was only part of a house. What he occupied consisted of two rooms in which he and his family lived, sleeping and cooking, and having their meals therein, so that in fact they lived, in one sense, entirely in these two rooms. It is stated, however, that they used the staircase in common with the other occupiers of the house. Therefore, the case obviously cannot mean that the claimant used no other part of the house than these two rooms, for he could not have got at his rooms without the staircase, and that part of the house he used in common with the rest of the occupiers of the house. The case states also that the landlord did not live on the premises or retain any control over them, but the other rooms in the house were let out in a similar manner to other tenants, which means, in other words, that the landlord did not retain any control over the premises, but that the whole house was let out in separate apartments. It is stated, moreover, that two poor rates had been made, namely, one in November, 1872, and the other in May, 1873, and that in both rates the rooms in question were rated separately, and the claimant was rated in respect of them. There was also, as it appears in the case, a former rate made previously to the commencement of the qualifying year to which these rooms were not separately rated, and in respect of which all the occupiers of the house were rated jointly. Now under these circumstances, notwithstanding the case of *Thompson* v. *Ward* (3), where the facts being similar, the decision was against the franchise, the revising bar-

rister in the present case thought proper to hold that the two rooms were occupied by the claimant as a separate dwelling and were separately rated, and that the claimant was entitled to be on the list of voters for the city of Exeter, and the question is whether that was a right decision.

The first point made is whether the occupier of these rooms could be separately rated to the relief of the poor. It is argued that the revising barrister cannot look beyond the rate, and that the rate book is binding upon him, that is to say, that if the overseers do in fact separately rate premises though they cannot do so legally, and such rate is not appealed against, it is binding on the revising barrister. I apprehend, however, that the practice is otherwise, and that the revising barrister both does and can look behind the rating which has been made, and that if it were not so power would be put into the hands of the overseers to give or withhold the franchise as they might please. I am of opinion that we must look, therefore, in this case, behind the rate and see if the rooms could be separately rated. That point depends on the true construction of the Representation of the People Act, 1867. Now with respect to ascertaining such construction I venture to re-state what I said in delivering the judgment of the Court in *Cull* v. *Austin* (10) that "the governing rule with regard to the construction of all statutes by a Court of law administering the law is that the Court is bound to construe them as nearly as possible according to the ordinary received meaning of the words and ordinary grammatical construction of the phrases and sentences used in them. The Court ought not in any case to depart from such ordinary sense and ordinary grammatical construction unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the legislature." The best course, it still seems to me, is to follow as nearly as possible the words of each clause.

It is said that by construing each section literally an absurdity in fact would arise. That is thus dealt with by the late Mr. Justice Willes in *Abel* v. *L*
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though he did not occupy, might be

instead of the occupier, but if so it was for a composition rate only.

That is how the matter stood as to rating at the time of the passing of the Representation of the People Act, 1867, and in *Stamper* v. *The Overseers of Sunderland* (2) a particular interpretation was put on the 7th section of that Act. It has been urged by Mr. Kingdon that the decision in that case is not satisfactory, and is not a binding authority in the present case, because it was only an appeal against a rate. It is true that it was an appeal against a rate, but the question raised in it was one which related to the Parliamentary franchise, and it was so treated by all the Judges who decided it, and therefore we would not be loyally following the decision in that case if we were to disregard it, because the case was not an appeal from a revising barrister. The real decision there as to the interpretation of the 7th section was that the enactment in that section that "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate," was to be treated as an exception to the former part of that section. Such former part contains, first, a negative, and then an affirmative. "After the passing of this Act," it says, "no owner of any dwelling-house or other tenement shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned." Unless the case be one to which the former part of the sentence in the section can be applicable, the exception to it cannot apply, and therefore it seems to follow that the 7th section cannot be applied to any Parliamentary borough in which, at the time of the passing of the Representation of the People Act, 1867, there was no statute by which the owner could be rated. If I thought differently from what was decided in *Stamper* v. *The Overseers of Sunderland* (2) I should still follow it, but I have often had occasion to consider it, and I think it was rightly decided, and that it could not have been decided otherwise. It follows, therefore, that neither the 7th section nor the case of *Stamper* v. *The Overseers of Sunderland* (2) applies to the present case, and consequently the occupiers of these rooms could have been separately rated.

Then the next point is whether assuming the part of the house occupied by the claimant to have been separately rated to the rates to which it was rated, it can be considered to fulfil rightly the condition as to rating given with reference to the definition of "dwelling-house" in section 61 of the Representation of the People Act, 1867. This part of the 61st section has been naturally contrasted with the 3rd section, and therefore the question is, first, as to the construction of that 3rd section, which in fact brings us to consider sub-sections 2 and 3 of that section. In *Jones* v. *Bubb* (11), *Abel* v. *Lee* (14) and *Cull* v. *Austin* (10) it is obvious that this Court came to the conclusion that the claimant to the borough franchise need only, so far as section 3 is concerned, be rated to such rates as were made during the qualifying year, and that he need not be rated to any rate made before that time. In the first of these cases where the rate was signed by the overseers before, but not allowed by the justices until after the commencement of the qualifying year, the Court said the voter need not be rated to such rate since "rated to all rates made" meant in sub-section 3 of the 3rd section all rates completely made within the year of occupation. In *Abel* v. *Lee* (14) the claimant had been rated to a rate made before the qualifying year, from the payment of which he had been excused by the justices during the qualifying year, and this Court having to consider only in that case sub-section 4 of this 3rd section, came to the conclusion that it was different from sub-section 3 because it was different as to the time, and following the exact wording of such sub-section 4, the Court held that the claimant was bound to have paid "all poor-rates that had become payable by him in respect of the premises up to the preceding 5th of January." In *Cull* v. *Austin* (10) the claimant had been rated before and after the qualifying year, and had paid the rates made during the qualifying year, but before the qualifying year he had been excused by the justices from the payment of a rate to which he

had been rated, and it was argued that according to the decision in *Abel* v. *Lee* (14) it was necessary that he should pay that rate in order to be qualified. This Court, however, came to the conclusion that it was not necessary that he should pay that rate to be qualified because there was only a certain number of rates in the qualifying year which the claimant was bound to pay. It seems to me that these cases decide that there is a difference between the 3rd and 4th sub-sections, and that the third sub-section applies only to the question of the claimant being rated, and that the fourth sub-section applies only to the rate which must be paid by him. The conclusion I have come to is that if the matter depended on the third section only, there was nothing in this case to shew that the claimant was not entitled, because with respect to the rate made before the qualifying year it must be taken that the claimant was either rated to it jointly with the other occupiers, or that he was not rated to it at all, and there is no finding in the case that it was not paid in point of fact. Therefore, irrespectively of the kind of occupation necessary to satisfy the definition in section 61 of the statute, there is nothing to shew that the occupier may not have satisfied all that is necessary in respect of rating. Now what is the meaning of the 61st section as to the definition of a "dwelling-house?" Obviously two things are necessary to make what, by hypothesis, is not a dwelling-house, but only part of one, a dwelling-house within the statute. The part must be separately occupied as a dwelling, and it must be separately rated. It has been argued by Mr. Kingdon that a house cannot be rated at all, and that it is not the premises but the occupier that is rated. That no doubt is strictly true, but the words in the Act have of course a meaning, and the meaning is that the person occupying that part of the house as a separate dwelling must be separately rated. Then if that be read into sub-section 2 of the 3rd section that sub-section would in the case to which the definition of "dwelling-house" in the 61st section would be applicable (for it is only in certain cases, that is to say where what has been occupied is part of a dwelling-house that the definition is required) stand thus: "is on the last day of July in any year, *and has during the whole of the preceding twelve calendar months* been an inhabitant occupier as owner or tenant of any part of a house within the borough occupied as a separate dwelling, *and separately rated to the relief of the poor.*" The definition is to supply the thing occupied, and there must be an occupation of the whole of that thing during the year preceding the last day of July. According to the ordinary grammatical construction of the words, the whole, including the separate rating, must have existed during the whole year. That was pointed out by Montague Smith, J., in *Stamper* v. *The Overseers of Sunderland* (2), and following his view of the matter and the rule of construction before laid down, it seems to me that it is not open to the Court in the present case to say that the claimant claimed in respect of what had been separately rated during the whole of the qualifying year. It was necessary, not that the claimant, but that the person occupying these rooms, should have been separately rated during the whole of the qualifying year, and I therefore, for this reason, agree with my brother Honyman, that the claimant was not entitled. As to the last and only remaining point, I am of opinion, after anxiously endeavouring to see whether the view I took in *Thompson* v. *Ward* (3) was wrong, that I cannot alter it, and on reading again what was said by the judges, and especially by Montague Smith, J., in *Stamper* v. *The Overseers of Sunderland* (2) it seems to me to be clear that at that time those Judges were of opinion that the 61st section did not affect the decision of this Court in *Cook* v. *Humber* (8). I think it must come either to what the late Mr. Justice Willes said in *Thompson* v. *Ward* (3), namely, that the 61st section has no effect at all on the meaning of dwelling-house, and leaves the matter as it was before the Representation of the People Act, 1867, and when it applies it applies only to the case of chambers in the Inns of Court or to flats, and that where the occupation is such as in the present case it does not

all or to what I myself said in
s v. *Ward* (3). After all the
ation I have again given to the
I adhere to what I said in *Thomp-*
ard (3), and am of opinion that
the rating was for a sufficient
he claimant is not entitled to the
on the ground that part of what
as a dwelling he used in common
other occupiers. I therefore
decision of the revising barrister
ng.

NG, J.—Like my brother Brett I
n unable to write my judgment,
the less necessary that I should
e so, as I substantially agree with
ch my brother Denman has de-
There are, however, one or two
which I wish especially to refer.
the passing of the Representa-
he People Act, 1867, where the
franchise was claimed in respect
cupation of a house, there was I
d no doubt that such franchise
have been obtained except by the
on of the whole house, but what
ssary to constitute such a house
uently a matter of dispute, which
ly gave rise to the doctrine of
ral severance." This it was
at the time would settle the ques-
in its result in this respect it was
atisfactory. Any one who doubts
only to read the judgment of Erle,
Cook v. *Humber* (8), in which he
to bring the decisions into a
d intelligible rule, and this he
he had accomplished, and yet the
nt case of *Henrette* v. *Booth* (9)
at this had not been done, and
law had not been ascertained, for
impossible to reconcile those two
s.

came the Representation of the
ct, 1867. Now, I presume that
slature, by that Act, intended to
franchise to persons who occu-
nething less than a whole house,
o say to persons who occupied
house. I agree with the canon
ruction as propounded by my
Brett, namely, that words are to
n in their natural sense, and
applying that rule, I think the
Legislature when it said the word "dwelling-house" "shall include any part of a house," meant something different from a whole house. I say so, however, with some diffidence, because the late Mr. Justice Willes in *Thompson* v. *Ward* (3) expressed a contrary opinion, but I prefer adopting the words of the Legislature, and when the Act says "part of a house," I take it to mean part of a house. I think the Legislature intended that the franchise might be acquired in respect of what was not necessarily "a house," within the meaning of the former Act. But part of a house in order to confer the franchise must be separately occupied and separately rated. Now Mr. Lopes has contended, and not without authority, that a man cannot separately occupy part of a house if he can only reach such part by using a staircase in common with the other occupiers of the other parts of such house. I presume, however, that it was a matter not unknown to the Legislature, that a house is ordinarily so let out in separate apartments, that the occupiers must necessarily use a common staircase in order to get to their several apartments. In the present case the claimant used the staircase with the other occupiers, and it was contended that therefore he did not separately use part of the house, because if a man uses anything in common with others he cannot occupy it separately, but I am of opinion that the claimant occupied separately the two rooms, and I do not see why he may not separately occupy part of a house, because in order to do so he has to walk up and down a staircase which is common to him and the occupiers of the rest of the house. It is true that he does not separately occupy the staircase, but is that any reason why he should not occupy separately part of a house? If it were necessary, as has been contended, that the staircase should be separately occupied, the franchise intended to be conferred by the Act would be done away with, and things would be reduced to the state they were in when the Act of 1867 was passed, which I think would be contrary to the intention of the Legislature.

Next, part of a house must be separately rated, in order to confer the franchise.

Now although the city of Exeter was not under any small tenement Act when the Representation of the People Act, 1867, was passed, I take it that it may be presumed that most cities and boroughs were. The case of *Stamper* v. *The Overseers of Sunderland* (2), as I read it, decides that no man who occupies part of a house wholly let out in apartments can be separately rated in respect of such part where at the time of the passing of the Representation of the People Act, 1867, the owner was rated. But if so, where then is the franchise? If in a majority of cases a person can neither be separately rated in respect of part of a house, nor separately occupy it, what meaning can be given to the interpretation of "dwelling-house" in the 61st section? I agree with my brother Denman as to the construction he has put on the 2nd sub-section of the 3rd section, and I do not assent to the proposition that the words "separately rated" in the interpretation clause as to "dwelling-house" in the 61st section are to be read only in sub-section 2 of section 3, which provides for occupation, and not in sub-section 3 of that section which provides for rating. I feel the full force of my brother Brett's observation, that if the legislature says that a thing shall be so, we are bound to give effect to it, and are not to refuse to do so because we think it unreasonable, but it is part of the same canon of construction, that if the words of the enactment are capable of a reasonable as well as of an unreasonable construction, the reasonable construction is to prevail. I think that there is nothing unreasonable in construing the 61st section (which cannot be read in a strictly literal sense), as enacting that the occupier of part of a house is to be rated to the poor in respect of his separate occupation, and I agree with my brother Denman in his view of that section. As to the case of *Stamper* v. *The Overseers of Sunderland* (2), I concur generally in the observation of my brother Brett. I think this Court ought to respect its former decisions, though I do not know of any rule which would preclude this Court from examining its previous decisions, but it should do so cautiously, and never depart from them except upon the strongest grou is, however, not necessary to pr any opinion on the case of *Sta The Overseers of Sunderland* (2), fo that the present case is excepted ou case by reason of there not having b small tenement Act in Exeter. cision in that case has undergon discussion, and Mr. Davis in hi work on the "Law of Registrati 235, regrets, and in this I coinci him, that the Court felt themselv pelled to hold that the state of t they existed at the time of the pa the Act of 1867, was to be taken with reference to the applicatio exception in the 7th section. I necessary now to consider the *Stamper* v. *The Overseers of Su* (2), but when the time arrives to may become a question how far t which was not decided under th tration Acts, is binding on us i mining registration cases, though with my brother Brett, that the had before them in that case wha be the effect of their decision up tions as to the franchise. As to ment of the rate in the presen cannot agree with those who h that the case is improperly st collect from it that all rates w and that as to that the revising was satisfied, and I see no oblig him to have stated more than done in this respect, nor do I th he was precluded by the case of *T* v. *Ward* (3), in which this C equally divided, from exercising judgment on the main questio way he has done. I adhere to the I expressed in *Thompson* v. *W* and for the reasons I have giv the decision of the revising barri right.

DENMAN, J., added.—With ref the case of *Stamper* v. *The Ove Sunderland* (2), I wish to say tha with what my brother Brett has that case as to the exception in section of the Act of 1867.

Attorneys—G. E. Philbrick, for appella Kingdom & Cotton, for respondent.

1874. Jan. 21, 27. } MAGEE *v.* LAVELL.

Contract, Construction of—Description of Subject-matter—Premises in Vendor's Occupation—Extrinsic Evidence—Penalty—Liquidated Damages.

By an agreement for the disposal to the defendant of the plaintiff's interest and goodwill in a public-house the premises were described as "the house and premises he now occupies known by the sign of the White Hart, with stabling and garden situate and being at," &c. The agreement contained a stipulation that the plaintiff was not, during the defendant's tenancy of the premises, to be concerned in the trade of a licensed victualling house within the distance of two miles from the said premises under a penalty of 100*l.* *It also contained stipulations by the defendant to purchase certain effects and stock by valuation, and it stated that if the defendant was not accepted by the landlord as tenant at a certain rent or under, a deposit money of* 50*l.* *should be returned, and the agreement should be void, and concluded thus, "if either party shall refuse or neglect to perform all and every part of this agreement they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of* 100*l.* *as damages, and recoverable in any of her Majesty's courts of law":—*

Held, *that the words "he now occupies" could not be rejected, and therefore a coach-house which belonged to the premises, but which was shewn by extrinsic evidence to be at the time of the agreement not in the occupation of the plaintiff but of a person to whom the plaintiff had let it for a term then unexpired, was not included in the agreement.*

Held also, *that the* 100*l.* *mentioned at the end of the agreement as damages was a penalty and not liquidated damages.*

This was an action for damages for not completing an agreement which had been made on the 3rd of December, 1872, between Alfred Ernest Magee (the plaintiff) of the one part, and James Lavell (the defendant) of the other part, and which contained the following stipulations—First, the said A. E. Magee doth hereby agree to let unto the said J. Lavell *the house and premises he now occupies known by the sign of the White Hart, with stabling and garden, situate and being at Mitcham Green, in the parish and county aforesaid,* for the sum of 100*l.* as goodwill, and also agrees to sell to the said J. Lavell the household furniture, fixtures and effects such as he has a right to sell, and which are now in and upon the said premises, at a fair valuation to be made by McLaren, Son & Rolfe and Messrs. Lovejoy & Miles, or their umpire, in the usual way of public-house valuations, and to assign over good and sufficient beer and other licenses, and do all necessary acts for effectually transferring the same to the said J. Lavell, and to sell by valuation by two gaugers, or their umpire, all the sound and saleable stock in the said house, not exceeding as follows—porter, three butts; ale, twelve barrels; wines, spirits and compounds, 100*l.*, and that such appraisement, valuation of stock, assignment of licenses and time of delivering up possession shall be on or before the 8th of January, 1873, at which time all arrears of rents, rates, taxes and gaslight rent and other incumbrances due or growing due shall be duly paid or allowed for in the settlement. And the said A. E. Magee shall not, at any time during the tenancy of the said premises by the said J. Lavell, or his wife, being a widow, take, keep or be in anywise interested or concerned in the trade of any licensed victualling house within the distance of two miles from the said premises, under a penalty of 100*l.* Secondly, the said J. Lavell doth hereby agree to take the before-mentioned house and premises at and for the sum of 100*l.* as goodwill, and agrees to purchase the aforesaid household furniture, fixtures, effects and stock by appraisement and valuation as aforesaid, and accept of such licenses; and that such appraisement, valuation of stock and time of taking possession shall be as aforesaid, and that he will pay the purchase money for the said goodwill, effects and stock, together with the unexpired time in the licenses and insurance at the time of taking possession. The sum of 50*l.* now paid as a deposit to be allowed at the same time. One moiety of the whole expenses to be paid by each

party. It is also agreed that if the said J. Lavell shall not be accepted by Mr. James Ward as tenant at the rent of 124*l.* per annum or under, the deposit shall be returned, and this agrement shall be null and void; and that if either party shall refuse or neglect to perform all and every part of this agreement they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of 100*l.* as damages, and recoverable in any of her Majesty's courts of law."

At the trial before Honyman, J., at the Middlesex sittings in Trinity Term, 1873, the defence rested mainly on the fourth plea, which was that, at the time of the making of the said agreement, a certain coach-house, then part of the said premises in the said agreement mentioned, had been and was let to one Samson for a term extending long beyond the said 8th of January, 1873, and that at the said time appointed for the completion of the said agrcement the said Samson was possessed of the said coach-house for the said term, and was in actual occupation thereof, and that the plaintiff was then unable to give the defendant possession of the said coach-house. The facts, as they appeared at the trial, were that on the 19th of March, 1872, James Ward let the White Hart to the plaintiff, with the coach-house, stabling, skittle-ground and garden, subject to the tenancy of Samson, who at that time held the coach-house and stabling as tenant to Ward on a tenancy which expired at Christmas, 1872. The plaintiff occupied the premises so demised, with the exception of the coach-house and stabling, and in October, 1872, he agreed with Samson for the letting of the coach-house and stabling to him for a further term, determinable at any time upon three months' notice to quit. At the time of making the agreement between the plaintiff and the defendant, no such notice had been given, but at the time appointed for the completion of the agreement the plaintiff was in the position to give the defendant possession of all the premises except the coach-house, and the question therefore was whether the coach-house was included in such agreement. There was evidence that before the agreement was signed the de was shewn round the premises, a told that the coach-house and stab been let to Samson, who was g give up all but the coach-house he would retain. The admissib this evidence was objected to. agreement itself was a printed and the words which are in itali all printed, except the words, " Hart, with stabling and garden," a Mitcham Green," which were in The landlord, Ward, was willing t accepted the defendant as his tena the defendant refused to complet could not have possession of the house at the time fixed for the com notwithstanding possession of offered to him on the 8th of 1873, Samson's tenancy having time been determined.

Under these circumstances the claimed to be entitled to a verd he claimed to have the same for t mentioned in the agreement, con that that sum was not a pena agreed liquidated damages. The Judge, however, was of opinion t plaintiff could only be entitled actual damage sustained which case was assessed at 30*l.*, but expressing any opinion as to the ant's right to refuse to compl directed a verdict for the plain 100*l.*, with leave to the defendant t to enter a verdict for him or a if the Court should be of opinio the coach-house was included agreement of the 3rd of December or to reduce the verdict to 30*l.*, th to have power to draw inferences and to direct upon the admissib evidence, and how the verdict sh entered with or without such evid

A rule *nisi* was accordingly o against which

Montagu Chambers and *Ma* now shewed cause.—The Judge received evidence shewing that fendant was verbally informed t coach-house was let to Sampson, a the defendant knew that the coac was to be left out of the agreemen trinsic evidence was necessary t

tain what was contained in the agreement, for the word "stabling" might or might not include the coach-house. But the words "which he now occupies" must be construed in their natural sense and cannot be rejected; they are decisive in the plaintiff's favour. To decide in the defendant's favour the Court must either strike out these words as insensible and as surplusage, or must insert in the agreement the words "and which Samson now occupies." It is contended that the Court ought not to adopt either of these courses, for each of these alternatives violates the rule of evidence that the meaning of a document is to be ascertained only from the words used therein, and that every word is to have a meaning assigned to it. As to the damages the stipulated sum is to be construed as liquidated damages.

[HONYMAN, J.—At the trial I thought the defendant right upon this point, as it was not distinguishable in principle from *Kemble* v. *Farren* (1).]

The agreement in this case substantially provides for one event only, namely the plaintiff letting the defendant have the premises and goodwill of the White Hart for the sum of 100*l.*, which the defendant undertakes to pay. It is exactly like the agreement in *Reilly* v. *Jones* (2). There, in like manner, the party who should not fulfil the agreement was to pay to the other a fixed sum as liquidated damages, and it was held that such sum was not a mere penalty, and that for breach of the agreement the defendant was liable for the whole of the sum so fixed as liquidated damages. The only difference between the present and that case is that in the present case the sum so fixed to be paid is stated to be damages and is not described as liquidated damages, but that, according to *Kemble* v. *Farren* (1), is of no consequence as the Courts look to the intention of the parties, and it is immaterial whether the sum payable be called liquidated damages or not.

[LORD COLERIDGE, C.J.—In *Reilly* v. *Jones* (2) the Court put it as one ingredient of their judgment that the parties used there the expression "liquidated damages," and they state that before that time there had been no case in which where the expression *liquidated damages* had been employed the plaintiff had been held not entitled to recover the sum named as stipulated damages. Now since that decision there have been several cases in which the plaintiff has been held to be not so entitled notwithstanding the contract contained that expression. KEATING, J.—In *Mayne on Damages*, 2nd ed. p. 104, it is stated that subsequent cases have overruled the doctrine laid down in *Reilly* v. *Jones* (2) that the mere use of the words "liquidated damages" is decisive against the sum being held to be a penalty.]

Reilly v. *Jones* (2) was approved and acted on in *Lea* v. *Whitaker* (3). The case of *Spurrow* v. *Paris* (4) is also an authority for this 100*l.* being recoverable as liquidated damages.

[LORD COLERIDGE, C.J.—There was in that case only one event on which the half freight which was to be forfeited was payable, and that event had happened.]

Here also the sum was payable on one event only, namely, on either party *wholly* failing to perform the agreement. The word "*complete*" shews that "all and every part" are superfluous words, and that completing or refusing to complete the agreement is the essential point. *Sainter* v. *Ferguson* (5) is another authority for holding this 100*l.* to be liquidated damages and not a mere penalty.

Murphy and *Blay*, in support of the rule.—There is no ambiguity on the face of the written agreement, and, therefore, no parol evidence was admissible. There is nothing in the agreement to shew in what sense the word "occupies" is used. A man may occupy by his tenant, and why may it not have been used here in

(1) 6 Bing. 141; s. c. 7 Law J. Rep. C.P. 258.

(2) 1 Bing. 302; s. c. 1 Law J. Rep. C.P. 105.

(3) Law Rep. 8 C.P. 70.

(4) 7 Hurl. & N. 594; s. c. 31 Law J. Rep. (N.S.) Exch. 137.

(5) 7 Com. B. Rep. 716; s. c. 18 Law J. Rep. (N.S.) C.P. 217.

that sense? The word "stabling" is large enough to include "coach-house," and, therefore, the coachhouse attached to the White Hart would pass to the defendant under this agreement unless it could be excluded by parol evidence. The evidence that the defendant had notice of the occupation of the coachhouse by Samson, and that Samson was to continue therein was clearly not admissible.

[KEATING, J.—Some parol evidence must be admissible. How are you otherwise to shew what is known by the sign of the White Hart?]

That may be so, but here the words "he now occupies" are the words in print and ought to be rejected, not being words inserted by the parties to describe the subject matter of the agreement, but amounting to a *falsa demonstratio*—*Doe d. Smith* v. *Galloway* (6).

[LORD COLERIDGE, C.J.—The words there rejected would have enlarged the grant.]

The case of *Doe d. Campton* v. *Carpenter* (7) is one in which the words "now in the occupation of" were not allowed to restrict a general devise but were rejected as a *falsa demonstratio*. In *Chamberlain* v. *Turner* (8), the words were, "the house or tenement wherein William Nicholls dwelleth called the White Swan," and it was considered that the words White Swan shewed that all the house was meant, and that the whole passed under the devise although William Nicholls never dwelt therein. To the same effect is *Stukeley* v. *Butler* (9).

[LORD COLERIDGE, C.J.—Lord Westbury in *West* v. *Lawday* (10), says that the maxim of *falsa demonstratio* "is applicable to a case where some subject matter is devised as a whole under a denomination which is applicable to the entire land, and then the words of description that include and denote the entire subject matter are followed by words which are a the principle of enumeration, bu completely enumerate and exhau particulars which are compreher included within the antecedent or generic denomination." Th this case where the occupation is to identify the property.]

Here the property is identifie sign of the White Hart—*Goo Southern* (11) and the cases in wh words of occupation may be rej stated by Lord Campbell in *doe bard* v. *Hubbard* (12).

[LORD COLERIDGE, C.J.—In *Fortune* (13) Lord Wensleydale of parol evidence being used w ence to the description of prop deed says that "such evidence i admissible to shew the condition part of the property and of circumstances necessary to p Court when it construes an in in the position of the parties to to enable it to judge of the m the instrument."]

Supposing parol evidence wa sible it would shew at all events tion to give the coachhouse defendant, though subject to th of Samson. Then with respe damages, the 100*l.* is only a pen

[DENMAN, J.—What meanin give to the words "recoverabl of Her Majesty's Courts of Law

In *Davies* v. *Penton* (14) th similar words, and yet the sum to be a penalty and not liquidated [They were then stopped by t as to this point.]

LORD COLERIDGE, C.J.—I am that this rule should be discharg much thereof as seeks to enter a v the defendant, and that it should absolute as to the reduction of This is an action for non-perfo an agreement. The agreeme

(6) 5 B. & Ad. 43.

(7) 16 Q. B. Rep. 181; s. c. 20 Law J. Rep. (N.S.) Q.B. 70.

(8) Cro. Car. 129.

(9) Hob. 171.

(10) 11 H.L. Cas. 384.

(11) 1 M. & S. 299.

(12) 15 Q.B. Rep. 227: s. c. 20 L (N.S.) Q.B. 61.

(13) 4 Macq. H.L. 127.

(14) 6 B. & C. 216; s. c. 5 Law J. Re

disputed, and the whole question, as to its construction, depends substantially on the fourth plea, which alleges that a coach-house, part of the premises included in the agreement, was let to a tenant, and that therefore the plaintiff was unable to give possession of the same. What is the true construction of this agreement? It states that the plaintiff agrees to let to the defendant "the house and premises he now occupies, known by the sign of the White Hart, with stabling and garden, situate and being at Mitcham Green." The question which has been argued has been what do those words mean? The fact is that there were certain premises at Mitcham called the White Hart, consisting of the house itself and of the coach-house, stabling, garden and other premises occupied with it, and which formed the subject matter of the demise from Mr. James Ward to the plaintiff. As a fact, the plaintiff did not occupy the coach-house and stabling, and at the time of the agreement the coach-house was in the occupation of Samson, under an undetermined demise; and, therefore, if the words in dispute in this agreement are to be taken to include the coach-house the defendant will be entitled to succeed, but if to exclude it, then the plaintiff will be entitled to succeed. The words in dispute are "the house and premises he now occupies, known as the White Hart, with stabling and garden." The argument on the part of the defendant is that the words "he now occupies" ought to be rejected, and that the word "stabling" includes coach-house. I fail to see on what principle of law the words "he now occupies" ought to be rejected. It has been said as one reason, because they are printed, but I think it would be an odd doctrine to say that words printed are not to be treated as of equal importance with other words merely because they are printed. Then it is said that these words are merely *falsa demonstratio*, but I do not see how that can be. Now, let us first consider what is the true construction of this agreement, without applying to it the extrinsic evidence objected to, and then, secondly, what it is with such evidence.

With regard to the first it obviously requires some extrinsic evidence in order to ascertain the subject matter of the demise, and when one does apply such evidence it turns out that there was a proper subject matter to which it could relate, and which was sufficient in my mind to satisfy the words "he now occupies." Those words are not cut down by the words "known by the sign of the *White Hart*," because they are to be taken with the subsequent words, "with stabling and garden," and so taken they passed the whole of the premises occupied by the plaintiff, and which were the subject matter of the lease to him from Ward. The extrinsic evidence which was objected to (if it is to be taken) clearly satisfies me that it was not intended by the parties that the coach-house should pass to the defendant. The lease from Ward to the plaintiff was made subject to the tenancy to Samson, and both the plaintiff and defendant were aware at the time of the agreement of the condition of the plaintiff with regard to Samson, and it was well understood between them that they were dealing only with respect to what the plaintiff had the power to pass the possession of. It also appears that Samson's tenancy was ultimately determined, and occupation of the coach-house and stabling was offered to the defendant on the 8th of March, 1873, but that the defendant would not have it, and stood on the technical objection he had taken, and so refused to perform, notwithstanding there had been what was in fact, in any view of the contract, a substantial performance by the plaintiff. It seems to me, therefore, that with or without such extrinsic evidence the verdict was rightly for the plaintiff.

As to the second question in this case, I am of opinion that the 100*l.* damages mentioned in the agreement are not liquidated damages. None of these kind of cases can be judged from the actual words, as to damages, used in the agreement. The Courts have laid down this sensible rule, that they will not be bound by the words "liquidated damages," but will see from the agreement what the parties really intended. In the present case there are several matters which the parties agree to perform, and the real damage which the plaintiff has

sustained in this instance has been ascertained at 30*l.*, and I think, therefore, the verdict should be reduced to that amount.

KEATING, J.—I am of the same opinion, and I will not add a word to what has been said by my Lord on the first point. With respect to the second point, I will state what passed in this Court in the case of *Lea* v. *Whitaker* (3), where reliance was put on the case of *Reilly* v. *Jones* (2). Now, as was pointed out by the Chief Justice when that case of *Reilly* v. *Jones* (2) was cited by Mr. McMahon, the ground on which the decision of the Court in that case partly proceeded was that up to that time there had been no case where, when the expression "liquidated damages" had been used by the parties, the Court had not so construed the agreement as specifying the sum to be paid for the breach of it. In *Lea* v. *Whitaker* (3) I appear to have referred to *Reilly* v. *Jones* (2) as an authority without making this qualification, but I observe that the rest of this Court decided *Lea* v. *Whitaker* (3) strictly on the principle which the Courts have established according to the cases decided since *Reilly* v. *Jones* (2). The case of *Lea* v. *Whitaker* (3) strongly shewed that the parties there contemplated liquidated damages, because a sum had been deposited by each of them with a third person to be paid over by the party who did not perform the agreement to the other of such parties, and it was thought by the Court that this was the stipulated sum to be paid for the breach of the agreement, not because the words used, "either party failing to complete this agreement shall forfeit to the other his deposit money, as and for liquidated damages," were simply words mentioning the damages as liquidated damages, but because there had been a deposit of the money, and it would be difficult for a stakeholder to divide it, and therefore it shewed that the intention of the parties was that the stakeholder was to pay the whole to one of the parties in the event of any breach by the other. It seems to me for these reasons that we came to a right conclusion in *Lea* v. *Whitaker* (3).

DENMAN, J.—I am of the
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the case of *Betts* v. *Burch* (1
of *Lea* v. *Whitaker* (3) does
help the present plaintiff,
should be absolute for the
damages.

Rule absolute accord

Attorneys—J. P. Murrough, for p
Sons, for defendan

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(15) 6 B. & C. 216; s. c. 5 L
112.

(16) 37 Law J. Rep. (N.S.) C.
Rep. 3 C.P. 161.

(17) 4 Hurl. & N. 506; s. c. 2
(N.S.), Exch. 267.

(18) Honyman, J., was not pre
when the decision was pronounced

1874. Jan. 24. { WELLER *v.* THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

Negligence—Railway Company—Invitation to Passenger to alight—Overshooting Platform.

The plaintiff was a passenger by the defendants' railway, and as the train reached the station to which he was to be carried, he heard the name of such station called out; the train afterwards stopped, and he heard the opening and shutting of doors usual upon passengers alighting. He then opened the door of the carriage in which he travelled, and which was the second from the engine, and put one foot on the step and the other on what he expected to be the platform, but the part of the train in which he was carried having overshot the platform he fell on to the embankment. It was a dark night at the time, and there was no light within forty feet of the spot, and the plaintiff was therefore unable to see whether the platform was or was not by the side of the carriage. A passenger in the third carriage from the engine proved that he got out and alighted on the platform, and that he afterwards saw the plaintiff fall. No warning was given by the defendants' servants to any of the passengers not to leave their seats, and the train was never backed, but after the accident proceeded on its journey.

In an action for the injury the plaintiff had sustained by such fall through the defendants' negligence,—Held, *that there was evidence on which a jury might reasonably find negligence on the part of the defendants, without contributory negligence of the plaintiff.*

This was an action for damages for an injury the plaintiff had sustained through the negligence of the defendants whilst travelling on their line of railway.

The plaintiff was a passenger by the defendants' railway from London Bridge to Selhurst on the evening of the 30th of November, 1872. On the arrival of the train at the Selhurst station, the carriage in which the plaintiff was travelling went about a yard beyond the platform. It was about seven o'clock, very wet and dark, so that the plaintiff was unable, as he said, to see whether there was a platform there or not, but he had heard some one call out "Selhurst" as the train reached the station, and after it had stopped he had heard the noise of opening and shutting doors usual upon persons alighting. He then opened the door of his carriage for the purpose of getting out, and having put one foot on the step he put the other on what he expected was the platform, but there being no platform there he fell down a distance of about four or five feet on to the embankment. The carriage in which the plaintiff travelled was the second from the engine, and a witness was called at the trial who travelled on the evening in question in the third carriage from the engine, and he stated that on the train stopping at the Selhurst station he got out and alighted on the platform, and that he then saw the plaintiff get out and fall down. He, with the railway guard, assisted the plaintiff in getting up, and the train afterwards went on. The only light near where the accident occurred was from a lamp which was forty-nine feet from that end of the platform. There was a station-master and one porter, but they only arrived at the spot where the plaintiff fell after the accident, and no warning of the danger of alighting there was given to any of the passengers. The plaintiff had a season ticket, and was in the habit of travelling up and down this railway, but he did not always use this station, and in fact more frequently used another.

Upon these facts, Bovill, C.J., before whom the cause was tried at the Middlesex sittings, after Trinity Term, 1873, nonsuited the plaintiff, but gave him leave to move to enter a verdict for 100*l.*, if the Court should be of opinion that there was evidence of negligence by the defendants, on which the jury should have found a verdict for the plaintiff, the Court being at liberty to draw inferences of fact. A rule *nisi* to that effect having been obtained,

Lopes (*Joyce* with him) shewed cause.—There was no negligence on the part of the defendants or their servants. The calling out the name of the station, especially whilst the train is in motion, as

it was here, has been held to be no invitation to alight—*Bridges* v. *The North London Railway Company* (1) and *Lewis* v. *The London, Chatham and Dover Railway Company* (2). That last case is very similar to the present one. There the train was brought to a stand still after it had partly overshot the platform at Bromley station, and the plaintiff there had heard "Bromley, Bromley," called out as the train arrived, and she stated that as she was getting out of the carriage the train was quite still, but a sudden moving of the train, caused by the engine backing, threw her down. The Court there held that there was no evidence of negligence to go to the jury, and Blackburn, J., said that it was quite distinguishable from *Cockle* v. *The South-Eastern Railway Company* (3), and that, "as for the calling out the name of the station that was but telling the plaintiff what she knew." "It was done," said that learned Judge in the course of his judgment, "to convey information to the passengers that the station had been reached, and of itself meant nothing more."

[BRETT, J.—Is there not evidence in the present case that the train had come to a final stand-still, and therefore, according to *Cockle's* case, there would be evidence here of negligence to go to a jury.]

But there was at least here contributory negligence on the part of the plaintiff. He was a season-ticket holder and in the habit of using this train, and must have known this particular station, and that there was great danger in his getting out of the carriage where he did.

Digby Seymour and *Willis* appeared in support of the rule, but were not called on.

BRETT, J.—I am of opinion that this rule should be made absolute. The first question is whether the Judge at the trial was entitled to nonsuit the plaintiff.

(1) 40 Law J. Rep. (N.S.) Q.B. 188; s. c. Law Rep. 6 Q.B. 377.

(2) 43 Law J. Rep. (N.S.) Q.B. 8; s. c. Law Rep. 9 Q.B. 66.

(3) 39 Law J. Rep. (N.S.) C.P. 226; s. c. Law Rep. 7 C.P. 321.

Now it is a rule of law that the
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to open and passengers got out,
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he did get out upon the platform
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of backing, but after the accid
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of railway companies was brought to an end by the case of *Cockle* v. *The London and South Eastern Railway Company* (3). It is not for a Judge to say what that practice is, and there was certainly evidence of negligence in this case on the part of the defendants for the jury to have acted on. As to the case of *Lewis* v. *The London, Chatham and Dover Railway Company* (2), we should have followed it if the facts there had been the same as those here, but that case is as distinguishable from the present one as that case was from *Cockle* v. *The London and South Eastern Railway Company* (3). There it appeared that the plaintiff knew or ought to have known that the train was beyond the platform and that it was about to back. The stoppage there was not a final stand-still, and the train was in fact put back. We are here to draw inferences of fact, but that must mean such inferences as a jury ought reasonably to draw, and all we have to consider is whether there be such evidence of negligence on the defendants' part as a jury might reasonably act on, and I think there was, and that there was no contributory negligence by the plaintiff.

DENMAN, J.—I am of the same opinion. The question in this case was one peculiarly fit for a jury. The main point as raised by Mr. Lopes in his argument depends on whether the train had come to a final stand-still before the plaintiff got out of the carriage. Now I am clearly of opinion that there was evidence upon which a jury might reasonably have found that the train had come to a final stand-still. It was proved that it did not move again until after the accident, and that it then proceeded on its journey, and there was nothing to shew that it was ever going to be put back, or that the passengers were told to keep their seats. Then if it had so finally stopped, was there evidence that the accident arose from negligence on the part of the defendants? As to that we must take into consideration all that occurred, that is to say the fact that the train in stopping went beyond the platform, that the night was dark, and that there was no light within forty feet of the spot where the accident occurred, and that no warning was given or anything said as to the passengers keeping their seats. I think all this was evidence of negligence to go to the jury, and although we are to draw inferences of fact, I agree with my brother Brett that we cannot put ourselves in the position of a jury to all intents and purposes. Had I been on the jury I should have found the defendants had been guilty of negligence on the ground of want of light and of the absence of any warning to the passengers, and I should also have found that there had been no contributory negligence on the part of the plaintiff. I therefore agree that this rule should be made absolute.

HONYMAN, J.—I am of the same opinion. I do not think that the calling out the name of the station is an invitation to alight so as to be of itself evidence of negligence, but I agree with what was said by my brother Keating in *Bridges* v. *The North London Railway Company* (1), that if the train stops afterwards it amounts to a notice that that is the place for passengers to that station to get out. I also agree that overshooting the platform is not alone evidence of negligence, but where there has been as here an overshooting of the platform, a dark night and no warning from any of the defendants' servants against alighting, I think there is evidence of negligence on which a jury might act. In the present case, if I had been on the jury, I should have found that there was negligence by the defendants and no contributory negligence on the part of the plaintiff. The case of *Lewis* v. *The London, Chatham and Dover Railway Company* (2) is very different from the present case as there the train had not come to a final stand-still.

Rule absolute.

Attorneys—Hy. Aird, for plaintiff Baxters & Co., for defendants.

1874. Feb. 5. } SMITH AND ANOTHER *v.* EGGINTON.

Lease—Assignee of Reversion—Tenant to Mortgagor in Possession—Evidence of New Tenancy—32 Hen. 8. c. 34.

The principle, that the assignee of a reversion is not bound by the terms in a lease not under seal, applies where the demise is of three windows in a factory, with the stipulation that the lessor shall provide steam power.

The question, whether the assignee of a reversion has adopted the terms of the demise entered into by his assignor, is one of fact, and is to be disposed of by the jury.

B. demised, by an instrument not under seal, three windows in a factory to the plaintiff, and stipulated to supply steam power. B. at the time of the demise was mortgagor in possession. His mortgagees sold to the defendant, who did not accept rent from the plaintiffs, but continued to supply steam power. Subsequently a dispute arose as to the terms upon which the plaintiffs should continue tenants of the defendant, who thereupon cut off the steam power. The plaintiffs having sued the defendant for cutting off the steam power, —Held, *that no action would lie against the defendant.*

The first count of the declaration stated that the plaintiffs became and were tenants to the defendant of a certain portion of a lace factory of the defendant, at the yearly rent of 55*l.* 18*s.*, payable quarterly, on the terms amongst others that the defendant should provide sufficient steam power to work and drive three machines of the plaintiffs erected on the said portion during twenty hours per day, during the said tenancy, the said tenancy to continue until the same should have been determined by six calendar months' previous notice to be given by either party; and all things were done and happened, and all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiffs to have the said terms observed by the defendant, and to maintain this action in respect of the breach hereinafter mentioned. Yet the defendant, during the said tenancy, and without any such notice as aforesaid having been given, discontinued the supply of the said steam power, a[illegible] wholly refused any longer to supply [illegible] same, whereby the machines of the pl[illegible] tiffs were brought to a standstill, and plaintiffs were compelled to discont[illegible] their business, and remove their [illegible] machines, and to dismiss their w[illegible] people, at a great expense, and lost [illegible] profits they would otherwise have [illegible] by their said trade and the worki[illegible] the said machines, and were compell[illegible] rescind the contracts they had previ[illegible] entered into, and were put to grea[illegible] pense in and about the removal [illegible] said machines.

Second count.—And the plaintiffs [illegible] sue the defendant for that, in [illegible] sideration that the plaintiffs would [illegible] come and continue tenants to the de[illegible] ant, until the said tenancy should [illegible] been determined by six calendar mo[illegible] notice to be given by either party, [illegible] certain portion of a certain factor[illegible] the defendant, and would remove ce[illegible] machines of the plaintiffs into and [illegible] them upon the said factory of the def[illegible] ant, the defendant promised the p[illegible] tiffs that he would, during the said [illegible] ancy, supply sufficient steam powe[illegible] drive the said machines during twe[illegible] four hours per day, and all things were [illegible] and happened, and all times elapsed, [illegible] all conditions were fulfilled necessa[illegible] entitle the plaintiffs to a fulfilment o[illegible] said promise, and to maintain this a[illegible] in respect of the breach hereinafter [illegible] tioned. Yet the defendant did not [illegible] would, during the said tenancy, s[illegible] the said steam power as aforesaid, w[illegible] by the plaintiffs suffered the specia[illegible] mages in the first count mentioned.

Third count.—And the plaintiffs [illegible] sue the defendant for that a certai[illegible] son being possessed of a lace factor[illegible] premises had agreed to allow the us[illegible] certain portion of the same to the pla[illegible] at the yearly rent of 55*l.* 18*s.*, payable [illegible] terly, on the terms, amongst others, tha[illegible] defendant should provide sufficient s[illegible] power to work and drive three lace mac[illegible] of the plaintiffs, to be set up and erecte[illegible] the plaintiffs in the said portion du[illegible] twenty hours per day during the cont[illegible] ance of the said arrangement, which [illegible] to continue until the same should [illegible]

determined by six calendar months' previous notice to be given by either party. And afterwards, and before the plaintiffs had set up and erected the said lace machines in the said portion, a contract was entered into by and between the owners of the said factory and the defendant for the sale by the said owners to the defendant of the said lace factory and premises, including the said portion, whereof the plaintiffs had notice; and thereupon, in consideration that the plaintiffs would set up and erect the said lace machines in the said portion of the said factory, the defendant promised the plaintiffs when the said purchase should have been completed, to continue the said arrangement, as if the defendant had been the original contracting party, and to continue to provide sufficient steam power to work and drive the said machines during twenty hours per day, until the said arrangement should have been determined as aforesaid, according to the said terms so agreed as aforesaid. And although the plaintiffs accordingly set up and erected the said lace machines in the said portion of the said factory, and the defendant's said purchase was completed, and all things were done and happened, and all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiffs to a fulfilment of the said promise by the defendant, and to maintain this action; and although the said arrangement was not determined as aforesaid; yet the defendant made default in supplying the said steam power according to the said terms, and wholly refused so to do, whereby the plaintiffs have suffered the special damage in the first count mentioned.

Pleas.—As to the first count. That the plaintiffs did not become and were not tenants to the defendant of the said premises upon the terms alleged.

Second. As to the first count. That he did not discontinue the supply of the said steam power, or wholly refuse any longer to supply the same as alleged.

Third. As to the second and third counts. That he did not promise as alleged.

Fourth. As to the second count. That he did during the said tenancy supply the said steam power.

Fifth. As to the third count. That the said certain person had not agreed to allow the use of the said premises to the plaintiffs on the terms alleged.

Sixth. As to the third count. That the said purchase was not completed as alleged.

Seventh. As to the third count. That he did not make default in supplying the said steam power, nor did he refuse so to do as alleged.

Joinder of issue.

The case came on for trial at the Summer Assizes, 1873, for Nottinghamshire, and the following were the material facts:

The factory mentioned in the declaration was situate in Woolpack Lane, Nottingham, and in June, 1872, belonged to George Bridgett, as mortgagor, and on the 30th of that month he let standing room for three machines, together with steam power to the plaintiffs. The instrument of demise was not under seal and was as follows.

"The lessor agrees to let, and the lessees agree to take three windows in room No. 3 in the lessor's factory, in Woolpack Lane, Nottingham, the lessor to provide steam power for the said room, at the yearly rental of 55*l.* 18*s.*, commencing on June 24, 1872, and to continue at that rate, the lessor to provide steam power during twenty hours per day, excepting the holidays hereinafter mentioned, but no charge for loss or stoppage shall be allowed as a claim in case of accident to engine, boiler, or gearing. The lessor is empowered at all reasonable times to have access to the room to oil the shafting and gearing and inspect the condition thereof. The holidays shall be the usual factory holidays, viz., two days at Easter, three days at Whitsuntide, two half days at the summer races, three days at the October fair and three days at Christmas, and any other holiday made by royal proclamation. The lessor to pay all rates and taxes. The tenancy to be determined by either party on six months' previous notice from the lessor, and on six months from the lessees, terminating same time of year the tenancy commences; upon each of the usual quarterly days the said rent

is to be made payable by four equal quarterly payments. But in the event of the said lessees becoming bankrupt or insolvent, or in case the lessor should be compelled to distrain for non-payment of rent, the lessor shall be at liberty, but not compelled to determine the said tenancy and this agreement by giving the lessees or one of them, or leaving on the premises in their tenancy a notice in writing to quit the same in one week's time from the date of such notice, at the expiration of which time the said tenancy shall cease, and this agreement is absolutely to determine, and in case of such notice or of a distress, not only for the rent due up to the last preceding quarter day, but also for the proportion of the then current quarter down to the day of distraining for the same; as witness, &c."

Bridgett, in 1870, had mortgaged the factory to the trustees of the Nottingham Permanent Benefit Building Society, but he omitted to pay the interest. On the 21st of August, 1872, through Messrs. Wells and Hind, their solicitors, the society gave notice to the tenants of the factory, including the plaintiffs, that they were mortgagees and forbade the plaintiffs to pay rent to any one, except to their agent. In September the society sold the factory to the defendant, and the purchase was to be completed on the 25th of December, 1872. At the end of September, 1872, the following notice was sent by the solicitors of the society to the plaintiffs—" We do hereby give you notice to quit and deliver up to us on the 25th of December next, or at such other time as your tenancy shall expire next after the end of three calendar months from the date of this notice, the quiet and peaceable possession of all those standings for machines in room No. 3, and all other hereditaments and premises whatsoever. This notice is given to you as an act of courtesy, but without admitting your right to notice from the mortgagees." The purchase by the defendant was not completed until February, 1873.

In November the plaintiffs paid rent to the trustees through their agent, Mr. Thornton, and again on the 4th of February. In November, 1872, one of the plaintiffs met the defendant who ex his willingness to allow them to re the factory, but stated that he sh quire them to hold under a fresh ment. On the 13th of May the ment proposed by the defendant w mitted to the plaintiffs who, h objected to its terms, and refused it. Payment of rent was offered plaintiffs to the defendant, and On the 15th of May the steam pov cut off; it was, however, resumed 26th of May, the action being com on the 22nd of May.

The jury were of opinion that tract had been entered into betw plaintiffs and the defendant, and their verdict for the defendant assessed the damages contingently

In Michaelmas Term, 1873, a ru obtained to enter the verdict f plaintiffs on the ground that the evidence upon which the Judge have directed the jury that they o find that the defendant was bound terms of the original tenancy, indepe of any new or express contract betw parties: or for a new trial on the of misdirection, first, in leaving jury as the question in the cause w there was a new and binding agr between the parties for the conti of the supply of steam power. Se in directing the jury to restri damages to the date of issuing th Thirdly, in not directing the jury all events the plaintiffs became li and ought to have had notice and able time afterwards to remove th chinery; and also on the ground t verdict was against the weight dence.

Field and *G. Sills* shewed cause defendant being assignee of the sion is not bound by the terms demise entered into between the pl and Bridget, for it was not a lease seal—*Standen* v. *Chrismas* (1), *Sp Case* (2), *Phillips* v. *Miller* (3) question whether the defendant cognised the plaintiffs as his tenan

(1) 10 Q.B. Rep. 135; s. c. 16 Law (N.S.) Q.B. 265.
(2) 1 Smith's L.C. 4th ed. 36.
(3) *Ante*, p. 74.

of fact, and the finding of the jury poses of it.

Digby Seymour and *Beasley* in support the rule.—Even if the Court think that principle of *Standen* v. *Chrismas* (1) plies to this case, yet the Judge ought have directed the jury that the defendant had adopted the terms of the mise by Bridget. The supply of steam wer from February until it was cut off May was very strong evidence of a cognition of the plaintiffs as tenants. *ckworth* v. *Simpson* (4) in its principle pports the plaintiffs' case. *Cornish* v. *Stubbs* (5) shews that the plaintiffs were least in the position of licensees, and ught to have been allowed a reasonable me to remove their machinery before the steam power was cut off.

KRATING, J.—This was an action brought against the defendant upon an alleged contract between him and the plaintiffs that he should supply steam to certain machinery in a portion of a factory; the plaintiffs complained that the steam had been cut off. The following is a short statement of the facts in the case.

In June, 1872, George Bridgett demised to the plaintiffs three windows in a room of a factory, and undertook to supply steam for the plaintiffs' machinery to be placed in the room. The hire of the windows and the remuneration for the supply of the steam power were included in one sum. The demise created yearly tenancy, and was determinable a six months' notice. At the time of aking the demise, Bridget had mortaged the factory to the trustees of a uilding society, and was merely mortagor in possession: therefore the mortagees were not in any way bound by the emise by Bridget. Afterwards the ortgagees entered into a contract for a ale of the factory to the defendant. The riginal contract for the sale was made the month of September, 1872, but e conveyance was not executed until e 14th of February, 1873. After the mise had been made the mortgagees, that is, the trustees of the Building Society, did intervene, and they gave to the present plaintiffs notice to quit, and it seems that they having entered into the agreement to sell to the defendant, undertook that the factory should be clear of any tenancy by the following month of December. Accordingly, they gave notice to the plaintiffs to quit at the following Christmas or at such other time as their tenancy should expire after the end of three calendar months from the date of the notice; no doubt they admitted in that notice that a tenancy had existed. They also received from the plaintiffs rent on account of the quarters ending at Michaelmas and Christmas. The notice stated that it was given to the plaintiffs as a matter of courtesy and without admitting their right to it as against the mortgagees. A good deal of discussion took place before us as to how far what the mortgagees had done, had had the effect of a recognition and adoption by them of the tenancy created by the mortgagor; and it appears to me that if it was material to enquire into this matter there was strong evidence against the mortgagees that they had recognised the previous tenancy, notwithstanding the kind of protest annexed to the notice to quit; but for the reasons hereinafter mentioned it is not at all necessary to consider the effect of the acts done by the mortgagees with reference to the plaintiffs' occupation.

The factory has been conveyed to the defendant, and an order to enable the plaintiffs to succeed the defendant must be fixed with a contract to supply them with steam-power; for if he cannot, the averments in the declaration will not be proved.

The plaintiffs have attempted to make the defendant liable upon a supposed contract in two ways. First, it was urged that the terms of the demise entered into between the mortgagor and the plaintiffs had been recognised by the mortgagees, and had passed with the reversion to the defendant, and that he had become bound by all the terms of that demise. My brother Honyman, before whom the case was tried, was of opinion that, inasmuch as at common law the stipulations con-

(4) 1 Cr. M. & R. 834; s. c. 4 Law J. Rep. (N.S.) ch. 104.

(5) 39 Law J. Rep. (N.S.) C.P. 202; s. c. Law R. 5 C.P. 334.

and that the rule in this case ought to be discharged.

GROVE, J.—I am of the same opinion. The first question is, did the stipulations in the demise from Bridgett, the mortgagor, to the plaintiffs pass with the reversion? The simple answer is that the demise was not by deed, and that the Statute 32 Hen. 8. c. 34 does not apply. In fact, this point has hardly been contested.

A second question is, whether the defendant recognised the lease granted by the mortgagor to the plaintiffs. I wish to remark that some evidence exists of a recognition by the mortgagees. It appears that they received rent from the plaintiffs, and did for a time continue to supply steam power. It may be an arguable question, whether it may be inferred from these circumstances that a tenancy was constituted between the mortgagees and the plaintiffs; but this becomes quite immaterial, unless by operation of law or by some act of the defendant the supposed recognition of a tenancy by the mortgagees became in turn a recognition of the tenancy by the defendant. It has been argued that recognition by the defendant is to be inferred because the defendant, by the hands of the mortgagees, had received rent from the plaintiffs. The answer is, that at the time when the mortgagees received the rent, the defendant was not the owner of the factory; the rent was received by the mortgagees before the conveyance to the defendant, and therefore they were not his agents. They received it on their own account, and they could not bind him. An attempt has been made to shew that before the conveyance the defendant admitted that the plaintiffs were tenants. I do not think that there is any evidence of that; and, moreover, if there were, the admission would not bind the defendant, as he was not the landlord.

A further question has been raised, namely, whether the defendant himself recognised the original demise at a time when his recognition would be valid, and whether he thereby created a fresh contract upon the terms of the former agreement. It seems to me that the defendant did not adopt the stipulations in the original demise, and that he did not ingraft them into a new agreement. Every case of this description is to be decided by the verdict of a jury, and an instance of the law here applicable is to be found in *Buckworth* v. *Simpson* (4). In the present case the only piece of fair and reasonable evidence in favour of the plaintiffs was that the defendant supplied them for some time with steam; but the question to be decided is not whether there was some evidence of an adoption of the former demise by the defendant, but whether there was such a preponderance of proof in favour of the plaintiffs, that the verdict was clearly wrong. For some time the defendant negotiated with the plaintiffs, although they did not adopt the demise by the mortgagor, but endeavoured to enter upon a new contract with the defendant. During the negotiation he allowed the plaintiffs to have the use of the steam power; but it does not follow that the relationship of landlord and tenant existed. On the other hand, there was strong evidence to shew that the defendant had not adopted the demise by the mortgagor, that from the first he had protested against it, that he had produced the draft of a new demise to which the plaintiff objected; the parties were not *ad idem*, and were discussing what contract they should enter upon. The defendant stood upon his rights; and although he allowed the plaintiffs to remain in the factory, yet it was only on the condition that they should accept his terms. He did not supply the steam upon the terms of the old demise, but with the intention that a new agreement should be arrived at. I think that the balance of evidence was in favour of the defendant, but at all events it was a question for the jury, and I cannot perceive any misdirection on the part of the learned Judge, nor any obligation to direct a verdict for the plaintiffs. I think the finding right. I need not say anything as to the question of damages.

HONYMAN, J.—I am of the same opinion. I do not make any remark upon any inference which the jury might have drawn from the receipt of rent by the mortgagees, for it is quite immaterial. As the demise to the plaintiffs was not under

seal, its terms did not bind the assignee of the reversion, and the evidence did not shew that the defendant had made a fresh agreement adopting the terms of the old demise. I do not think that the verdict ought to be entered for the plaintiffs.

It has been argued that a new trial ought to be allowed. But I asked the jury whether the defendant either adopted the former demise or entered into a fresh contract between himself and the plaintiffs to abide by the terms made by either Bridgett or the mortgagees. The jury answered that question in the negative. An admission was made by one of the plaintiffs upon cross-examination which seemed wholly to dispose of the case as to this point. He stated that when he asked the defendant whether he and his co-plaintiff were to remain in the factory, the defendant said, "Yes, you may; but it must be on terms similar to those under which I occupied the former mill." I should have thought the jury wrong, if they had found that a new agreement had been arrived at. It is unnecessary to say anything as to the question of damages.

It has been argued that the plaintiffs were licensees; but at the trial it was not seriously contended that the jury ought to be directed that a license had been granted to the plaintiffs, by virtue of which a reasonable time ought to have been allowed them to remove their machinery and to hire another workshop. The plaintiffs' counsel did mention the question; but I pointed out that the plaintiffs' machinery was brought into the defendant's factory in the teeth of the defendant's servants. The matter was thereupon dropped. I think it extremely inconvenient that the subject should be revived. Counsel ought not to argue that I had omitted to leave a question to the jury when it was abandoned at the trial. I am therefore of opinion that the rule ought to be discharged.

Rule discharged.

Attorneys—G. L. P. Eyre & Co., agents for D. W. Heath, Nottingham, for the plaintiffs; Aldridge & Thorn, agents for Acton, Nottingham, for the defendant.

1874. Feb. 6. } JOHNSON *v.* APPLEB

Contract in Writing—Letters—plete Contract—Parol Evidence—C Trade.

When letters contain certain tern may form the basis of a contract, it sary to ascertain from the letters the terms are finally arrived at, anc are not, verbal evidence is admissibl that a different contract has been into.

The plaintiff proposed by letter into the defendant's service as salesm term of service was to be for one ye a list of customers was to be drawn u defendant replied by letter stating terms of the plaintiff's letter requi ther definition, but requesting him on an appointed day. The plaintiff upon the defendant's service, but missed before the expiration of t with a month's notice. The plaintif sued for a wrongful dismissal, at evidence was tendered of a custom miss salesmen at a month's noti Judge rejected the evidence, on the that the letters contained a compl tract in writing:—Held, *that the was admissible, as the contract in th was incomplete.*

The first count of the declaratio that it was mutually agreed by tween the plaintiff and the defend the plaintiff should serve the de and that the defendant should ret employ the plaintiff in his servi certain capacity, and at and for salary and commission then agre between them, for one year, and a the plaintiff entered upon the said under and in pursuance of the sai ment, and so continued therein fo of the said year, and performed al tions precedent, and all things we and happened necessary to enti plaintiff to be retained and empl such service on the terms aforesaid the remainder of the said year: defendant before the expiration said year wrongfully dismissed th tiff from the said service, and ref retain and employ the plaintiff

for the remainder of the said year. Whereby the plaintiff was prevented from earning his said salary and commission which he would have derived from being retained and employed in the said service for the remainder of the said year, and remained for a long time unemployed.

The second count stated that the plaintiff sued the defendant for money payable by the defendant to the plaintiff for the work, journeys and attendances of the plaintiff by him done, performed and bestowed as the salesman and agent of the defendant, and otherwise for the defendant at his request, and for commission and reward due from the defendant to the plaintiff in respect thereof, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

Pleas—1. As to the first count, that it was not agreed as alleged. 2. As to the first count, that the plaintiff did not enter upon the said service, nor did he continue therein as alleged. 3. As to the first count, that the plaintiff was not ready and willing to continue in the said service according to the terms of the said contract. 4. As to the first count, denial of the breach. 5. As to the first count, that after the alleged contract and before any breach thereof it was agreed by and between the plaintiff and the defendant that the said contract should be rescinded, and they then rescinded the same accordingly. 6. As to the first count, that the plaintiff became and was the servant of the defendant, as in the said count mentioned, in his trade or business of a manufacturer and calico printer upon certain terms and according to a certain condition annexed to the said contract by the general usage and custom in that behalf of and in the said trade or business in which the plaintiff was so employed, that is to say, that either of the said parties might determine the said service upon giving to the other of them one calendar month's notice of his intention so to do, the plaintiff in the event of his said service so being determined, and upon the determination thereof becoming and being entitled in lieu from the defendant a proportionate part of his salary and his commission in a [illegible] the time of the expiration of such notice and such determination of the said service. And the defendants say that the calendar month before the [illegible] the said service and refused to retain and employ the plaintiff therein, and the defendants gave to the plaintiff the calendar month's notice if the defendants intention to determine the said service and to dismiss the plaintiff therefrom. And the defendants say after the expiration of the said calendar month dismissed the plaintiff from the said service and refused to retain and employ the plaintiff therein, which is the alleged breach in the said [illegible] mentioned. 7. As to the [illegible] never [illegible] 8. As to the [illegible] counts payment [illegible]

Joinder of [illegible]

The [illegible] mer Assizes [illegible] the Salford [illegible] caster, before [illegible] appear [illegible] case—

The plaintiff was a [illegible] defendant a [illegible] was brought to recover [illegible] damages for the [illegible] plaintiff from the [illegible] also for commission [illegible] from the [illegible]

The [illegible] plaintiff [illegible] following [illegible]

"[illegible]

[illegible]

be allowed to me on all casual sales made in your warehouse by others than myself to any of my regular list of customers.

"If the terms herein specified are in accordance with your ideas, kindly confirm them by return, and I will then prepare to enter on my duties at your warehouse on Monday morning next, and trust by energetic and persevering work to effect a mutually favourable result to the engagement.

"Yours respectfully,
"A. J. Johnson.

The reply of the defendant was as follows—

"22nd September, 1871.

"Dear Sir,—Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday.

"Yours truly,
"J. Appleby.

"P.S.—I have made a list of customers which we can consider together."

The defendant supplied the plaintiff with a list of customers upon whom he was to call, and the plaintiff entered upon his duties on the 25th of September, 1871, and on the 3rd of May, 1872, received the following notice—

"Memorandum for Mr. Arthur J. Johnson, from John Appleby & Co.

"Sir,—We hereby give you notice to leave our employment in one month from this date.

"John Appleby & Co."

The plaintiff was dismissed at the end of the month.

On behalf of the defendant evidence was tendered of a custom prevailing in the calico trade whereby the engagement of a salesman by a manufacturer might be ended by either party upon a month's notice, unless a special time had been determined upon.

The learned Judge, however, thought that the letters above set forth constituted a hiring for one year certain, and rejected the evidence of the custom. The jury thereupon found a verdict for the plaintiff, with 65*l.* 15*s.* 10*d.* damages.

In Michaelmas Term *Pope* obtained a rule for a new trial on the ground o proper rejection of parol evidence dered on behalf of the defendant to that the contract between the partie not wholly contained in the letters c 21st and 22nd of September, and wa then a completed contract, but wa fact, completed at a subsequent inte between the plaintiff and the defe and before the service was entered *Rogers* v. *Hadley* (1) was cited.

Herschell (on Feb. 6) shewed ca The letters of the 21st and 22nd tember constituted a complete co between the parties; it was an agree not to be performed within a yea therefore by the 4th section of the St of Frauds must be wholly in wr For the defendant it was proposed t sert a term that the engagement be terminated by a month's notice the hiring was for one year certai verbal evidence of a custom to dism a month's notice contradicts the w documents, and therefore is inadmis *Noble* v. *Ward* (2) shews that a co required to be in writing by the St of Frauds cannot be varied by v testimony. *Wallis* v. *Littell* (3) was of a *quasi* escrow.

Pope and *Hopwood*, in support c rule.—It is admitted that a writte tract cannot be varied by parol; bu question here is, whether the letter tained a complete contract; if the not, parol evidence is admissible t plain how matters really stood—*Mal The London and South Western Ra Company* (4).

[HONYMAN, J.—That case has no cation here; it merely shews that a may be added by parol to a written tract, provided it does not contradi contents of the document.]

The words in the plaintiff's letter

(1) 2 Hurl. & C. 227; s. c. 32 Law J (N.S.) Exch. 241.

(2) 35 Law J. Rep. (N.S.) Exch. 81; in Chamber s. c. 36 Law J. Rep. (N.S.) Exch.

(3) 11 Com. B. Rep. N.S. 369; s. c. 31 Rep. (N.S.) C.P. 100.

(4) 35 Law J. Rep. (N.S.) C.P. 166; s. Rep. 1 C.P. 336.

one year on trial" suggest a mere proposal.

KEATING, J.—The real question to be decided in this case is, whether the letters of the 21st and 22nd of September constituted a complete contract; for if they did, the contract could not be varied by parol, and the evidence of the alleged custom would be inadmissible. After some hesitation, I have come to the conclusion that the letters do not contain a complete contract. I think this clear upon analysing their contents. It was stipulated by the plaintiff that a list of merchants to be regularly called on by him was to be made and corrected. This shews that something remained to be done at a future time. Further, the plaintiff was to receive a commission upon orders to be given by the customers, and until they were ascertained the matter was not complete. The defendant did not simply confirm the terms contained in the plaintiff's letter, he wrote doubtfully. The appropriate confirmation would have been "I agree to your terms." The defendant did not write what the plaintiff required. My opinion of the defendant's letter is that it did not contain an unconditional and definitive acceptance of the plaintiff's terms. I think that the contract was incomplete, and that therefore the evidence of the custom was admissible; for as no contract in writing had been arrived at, the objection to verbal evidence cannot be sustained. With all respect to the opinion of my brother Brett, I think that his view at the trial was erroneous, and that this rule for a new trial must be made absolute.

GROVE, J.—I am of the same opinion. The question is, whether there was anything equivocal; for if there was, the contract between the parties was not complete. The defendant's letter does not amount to an unequivocal acceptance of the plaintiff's terms, for the conditions of the contract required to be further considered. If the contract leaves something to be arranged at a subsequent time, the parties are not *ad idem*. It is by no means clear that the intimation to the plaintiff to come on the following Monday carried with it an acceptance of the terms in his letter; it might well be that when the plaintiff came to the defendant's on the Monday, a disagreement would arise and the whole arrangement would fall through. The postscript in the defendant's letter shews that something remains *in fieri*. If the terms in the plaintiff's letter clearly expressed the intention of the parties, there would be no need of further defining them as is proposed in the defendant's letter; he evidently intended that it should be clearly settled between them, what was the meaning of the contract of hiring. The wages mentioned in the plaintiff's letter was not the only mode of compensating him for his services, and the amount of his remuneration is left open for future discussion; a good many of the terms were left uncertain. The plaintiff ought to have asked whether the defendant would accept in writing the terms of his proposal; and as he omitted to do this, he took the risk of disagreement.

HONYMAN, J.—With reluctance I come to the conclusion that this rule for a new trial must be made absolute. The question which we have to consider is, whether the parties arrived at a definite agreement by the two letters. The defendant is not concluded merely by his signature attached to his letter; it is for the Court to decide whether the contract is complete. As this is a contract not to be performed within a year, it must be in writing, and variation by verbal testimony cannot be allowed. The difficulty arises from the fact that the defendant in his reply used indefinite terms instead of assenting absolutely. The defendant's letter merely indicates a general acceptance of the plaintiff's terms subject to further definition. The parties were never *ad idem*, and before the terms were completely settled differences arose.

Rule absolute.

Attorneys—Pritchard, Englefield & Co., agents for Grundy & Kershaw, Manchester, for plaintiff; Phelps & Sidgwick, agents for Sale, Shipman & Co., Manchester, for defendant.

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amount the defendant is willing to set off against the plaintiff's claim.

4. As to the claim for money payable, never indebted.

Joinder of issue.

The cause came on for trial at the Manchester Summer Assizes, 1873, before Quain, J., and the following appear to be the material facts of the case.

The plaintiff became bound to the defendant by the articles hereunder set forth—

"This indenture witnesseth that Thomas Abbott, formerly of Manchester, but now of Lambourne, in the parish of Chipping Lambourne, in the county of Berks, doth put himself apprentice to Frederick Bates, of Lambourne, in the county of Berks, horse-trainer, of his own free will and that of his father, Thomas Abbott, to learn his art and with him, after the manner of an apprentice, to serve from the 31st of December, 1867, unto the full end and term of five years from thence next following to be fully complete and ended; during which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do, and shall do no damage to his said master, nor see to be done of others, but to his power shall tell or forthwith give warning to his said master of the same, and shall not waste the goods of his said master, nor lend them unlawfully to any. He shall not commit fornication, nor contract matrimony, within the said term, shall not play at cards or dice tables, or any other unlawful games, whereby his said master may have any loss with his own goods or others during the said term, without license of his said master; and he shall neither buy nor sell, and shall not haunt taverns or playhouses, nor absent himself from his said master's service day or night unlawfully. But in all things as a faithful apprentice he shall behave himself towards his said master and all his during the said term. And the said Frederick Bates, in consideration of the faithful service of his apprentice, in the art of a horse-trainer which he useth, by the best means that he can, shall teach and instruct, or cause to be taught and instructed, finding unto the said apprentice sufficient meat, drink and the undermentioned yearly wages, lodging and all other necessaries, during the said term—for the first year the sum of four pounds, for the second year the sum of five pounds, for the third year the sum of six pounds, for the fourth year the sum of seven pounds, and for the fifth year the sum of eight pounds. And for the true performance of all and every the said covenants and agreements, either of the said parties bindeth himself unto the other by these presents. In witness whereof the parties above-named to these indentures interchangeably have put their hands and seals, the 30th day of November, and in the thirty-first year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, queen, defender of the faith, and in the year of our Lord one thousand eight hundred and sixty-seven."

The articles were signed by the parties thereto.

In answer to the plaintiff's claim of 30*l.* for wages which had not been paid, the defendant under the plea of set-off alleged that a debt exceeding the plaintiff's demand was due to him from the plaintiff for clothing and washing provided during the term of five years at the defendant's expense. It was contended that by a custom in the trade of horse-trainers washing and clothing were not considered "necessaries" for apprentices, at all events if the master paid wages; and evidence was adduced in support of this contention.

J. H. Peart deposed that he had been manager at the stables of J. Scott, who had the largest horse-training establishment in the world. The articles between the plaintiff and the defendant were in the form which the witness always used. He settled the accounts between Mr. Scott and his apprentices. He knew of no meaning attached to the word "necessaries" but board, lodging and medical attendance, and it did not include clothing and washing; wages were given to provide clothing. The witness further stated that the word "necessaries" was not used in the horse-training trade except in articles of apprenticeship, that he

had always paid for the washing and clothing of the apprentices out of their wages, and that he had never seen the words "washing and clothing" inserted in any articles.

The defendant stated that he was a trainer of horses, and that he had many apprentices in his service; that in the articles "necessaries" included medical attendance, but not washing or clothing; and that washing and clothing were charged for out of the wages. He added that where he paid no wages, he considered himself bound under the words "all other necessaries," to provide clothing and washing.

Other witnesses having given evidence of a like kind, the learned Judge left the question to the jury, whether in articles providing for the payment of wages, the word "necessaries" had acquired in the horse-training trade a technical meaning, restricting its ordinary sense, and excluding washing and clothing.

The jury found that the word had acquired a restricted meaning, and the verdict was entered for the defendant, leave being reserved to move to enter a verdict for the plaintiff.

A rule having been obtained accordingly,

Baylis and *Tomlinson* (on Feb. 5) shewed cause.—The word "necessaries" is uncertain in its signification; its legal meaning varies, and all that the defendant wishes to establish is that in the articles it was used in a somewhat restricted sense. The learned Judge was right in leaving to the jury the question whether the word "necessaries" had acquired in the trade of horse-trainers a technical meaning; the recent case *Ashworth* v. *Redford* (*ante*, p. 57) shews that when the language of a document used in a trade is uncertain in its meaning, the jury may be asked what is its signification. The custom is not excluded by the terms of the articles —*Hutton* v. *Warren* (1), *Smith* v. *Wilson* (2), *Cochran* v. *Retberg* (3), *Clayton* v. *Gregson* (4), *Grant* v. *Maddox* (5), *Gorrie*[illegible] *sen* v. *Perin* (6), *Myers* v. *Sarl* (7).

[HONYMAN, J.—The evidence shews th[illegible] there is no fixed meaning attached in t[illegible] trade to the word "necessaries." KE[illegible] ING, J.—The Court may control a v[illegible] dict of a jury founded upon insuffici[illegible] evidence—*Ryder* v. *Wombwell* (8). [illegible] any case be found in which a custom [illegible] upheld, whereby different meanings [illegible] assigned to the same word in the s[illegible] trade, and where the signification v[illegible] in a written document according to [illegible] insertion or omission of other matter [illegible]

Brown v. *Byrne* (9) seems in point.

[HONYMAN, J.—That case does not ap[illegible] here.]

The passage in *Starkie on Evidence*, page 710 (4th ed.), contains princip[illegible] in the defendant's favour.

Herschell (on Feb. 5th and 6th) in su[illegible] port of the rule.—The argument for t[illegible] defendant is fallacious. Evidence of cu[illegible] tom is admissible to explain a writt[illegible] contract only when it is made betwe[illegible] parties in the same trade; for it is esse[illegible] tial to shew that all the parties knew [illegible] had opportunity of knowing the meani[illegible] sought to be introduced. The plaint[illegible] when he signed the articles was a me[illegible] boy entering the horse-training trade [illegible] *Leake on Contracts*, 116, *Kirchner* v. *Ve*[illegible] (10), *Humfrey* v. *Dale* (11).

Cur. adv. vult.

The following judgments were delive[illegible] on Feb. 12—

KEATING, J.—The plaintiff has sued [illegible] wages upon a covenant in a deed [illegible] apprenticeship, whereby the defend[illegible] undertook during the term of five ye[illegible] to find for him sufficient meat, dri[illegible]

(1) 1 Mec. & W. 466; s. c. 5 Law J. Rep. (N.S.) Exch. 234.
(2) 3 B. & Ad. 728; s. c. 1 Law J. Rep. (N.S.) K.B. 194.
(3) 3 Esp. 121.
(4) 5 Ad. & E. 302.
(5) 15 Mec. & W. 737; s. c. 16 Law J. (N.S.) Exch. 237.
(6) 2 Com. B. Rep. N.S. 681; s. c. 27 L[illegible] (N.S.) C.P. 29.
(7) 3 E. & E. 306; s. c. 30 Law J. Rep [illegible] Q.B. 9.
(8) 38 Law J. Rep. (N.S.) Exch. 8; s. [illegible] Rep. 4 Exch. 32.
(9) 3 E. & B. 703; s. c. 23 Law J. Re[illegible] Q.B. 313.
(10) 12 Moore, P.C. 361.
(11) 7 E. & B. 266; s. c. 26 Law J. R[illegible] Q.B. 137.

ne of fact, and the finding of the jury disposes of it.

Digby Seymour and *Beasley* in support of the rule.—Even if the Court think that the principle of *Standen* v. *Chrismas* (1) applies to this case, yet the Judge ought to have directed the jury that the defendant had adopted the terms of the demise by Bridget. The supply of steam power from February until it was cut off in May was very strong evidence of a recognition of the plaintiffs as tenants. *Buckworth* v. *Simpson* (4) in its principle supports the plaintiffs' case. *Cornish* v. *Stubbs* (5) shews that the plaintiffs were at least in the position of licensees, and ought to have been allowed a reasonable time to remove their machinery before the steam power was cut off.

KEATING, J.—This was an action brought against the defendant upon an alleged contract between him and the plaintiffs that he should supply steam to certain machinery in a portion of a factory; the plaintiffs complained that the steam had been cut off. The following is a short statement of the facts in the case.

In June, 1872, George Bridgett demised to the plaintiffs three windows in a room of a factory, and undertook to supply steam for the plaintiffs' machinery to be placed in the room. The hire of the windows and the remuneration for the supply of the steam power were included in one sum. The demise created a yearly tenancy, and was determinable by a six months' notice. At the time of making the demise, Bridget had mortgaged the factory to the trustees of a building society, and was merely mortgagor in possession: therefore the mortgagees were not in any way bound by the demise by Bridget. Afterwards the mortgagees entered into a contract for a sale of the factory to the defendant. The original contract for the sale was made in the month of September, 1872, but the conveyance was not executed until the 14th of February, 1873. After the demise had been made the mortgagees, that is, the trustees of the Building Society, did intervene, and they gave to the present plaintiffs notice to quit, and it seems that they having entered into the agreement to sell to the defendant, undertook that the factory should be clear of any tenancy by the following month of December. Accordingly, they gave notice to the plaintiffs to quit at the following Christmas or at such other time as their tenancy should expire after the end of three calendar months from the date of the notice; no doubt they admitted in that notice that a tenancy had existed. They also received from the plaintiffs rent on account of the quarters ending at Michaelmas and Christmas. The notice stated that it was given to the plaintiffs as a matter of courtesy and without admitting their right to it as against the mortgagees. A good deal of discussion took place before us as to how far what the mortgagees had done, had had the effect of a recognition and adoption by them of the tenancy created by the mortgagor; and it appears to me that if it was material to enquire into this matter there was strong evidence against the mortgagees that they had recognised the previous tenancy, notwithstanding the kind of protest annexed to the notice to quit; but for the reasons hereinafter mentioned it is not at all necessary to consider the effect of the acts done by the mortgagees with reference to the plaintiffs' occupation.

The factory has been conveyed to the defendant, and an order to enable the plaintiffs to succeed the defendant must be fixed with a contract to supply them with steam-power; for if he cannot, the averments in the declaration will not be proved.

The plaintiffs have attempted to make the defendant liable upon a supposed contract in two ways. First, it was urged that the terms of the demise entered into between the mortgagor and the plaintiffs had been recognised by the mortgagees, and had passed with the reversion to the defendant, and that he had become bound by all the terms of that demise. My brother Honyman, before whom the case was tried, was of opinion that, inasmuch as at common law the stipulations con-

(4) 1 Cr. M. & R. 834; s. c. 4 Law J. Rep. (N.S.) Exch. 104.

(5) 39 Law J. Rep. (N.S.) C.P. 202; s. c. Law Rep. 5 C.P. 334.

tained in a lease ran with the land and not with the reversion, it was necessary to resort to 32 Hen. 8. c. 34, in order to give effect to the contention on the part of the plaintiffs. But it has been determined that the effect of that statute is limited to leases under seal; and therefore the defendant, when he bought the factory, did not become bound by the stipulations in the demise by the mortgagor to the plaintiffs, on the ground that they ran with the reversion.

Secondly, it was urged that even if the obligation to observe the terms of the demise had not devolved upon the defendant by operation of law, yet he had bound himself to fulfil them, because he entered into a contract with the plaintiffs which recognised the demise by the mortgagor; and it was contended that the defendant by that contract had, in effect, incorporated the terms of the demise into a fresh agreement between himself and the plaintiffs. If the facts of the case supported this argument, the defendant might have been liable; but my brother Honyman left the evidence upon this matter for the consideration of the jury. It seems to have been established at the trial that after the defendant had entered into the contract for the purchase of the factory, he negotiated with the plaintiffs as to a future tenancy, and that it was recognised by both the plaintiffs and the defendant that the old terms were not to be continued, and a fresh demise was to be made upon other terms. Accordingly a fresh demise was drawn up, but was not signed by the plaintiffs, because they objected to some of its terms. My brother Honyman asked the jury whether the defendant had entered into a contract which bound him to observe the terms of the demise made by the mortgagor, or whether he had, by a fresh agreement, undertaken to supply steam power to the plaintiffs; and the jury were clearly of opinion that no contract had been arrived at between the plaintiffs and the defendant. Their finding disposed of this branch of the case. The counsel for the plaintiffs objected to the ruling of the learned Judge, and thereupon leave was reserved to him to move to enter the verdict for the plaintiffs, if this Court should be of opinion that my Honyman's statement of the law demise by the mortgagor was n upon the defendant as an incid reversion, was wrong; but w opinion that the ruling at the clearly right, and that there is r for making absolute the bran rule which relates to entering t for the plaintiffs.

The plaintiffs also relied upon misdirection of the learned Jud was contended that he ought asked the jury whether the defe so far recognised the previous to have carried it on against hir he became the owner of the f am of opinion that this matter stantially left to the jury, and wa in the questions which were sul them.

It was further objected befo my brother Honyman ought directed the jury that the plai become licensees, and were e notice, and to a reasonable t notice, to remove their mach point of that kind was made a nor was my brother Honymar leave any question of that desc the jury; and, moreover, I am that no evidence of any licen duced at the trial. The tr which took place between the and the defendant, if they did n to a contract, amounted to not the jury negatived the exist contract. There is no pretence there was a license.

It was also alleged that m Honyman had mis-directed the the time up to which the damag be assessed, and as to the manne they were to be assessed. It unnecessary to consider that cause I am of opinion that t was clearly right upon the evid because the learned Judge, being dissatisfied with the ver the facts, would have been dis the verdict had been for the This disposes of the only remain in the rule, namely, that the v against the weight of evidence. it seems to me that the verdict

and that the rule in this case ought to be discharged.

GROVE, J.—I am of the same opinion. The first question is, did the stipulations in the demise from Bridgett, the mortgagor, to the plaintiffs pass with the reversion? The simple answer is that the demise was not by deed, and that the Statute 32 Hen. 8. c. 34 does not apply. In fact, this point has hardly been contested.

A second question is, whether the defendant recognised the lease granted by the mortgagor to the plaintiffs. I wish to remark that some evidence exists of a recognition by the mortgagees. It appears that they received rent from the plaintiffs, and did for a time continue to supply steam power. It may be an arguable question, whether it may be inferred from these circumstances that a tenancy was constituted between the mortgagees and the plaintiffs; but this becomes quite immaterial, unless by operation of law or by some act of the defendant the supposed recognition of a tenancy by the mortgagees became in turn a recognition of the tenancy by the defendant. It has been argued that recognition by the defendant is to be inferred because the defendant, by the hands of the mortgagees, had received rent from the plaintiffs. The answer is, that at the time when the mortgagees received the rent, the defendant was not the owner of the factory; the rent was received by the mortgagees before the conveyance to the defendant, and therefore they were not his agents. They received it on their own account, and they could not bind him. An attempt has been made to shew that before the conveyance the defendant admitted that the plaintiffs were tenants. I do not think that there is any evidence of that; and, moreover, if there were, the admission would not bind the defendant, as he was not the landlord.

A further question has been raised, namely, whether the defendant himself recognised the original demise at a time when his recognition would be valid, and whether he thereby created a fresh contract upon the terms of the former agreement. It seems to me that the defendant did not adopt the stipulations in the original demise, and that he did not ingraft them into a new agreement. Every case of this description is to be decided by the verdict of a jury, and an instance of the law here applicable is to be found in *Buckworth* v. *Simpson* (4). In the present case the only piece of fair and reasonable evidence in favour of the plaintiffs was that the defendant supplied them for some time with steam; but the question to be decided is not whether there was some evidence of an adoption of the former demise by the defendant, but whether there was such a preponderance of proof in favour of the plaintiffs, that the verdict was clearly wrong. For some time the defendant negotiated with the plaintiffs, although they did not adopt the demise by the mortgagor, but endeavoured to enter upon a new contract with the defendant. During the negotiation he allowed the plaintiffs to have the use of the steam power; but it does not follow that the relationship of landlord and tenant existed. On the other hand, there was strong evidence to shew that the defendant had not adopted the demise by the mortgagor, that from the first he had protested against it, that he had produced the draft of a new demise to which the plaintiff objected; the parties were not *ad idem*, and were discussing what contract they should enter upon. The defendant stood upon his rights; and although he allowed the plaintiffs to remain in the factory, yet it was only on the condition that they should accept his terms. He did not supply the steam upon the terms of the old demise, but with the intention that a new agreement should be arrived at. I think that the balance of evidence was in favour of the defendant, but at all events it was a question for the jury, and I cannot perceive any misdirection on the part of the learned Judge, nor any obligation to direct a verdict for the plaintiffs. I think the finding right. I need not say anything as to the question of damages.

HONYMAN, J.—I am of the same opinion. I do not make any remark upon any inference which the jury might have drawn from the receipt of rent by the mortgagees, for it is quite immaterial. As the demise to the plaintiffs was not under

to Jules Lausseure the sum of 20*l.* Lausseure thereupon drew a bill of exchange on Morel, payable to his order, for the sum of 201*l.* 12*s.*, the invoiced amount of the wines, and indorsed the bill to the plaintiff; and on the 17th of December the plaintiff wrote a letter to Morel forwarding the bill for acceptance, but although the plaintiff had several times applied to Morel for the return of the bill duly accepted, he had been unable to procure the same.

The defendant in the interpleader issue, Clements, had obtained judgment against Jules Lausseure upon a bill of exchange, and the sum of 260*l.* 14*s.* 8*d.* remained due upon the judgment. The attorney for Clements, being informed that the sum of 201*l.* 12*s.* above mentioned was due from Morel to Lausseure, obtained on the 3rd of January a garnishee summons, and served Morel with a copy thereof. A few days after, the plaintiff was informed by Morel that the price of the wines was attached, and an interpleader order was obtained directing the issue to be tried.

It further appeared that Lausseure had sold to Morel the wines supplied by the plaintiff, and that the invoice described Lausseure as seller and Morel as buyer. Morel took possession of and accepted the wine on the 2nd of January, 1874.

Brett, J., left to the jury the questions whether Rich had authority to bind Morel by a promise to hand the bill of exchange for the price of the wine to the plaintiff, and whether the promise was in fact made. The jury found that Rich had such authority, and that the promise was made. The verdict was therefore entered for the plaintiff, but the Judge stayed execution.

Bush Cooper now moved for a new trial upon the ground of misdirection.—The Judge at the trial misdirected the jury by asking them to consider the questions which he put to them. He ought to have withdrawn the case from them, and to have directed them to find for the defendant. In the month of December, when the agreement was made between the plaintiff Lausseure and Morel, no debt was due from Morel to Lausseure. The debt did not come into existence until the 2nd of January, when Morel the wine. It must be admitted, of the defendant, that the agree valid as a contract, that the should receive the price of th Morel accepted it; and Morel liable in an action at the plain for not accepting the bill of exc not paying over the price of th him, but the agreement was in to pass the property in the futu the plaintiff, so as to make him ditor of Morel instead of Lausse the wine was accepted. The i scribed Lausseure as the selle wine to Morel, and the plaintiff be substituted as creditor befor of January. Therefore, the being a judgment creditor of I was entitled to attach the deb by Morel.

Denman, J.—I am of opinio ought not to grant a rule. The which we have to consider is my brother Brett was right in l questions to the jury. I thinl direction was quite correct. I k principle in law which can prev case of a future debt, the subst another person as the payee original creditor. Such an arr is perfectly valid as regards a debt; and I am unable to under the person who may become satisfy a future or contingent d discharged if, when it comes i ence, he pays its amount to th of the original creditor.

Brett, J.—I am of the sam The question upon the interple was, whether the debt owing belonged to the plaintiff. Laus desirous of supplying Morel w and in effect applied to the p sell wine to himself, which he intended to sell to Morel. Th was willing to accede to this provided he could rely upon be and it was agreed upon a valu sideration between the plaintiff, and Morel, that when Morel ac wine and became bound to pay debt should be considered as bel the plaintiff instead of Laussen

the evidence given in support of the plaintiff's case, which was adopted by the jury, it is clear that this was the result of the transactions between the parties. Now it is not denied, on behalf of the defendant, that if an agreement of this kind had been made after the debt had come into existence, it would have been valid, and that the plaintiff and not Lausseure would have been entitled to receive the price of the wine from Morel; in fact, that Lausseure would have ceased to be interested in the debt. But it has been argued that a future or contingent debt cannot be assigned, and that as the agreement was made in December, 1873, and the wine was not accepted until January, 1874, it was inoperative to vest the property in the debt in the plaintiff. I think this contention groundless, and that a rule ought not to be granted.

Rule refused.

Attorneys—Fitch & Fitch, for plaintiff; Raven & Curtis, for defendant.

1874. April 16, 18. { HAMMOND *v.* THE VESTRY OF THE PARISH OF ST. PANCRAS.

Negligence—Statutory Duty—Sewers—The Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 72.

When a specified duty is imposed by statute on a public body, it is, in the absence of express enactment, to be assumed that the legislature intended to exempt the public body from liability to make compensation for alleged omissions to fulfil that duty, unless negligence can be proved to exist.

The Metropolis Management Act, 1855, s. 72, *imposes upon certain vestries, amongst them the defendants, the duty of keeping the sewers in their respective parishes properly cleared, cleansed and emptied. The plaintiff was the occupier of a messuage in the defendants' parish, and received injury from the overflow of a sewer; the overflow happened without any default on the part of the defendants*:—Held, *that the plaintiff could not maintain an action against the defendants for the injury which he had suffered.*

The declaration stated that, at the time of the committing of the grievances hereinafter mentioned, a certain sewer and barrel-drain were vested in the defendants, and the plaintiff was possessed of premises near thereto; and the defendants did not keep the said sewer and barrel-drain properly cleansed, whereby they became choked up and overflowed with foul water and other filth which flowed into and over the premises of the plaintiff: Whereby the said premises were much injured, together with certain plant, tools, utensils, cellar-pipes, stock-in-trade and goods of the plaintiff then being in and near the said premises, and the plaintiff lost the use and enjoyment of the same, and whereby the plaintiff suffered much damage through loss of trade, and whereby the plaintiff was much injured in his health, and incurred expense for medicine and medical and surgical attendance.

Pleas, first—Not guilty, by Statute 25 & 26 Vict. c. 102 (Public Act), s. 106. Second, That the said supposed sewer and barrel-drain were not vested in the defendants as alleged.

Joinder of issue.

The cause came on for trial at the sittings in Middlesex after Trinity Term, 1873, before Bovill, C.J.; and owing to the decision of the Court it is necesary to state only the following facts—

The plaintiff was the occupier of a messuage within the defendants' district, who were, by the Metropolis Management Act, 1855, s. 72, bound to keep the sewers in the parish of St. Pancras properly cleared, cleansed and emptied. The plaintiff's messuage was flooded by the overflow of a sewer which had become stopped up. His stock-in-trade and his health were likewise injured. The defendants were not aware of the existence of the sewer; but by the exercise of reasonable care might have learnt that it did exist. The jury found that there was no sufficient evidence of negligence in the defendants in not keeping the sewer cleansed; and that the obstruction in the

sewer was not known to the defendants before the mischief happened, and that the defendants could not have known of the stoppage until the overflow occurred. A verdict was entered for the plaintiff with 50*l.* damages.

In Michaelmas Term, 1873, a rule was obtained to set aside the verdict, and to enter a verdict for the defendants, or a nonsuit, on the ground that, on the evidence given at the trial and on the finding of the jury, no liability attached to the defendants; and to arrest the judgment on the ground that no cause of action was stated in the declaration, and that no negligence was therein alleged.

J. J. Powell (on April 16) shewed cause.—The plaintiff is entitled to succeed in the present action. By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 68, the sewers within the parish of St. Pancras are vested in the defendants, and by section 69 the duty to maintain them is imposed upon the defendants, and their liability is regulated by the 72nd section, which enacts that "every vestry and district board shall cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied; and for the purpose of clearing, cleansing and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines and other works as may be necessary." The statute has vested the sewer in the defendants, and they were bound to cleanse it, although they were not aware of its existence, for it is found that by reasonable diligence they might have known of it. *Wilson* v. *The Mayor and Corporation of Halifax* (1) is distinguishable; for in that case a discretion was vested in the defendants. In the present action the vestry were bound to maintain proper sewers—*Brown* v. *Sargent* (2).

[BRETT, J.—*Whitehouse* v. *The Birmingham Canal Company* (3) shews that when a public body intend to act in of parliamentary powers, they only, if they are guilty of negli

Those who undertake the pe of a statutory duty are bound in every respect. *Meek* v. *T chapel Board of Works* (4) is a thority for the plaintiff, and cannot make this rule absolut overruling that case.

Sir H. James and *Beasley* in the rule.—The defendants are under the 72nd section, unless been guilty of negligence. Th has been driven to contend entitled to receive compensation the defendants were not awa existence of the sewer. This co of the enactment, if it be adop Court, will impose great hard vestries and district boards in polis.

[BRETT, J.—We must decid as if the defendants had kno sewer, for they might have m selves aware of its existence by diligence. Inasmuch as they means of knowledge, they mus to have had actual knowledge.]

As this Court will hold the to be in the same position as i been cognisant of the sewer, it urged on their behalf that, as th tion would have happened wi default upon their part, they a to succeed in this action. It i contended that they would not for negligence—*The Mersey Harbour Board* v. *Gibbs* (5), v. *Fellows* (6); but if they had that the stoppage was likely the plaintiff cannot recover. I *Clarke* (7) it was held that o the exercise of a public functi emolument, which he is com execute, acting without malic cording to his best skill and dili obtaining the best information h an act which occasions co damage to a subject, is not li

(1) 37 Law J. Rep. (N.S.) Exch. 44; s. c. Law Rep. 3 Exch. 114.
(2) 1 Fos. & F. 112.
(3) 27 Law J. Rep. (N.S.) Exch. 25.
(4) 2 Fos. & F. 144.
(5) 35 Law J. Rep. (N.S.) Exch. 22
(6) 10 Com. B. Rep. N.S. 765; s. Rep. (N.S.) C.P. 305.
(7) 6 Taunt. 29.

action for such damage. An analogous case to the present is *Readhead* v. *The Midland Railway Company* (8); the principle of the decision in that case is in favour of the defendants in the present action.

Cur. adv. vult.

The following judgments were delivered on the 18th of April.

BRETT, J.—This action was brought against the vestry of the parish of St. Pancras for damage to the plaintiff arising from the overflow of a sewer lying within the ambit of their district. It was contended before us that the suit was maintainable, and reliance was placed on the 72nd section of the Metropolis Management Act, 1855, which was supposed to impose upon the defendants an absolute duty to keep the sewers, subject to their jurisdiction, cleansed and emptied; and it was urged that, as the injury accrued to the plaintiff from the stoppage of one of these sewers, they are bound to compensate the plaintiff. On the other hand, the defendants contended that the enactment which I have mentioned did not create an absolute liability, and that the only duty thereby cast upon them was to keep the sewers in good repair. It has been argued that unless they are guilty of negligence they are not responsible for such damage as the plaintiff complains of; and that if they have done all that reasonable men could do to prevent an overflow they are not liable in this action. At the trial the verdict passed for the plaintiff with 50*l.* damages, but the late Lord Chief Justice reserved leave to the defendants to move to enter the verdict for them. A motion was made accordingly, and the defendants also obtained a rule to arrest the judgment. We must take it that by reasonable enquiry the defendants might have made themselves acquainted with the existence of the sewer; but that if they had known of its existence the stoppage might have occurred without their being able to prevent it. Upon these facts, it is plain that the defendants cannot excuse themselves, on the ground that they were in fact ignorant of the sewer; and as they might have discovered it by enquiry, the case must be considered as if they had been aware of its existence. At the time of the overflow it was not cleansed and emptied. If the 72nd section throws an absolute duty upon the defendants and they must guarantee that the sewers shall always be cleansed and emptied, they are liable at the suit of the plaintiff. The construction of the Act will decide this question; for the declaration does not allege what may be called a liability at common law; it does not charge the defendants with negligence; the plaintiff has rested his case upon the meaning of the statute. The enactment is capable of an interpretation in favour of either the plaintiff or the defendants, and we must construe it upon general principles. It is to be observed that the defendants are a public body, upon which duties are imposed by Act of Parliament. They may use all reasonable care in endeavouring to perform those duties, but they may fail to perform them satisfactorily. The sewer may be obstructed, although all care may be taken. It is contrary to what may be called our ideas of natural justice that the Legislature should oblige the defendants to give compensation for damage which they have been unable to prevent. No doubt it is within the powers of Parliament to make the defendants responsible for the overflow of a sewer caused by an obstruction which they could not foresee; but I am entirely of opinion that, in order to create a liability so extensive, clear language must be employed. Whenever doubtful language is used, we ought not to infer that the Legislature intended to impose the burthen of giving compensation, when an injury has happened without the default of the person upon whom the statutory duty is cast. The terms of the 72nd section are doubtful, and we ought not to hold the defendants liable, when they have not been guilty of misconduct. They are bound to employ only reasonable care in keeping the sewers emptied and cleansed; the duty cast upon them is not absolute, and they are not bound to indemnify the plaintiff for an injury which has befallen him without their default; they are not liable unless they

(8) 9 B. & S. 519; s. c. 38 Law J. Rep. (N.S.) Q. B. 169.

have been wanting in reasonable care and skill. The rule must be made absolute both to set aside the verdict and to arrest the judgment. One case of very great authority seems opposed to the view which I take of the law applicable to the facts brought before us; it is *Meek* v. *The Whitechapel Board of Works* (4). I incline to think that in that case there was evidence of negligence, and that the ruling of Wilde, B., may be supported on the assumption that the defendants had been guilty of a breach of statutory duty. If the case does not admit of this explanation, it is inconsistent with our decision; and with the utmost respect for the eminent Judge who presided at the trial therein, I dissent from the conclusion at which he arrived.

DENMAN, J.—I am of the same opinion. *Meek* v. *The Whitechapel Board of Works* (4) excited doubts in my mind, but the case may perhaps be explained in the manner suggested by my brother Brett. Our decision depends upon the meaning of the 72nd section; that enactment at first sight appears to impose an absolute duty, but upon reflection I do not think this the proper mode of construing it. The 72nd is one of several clauses which no doubt give the defendants extensive powers, but which also cast upon them the great burthen of keeping the sewers within their district in proper condition; and it can hardly have been the intention of the Legislature to make the defendants pay compensation because one sewer, without any default on their part, has become stopped. To decide for the plaintiff would cause a great hardship to the defendants. The obstruction may have been caused by rats, or by putting something into the sewer without any default of the defendants. The jury acquitted them of negligence, and found that if they had been aware of the sewer they would nevertheless have been unable to prevent the overflow. I am of opinion that the rule must be made absolute to arrest the judgment, and to set aside the verdict.

Rule absolute.

Attorneys—J. L. Mathews, for plaintiff; Cunliffe & Beaumont, agents for W. D. Cooper, for defendants.

1874. May 6. } RAWLINGS *v.* THE COAL ASSOCIATION (LIM

Contract—Illegality—Stifling tion for Felony—Agreement t Action for False Imprisonment o Prosecution if Indictment for withdrawn.

An agreement to withdraw f secution for felony, provided accused will promise to bring no trespass and false imprisonmen cious prosecution, is void, and enforced; and if the person acc quently sues the prosecutor, the not be stayed upon the ground brought against good faith.

[For the report of the abov 43 Law J. Rep. (N.S.) M.C. 11

1874. May 4. } BOWS (*appellant*) *v* (*respondent*

Gaming—Betting House—Offi —16 & 17 Vict. c. 119. ss. 1 an

The defendant had a stool course during the races, over w large umbrella, about seven or high, capable of covering severa the stick of which was fasten ground with a spike. The d name, with the addition, "Vict Leeds," was painted in large let umbrella, and there was a card words, "We pay all bets firs post." The defendant stood on offering to make and making money being deposited with h time, for which he gave a ticke that the stool and umbrella co "place" within the meaning of Vict. c. 119, the Act for the Supp Betting Houses.

[For the report of the abov 43 Law J. Rep. (N.S.) M.C. 10

WILLIAMSON *v.* FRERE.

rivileged Communication—Post-ram—Publication.

défamatory matter by a post-ram is an unauthorised publica- prevents a communication from ileged though made bona fide circumstances which otherwise made it privileged.

s an action for libel which was e Brett, J., at the last Leices- ring assizes. It appeared that ff, who was a young woman, d the service of the defendant, l shoe maker at Leicester, in y of book-keeper, and that the having accused her of robbing oney had sent the following telegrams to her father in 'Come at once to Leicester if o save your child from appear- the magistrate. Answer per ' and, "Your child will be arge of the police unless you come to-day. She has taken of the till." The learned ed that, as these telegrams ssarily be seen by the telegraph sending them prevented the tion with the plaintiff's father a privileged communication; ury having found that the were libellous, and that there ecessity for the defendant's ting with the plaintiff's father h instead of by letter, gave a the plaintiff; damages 100*l.*

(*Merewether* with him) now suant to leave reserved at the er a verdict for the defendant, and that there was no evidence o go to the jury as the com- was a privileged one. He for a new trial, on the ground amages were excessive. It is he communication would have leged if the defendant had to the plaintiff's father by a it is not the less so because it y a post-office telegram. There ion which has a direct bearing on such a case as the present. In *Whitfield* v. *The South Eastern Railway Company* (1), which is the nearest case on the subject, the defendants were the proprietors of the electric telegraph upon their line of railway, and it seems to have been assumed that they published the libel by sending it by their telegraph, but the only point there decided was that an action for libel was maintainable against them, notwithstanding they were a corporation. The post-office telegraph is only a more rapid mode of conveying messages through the post than of doing so by letter. It is as confidential a mode; for by the 20th section of the Telegraph Act, 1868 (31 & 32 Vict. c. 110), any post-office official "who shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic message or any message intrusted to the Postmaster-General for the purpose of transmission, shall, in England and in Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and shall upon conviction be subject to imprisonment for a term not exceeding twelve calendar months, and the Postmaster-General shall make regulations to carry out the intentions of this section, and to prevent the improper use by any person in his employment or acting on his behalf of any knowledge he may acquire of the contents of any telegraphic message."

[LORD COLERIDGE, C.J.—Is not the unnecessarily sending a message by the telegraph instead of by letter evidence of malice? BRETT, J.—I think it has been decided that sending defamatory matter on a post card is a publication, though the card be addressed only to the person libelled.]

No such decision appears to have been reported (2), and there is a manifest distinction between a post card, which is open for anyone to see, and a telegram, which is always sent in a closed envelope like a letter, and the contents of which

(1) E. B. & E. 115; s. c. 27 Law J. Rep. (N.S.) Q.B. 229.

(2) There has been a ruling by Brett, J., at Nisi Prius to this effect, but it is believed the point has not been raised before the Court in Banc.—*Reporter.*

cannot be known by anyone before it reaches the person to whom it is addressed, except by the sender and the officials of the post-office, who could not disclose them without being guilty of a breach of duty and incurring also the penalty of the Telegraph Act, 1868.

LORD COLERIDGE, C.J.—I am of opinion that there ought to be no rule in this case. On the point as to the communication being a privileged one, it has been argued by Mr. O'Malley that the telegraphic message cannot be known during its transmission. The question is, why should it not be known, and that is a question which the learned counsel has not been able to answer. The message is in point of fact told to the telegraph clerks, and they are clearly beyond the privilege; for certainly it would be a very dangerous doctrine to say that the transmission of telegrams through the many hands who are employed by the post-office authorities is privileged. There was, therefore, a publication. As to the damages being excessive, the learned Judge who tried the cause is not dissatisfied, and there is therefore no reason for disturbing the verdict.

BRETT, J.—I consider the question of law, which has been raised in this case, is a very important one, and that is whether a communication which might have been privileged if made to a certain person alone is to be deemed to be made to such person only when sent by means of a telegram through the post-office, because the Act of Parliament forbids the Post-office officials disclosing the contents of such telegram, though in point of fact it is made to several persons. The question is most important since the question of privileged communication would ordinarily only arise when the libel could not be justified, and therefore the question is, whether persons can have their characters destroyed by unjust accusations made through the means of telegrams. I agree with my Lord that sending telegraphic messages unnecessarily is strong evidence of malice; but I desire, for the protection of the public, to put this matter on higher grounds, and to say that even though the telegraphic message be sent *bona* inasmuch as it must be publis telegraph clerks, it is unprivile the same as a publication by a and it has been ruled that the such cards is a publication. reasons and on this ground state that I think a publication of a telegram avoids the privil might otherwise exist.

DENMAN, J.—I am of the sam I think we may assume that munication which was made though it was by means of the was made *bona fide;* and that been sent by letter, it would privileged. Still the communi not privileged unless made t whom there was a duty on th the defendant to make it, and made to the telegraph clerk whom the defendant had no and therefore such communic not privileged.

Rule

Attorneys—Shaw & Frazer, for plain Roscoe & Co., agents for G. Stevens for defendants.

1874. April 25. } BENJAMIN *v* STOE ANOTHER.

Action—Public Nuisance—Private Rights—Pleading—"dious."

In order to maintain an ac public nuisance, the plaintiff that he has suffered a particular, substantial injury.

The defendants were auctio received large quantities of goods at their rooms. The plaintiff ke house near to the defendants' pla ness, and complained that the delivered goods at their rooms the public street so as to darken shop, and to compel him to burn daylight, and that the horses c pleasant smells, which rendere tomers unwilling to frequent his

declaration did not specially charge that the plaintiff was annoyed by the smells, but alleged that by reason of the obstruction the plaintiff's house was rendered incommodious. At the trial, evidence was allowed to be given of the bad smells, and a verdict was found for the plaintiff:—Held, *that the injury to the plaintiff was particular, direct and substantial, so as to entitle him to maintain an action, and that, under the allegation in the declaration that the plaintiff's house was rendered incommodious by the obstruction, he could give evidence as to the unpleasant smells.*

The writ was issued upon the 24th of April, 1873.

The declaration stated that before and at the time of the happening of the grievances hereinafter mentioned, there was, and still of right ought to be, a certain public highway known as and called Rose Street; and the plaintiff before and at the time of the happening of the grievances hereinafter-mentioned, was possessed of a certain coffee-house and premises abutting on and opening into the said highway, and carried on in the said coffee-house the business and trade of a coffee-house-keeper. Yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his said trade as a coffee-house-keeper, from time to time kept and continued to keep divers and an unnecessary number of carts, vans, waggons and horses standing in the said highway, for an unreasonable and unnecessary length of time, and in such a position as unreasonably and unnecessarily to obstruct the said highway, and the light and air entering through the windows and doors of the said coffee-house of the plaintiff, and the access to the said coffee-house, whereby the plaintiff was and is prevented from carrying on his said trade in so large, ample and beneficial a manner as he otherwise might and would have done, and lost and has been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from carrying on his said trade and business of a coffee-house-keeper; whereby also the said coffee-house and premises have been rendered unhealthy and incommodious, as well as a house of business as also a dwelling-house.

Plea, Not Guilty; upon which issue was joined.

The cause came on for trial at the sittings in Middlesex, during Trinity Term, 1873, before Honyman, J., and the following appear to be the material facts of the case.

The defendants were auctioneers and occupied a large house, standing at the corner of Rose Street, and situate in King Street, Covent Garden, in the county of Middlesex. Their business was extensive, and it was necessary to bring the goods to be sold in vans and other vehicles, which used to stand in Rose Street, at one of the defendants' doors. Adjoining the defendants' house was the plaintiff's coffee-shop, which stood in Rose Street.

The plaintiff deposed that he became possessed of the coffee-house in March, 1870; fifteen years of the term were still unexpired. Rose Street was a public highway; the width of the carriage-way in Rose Street was about eight feet, and therefore two carts could not stand therein abreast at the same time. When the plaintiff first went to Rose Street in 1870, he found that the defendants used Rose Street "now and then" in the manner complained of, but not so frequently as at subsequent times. The defendants took in goods at various times in the day from 8.30 a.m. until 7 or 8 p.m., and this continued from Monday mornings until Saturday afternoon. The defendants' van was in the habit of standing in Rose Street with the tail at their door; when so stationed the van covered the window, and the horse drawing it covered the door of the plaintiff's coffee-shop. The plaintiff's windows were darkened, and the smell from the horse droppings was very disagreeable; the coffee-shop was so darkened by the vans standing in front of the windows that he had to burn gas nearly all the day, and he was compelled to keep the door shut in order to prevent the smell from entering. Sometimes the plaintiff's customers left after having given orders, without waiting to be served with refreshments, owing to the smell. The receipts in the plaintiff's business

were much diminished owing to the continuance of the nuisance.

The wife of the plaintiff deposed that the defendants' van caused great inconvenience, and that the smell was so bad as to create complaints from persons frequenting the coffee-shop. The plaintiff's customers could not go along the pavement of Rose Street, and had to cross the street and make a detour.

It was objected that evidence as to the smell was inadmissible, but the Judge received it.

Other witnesses having been called to support the plaintiff's case, the jury, after hearing evidence for the defendants, found a verdict for the plaintiff for 75*l.*

In Trinity Term, 1873, a rule was obtained to set aside the verdict, and to enter a nonsuit pursuant to leave reserved, on the ground that the plaintiff did not give sufficient evidence of damage to himself to maintain the action; or why a new trial should not be had, on the grounds, first, that improper evidence was admitted against the defendants at the trial; second, that the verdict was against the weight of evidence.

R. V. Williams now shewed cause.—The plaintiff relies upon two grounds of complaint, namely, the smell arising from the horse droppings, and the obstruction to the light and to the access to his coffee-shop. It is contended he has proved sufficient damage to entitle himself to maintain an action; in *Bullen and Leake's Precedents of Pleading*, p. 429 (3rd ed.), it is stated in note (a) that "an individual cannot maintain an action for the obstruction of a public way, unless he has suffered a particular and special damage from the obstruction;" reference is made to p. 377, where it is laid down that "if an obstruction of the highway prevents access to a person's abode and hinders his business, he may maintain an action for the damage thereby done to his trade." The plaintiff relies upon the doctrine here put forward. *Wilkes* v. *The Hungerford Market Company* (1) shews that an action will lie for an obstruction to a highway, from which damage has accrued to one of the Queen's subjects; that case was impea *Rickett* v. *The Metropolitan Railw pany* (2), but only so far as it deci an action could be maintained fo custom arising from an obstructi highway, which prevented pa from going near the plaintiff's hou judgment of Willes, J., in *Becket Midland Railway Company* (3), co review of the law applicable to sent case, and the principles th down are much in favour of the sue; *Iveson* v. *Moore* (4) is the mented upon, and appears to ha correctly decided. The cases as pensation under the Lands Clau 1845, are not wholly in point, for i to obtain redress under that stat person damnified must prove an i his property; but compensation obtained for the filling up of a dock, which rendered a warehous valuable—*MacCarthy* v. *The Metr Board of Works* (5).

[BRETT, J.—*Rickett* v. *The Metr Railway Company* (2) is not agai plaintiff, and it must be taken to ha found by the jury that the pub sance was sufficient to maintain an ment; the point which he has to e is that he has suffered an injury to himself and beyond that inflict other persons.]

The plaintiff suffered a particula for he was compelled to burn gas daylight; moreover the air coming coffee-house was rendered foul by fendants, and this alone will main action—*The St. Helen's Smeltin pany (Limited)* v. *Tipping* (6).

[BRETT, J.—That case does no the plaintiff: the declaration there that the trees, shrubs and herba the plaintiff's land were injured cattle rendered unhealthy by the gases issuing from the defendants' s works, and the jury found in his fav the present action the plaintiff mus lish that if a van standing in a narro

(1) 2 Bing. N.C. 281.

(2) House of Lords, 36 Law J. R Q.B. 205.

(3) 37 Law J. Rep. (N.S.) C.P. 11; Rep. 3 C.P. 82.

(4) Ld. Raym. 486; s. c. Carth. 451.

(5) 42 Law J. Rep. (N.S.) C.P. 81.

(6) 35 Law J. Rep. (N.S.) Q.B. 66.

obstructs the light entering a coffee-shop, and if the horse renders the air foul, the occupier suffers an injury for which he may recover damages; the defendants have as much right to carry on their business as any other of the Queen's subjects; the plaintiff, however, may rely upon the finding of the jury, which upholds the allegation in the declaration that the vans and the horses stood at the defendants' door in Rose Street for an unreasonable length of time.]

It is further contended for the plaintiff that the evidence as to the bad smells was improperly admitted.

[BRETT, J.—If the Judge was wrong in receiving this evidence at the trial, the plaintiff has recovered damages for a substantive injury not alleged in the declaration.]

The plaintiff charges that the coffee-shop has been rendered unhealthy and incommodious as well as a house of business as also as a dwelling-house; these words are large enough to include a nuisance caused by bad smells. The verdict was not against the weight of evidence.

J. B. Torr and *James Torr*, in support of the rule.—The plaintiff has not proved sufficient special damage to himself to obtain the judgment of this Court. An action cannot be maintained for a public nuisance, unless the plaintiff can prove an injury to himself beyond that suffered by others of the Queen's subjects—*Hubert* v. *Groves* (7), *Winterbottom* v. *The Earl of Derby* (8), *Rickett* v. *The Metropolitan Railway Company* (2), *The Caledonian Railway Company* v. *Ogilvy* (9). A slight diminution of light does not entitle the person damnified to legal redress—*The City of London Brewery Company* v. *Tennant* (10).

[BRETT, J.—The decision in that case proceeded upon the insufficiency of the plaintiff's evidence, and turned upon the doctrine that a Court of Equity will not by injunction prevent an obstruction to light, unless the grievance be of a substantial character (11). The principle of that case does not apply to proceedings at common law.]

It is contended for the defendants that even at law the question must be considered whether the alleged nuisance causes a substantial amount of discomfort—*Cavey* v. *Lidbetter* (12). In *The King* v. *The Directors of the Bristol Dock Company* (13) it was decided that no compensation was due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of a public river, from which the brewery had been before supplied by means of pipes laid under low-water mark, the use of the water having been common to all the King's subjects, and not claimed as an easement to the particular tenement. The evidence in this case did not establish an inconvenience like that proved in *Glover* v. *The North Staffordshire Railway Company* (14). For a temporary obstruction no compensation can be obtained—*Herring* v. *The Metropolitan Board of Works* (15). It is submitted that *Senior* v. *The Metropolitan Railway Company* (16) is not now law. *Cameron* v. *The Charing Cross Railway Company* (17) was overruled in the Exchequer Chamber (18) upon the authority of the decision of that Court in *Rickett* v. *The Metropolitan Railway Company* (19). Then the evidence as to the bad smells was improperly received. It cannot be said, in the proper sense of the word, that a house is rendered "incommodious" by bad smells.

[BRETT, J.—In *Webster's Dictionary* I find "incommodious" explained as "inconvenient; not affording ease or advan-

(7) 1 Esp. 148.
(8) 36 Law J. Rep. (N.S.) Exch. 194; s. c. Law Rep. 2 Exch. 316.
(9) 2 Macq. Scot. App. 229.
(10) 43 Law J. Rep. (N.S.) Chanc. 457; s. c. Law Rep. 9 Chanc. 212.

(11) See *Kerr on Injunctions in Equity*, ch. 18, s. 2, p. 352.
(12) 32 Law J. Rep. (N.S.) C.P. 104; s. c. 13 Com. B. Rep. N.S. 470.
(13) 12 East 429.
(14) 20 Law J. Rep. (N.S.) Q.B. 376; s. c. 16 Q.B. Rep. 912.
(15) 34 Law J. Rep. (N.S.) M.C. 224; s. c. 19 Com. B. Rep. N.S. 510.
(16) 2 H. & C. 258; s. c. 32 Law J. Rep. (N.S.) Exch. 225.
(17) 33 Law J. Rep. (N.S.) C.P. 313; s. c. 16 Com. B. Rep. N.S. 430.
(18) 19 Com. B. Rep. N.S. 764.
(19) 34 Law J. Rep. (N.S.) Q.B. 257.

tage; unsuitable; giving trouble without much injury."]

As to the verdict being against the weight of evidence, it is contended that the jury upon the facts proved ought to have found for the defendants. .

BRETT, J.—This action is brought to recover compensation for the unreasonable user of a highway; it charged that the defendants created a nuisance upon it, and that the plaintiff is entitled to maintain this action on the ground that the acts complained of caused him damage. It has been discussed whether the plaintiff in order to succeed must shew more than a personal injury to himself, and must go on to shew damage to his property, but it has not been denied by the plaintiff that a claimant for compensation under the Lands Clauses Act, 1845, has to establish an injury to his property. The principle of the common law seems to me capable of being stated in the following terms—whoever creates a public nuisance, and thereby causes an injury to the Queen's subjects in general, may be punished upon indictment, but an action cannot be maintained unless a personal injury has been suffered; an illegal use of the highway is insufficient, and the plaintiff must shew special damage. This is clear law. A further question arises, was it necessary for the plaintiff to prove an injury to his property? I think it was not. It was however requisite for him to shew the existence of three incidents — first, it is necessary that he should have suffered a particular injury; unless he establishes that, he must fail; an illustration of this rule is to be found in *Hubert* v. *Groves* (7), where it was held that for an obstruction to a highway which is a public nuisance an action cannot be maintained, although the business of a person be interrupted; the only remedy is by indictment. This doctrine is supported by the decision in *Winterbottom* v. *The Earl of Derby* (8), where it was determined that when a public way is obstructed, an individual cannot bring an action against the obstructor unless he has sustained some special damage apart from that sustained by the rest of the public; and his being obliged by the obstruction to turn back and proceed by a less direct rou remove the obstruction, and being and put to expense in doing so wil sufficient. These cases clearly sh to ground an action the damage from the public injury must be pa A second requirement is, that the accruing to the plaintiff shall b and not merely consequential, and the darkening of the plaintiff's s the van a direct injury. Moreo injury must be substantial. The has given evidence to shew that t and air coming into his house h obstructed by the defendants' acts necessary to light the gas; there suffered a pecuniary, that is, a sub loss. The injury inflicted upon th tiff fulfils all the requisite conditi is particular, direct and sub Moreover, during the time when obstructed the street, the access plaintiff's house was rendered mo cult; any person, for instance a cu could not enter it so easily as when was not there; and the jury hav that it stood in the street for an sonable time. So much of the ru lates to entering a nonsuit cannot l absolute.

It has been further argued that e was improperly received at the tria the plaintiff was allowed to prove i nience arising from bad smells; thi tion is not merely technical, beca grievance was not disclosed before tion was commenced. My brother H refused to amend at the trial up ground, and in my opinion we ough amend now. We must decide upon struction of the declaration accordi strictly legal meaning. The que whether, in its present form, it suf charges injury from bad smells. T allegation in the declaration is m the smells cannot, in the present said to have rendered the coffee-sh healthy; there was not evidence of to health. The plaintiff must rel the word "incommodious;" and opinion his coffee-shop was rende commodious by the bad smells arisi the horses; when we speak as law do not always use words in their o and popular signification, and we s

be doing violence to language by holding that "incommodious" sufficiently describes annoyance by bad smells. The rule cannot be supported where it claims a new trial for misreception of evidence.

As to the question whether the verdict was against the weight of the evidence, I should have looked with suspicion upon the testimony brought forward on behalf of the plaintiff, but the expense caused by burning an additional quantity of gas seems a real loss, and I think that we are not entitled, upon this ground, to overrule a verdict unless it is utterly unreasonable. The rule upon all its branches must be discharged.

DENMAN, J.—I am of the same opinion. In my judgment the evidence established that the plaintiff had suffered an injury, apart from that inflicted upon the rest of the public. Moreover, the obstruction immediately caused a darkening of the coffee-shop, and this was direct damage; and the burthen cast upon the plaintiff of burning more gas produced substantial and appreciable loss. The rule as to entering a nonsuit cannot be supported. Under the allegation in the declaration that the coffee-house was rendered incommodious, the jury were entitled to find that the plaintiff was annoyed by offensive smells arising from the horses; and it was proper for my brother Honyman to allow the complaint as to the smells to be submitted to the jury. As to the objection that the verdict was against the weight of evidence, it is to be recollected that the case was tried before a jury of the county of Middlesex, who were a more competent tribunal than we are to weigh the evidence given at the trial.

Rule discharged.

Attorneys—C. H. Lind, for plaintiff; Stileman & Neate, for defendants.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Common Pleas.*)

1874. Feb. 4. May 13. } WINCH *v.* THE CONSERVATORS OF THE RIVER THAMES.

Negligence—Liability for Maintenance of Towing-path—Toll for Use of Towing-path —Action.

The defendants were a corporation constituted for the purpose of the upper navigation of the river Thames by the Thames Navigation Act, 1866 (29 & 30 *Vict. c.* 89), *and under the powers of that Act and of the previous statutes relating to the navigation which had become vested in them, the defendants had constructed bridges and other works, and had acquired the right to use the whole of the towing-paths along the river, and to take toll for the same. In the exercise of such right the defendants took an aggregate toll in one sum for the use of the entire navigation and towing-paths, which included the works the defendants had constructed, as well as the natural soil which had been worn into the track of a towing-path. Part of such natural towing-path got into a dangerous state by the action of the water, and in consequence thereof the plaintiff's horses whilst using it in towing a barge, for which the proper toll had been paid to the defendants, fell into the river and were drowned:*—Held *by the Court of the Exchequer Chamber* (CLEASBY, B., *dissentiente*), *that as the defendants took one toll for the use of the entire towing-path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but that it was the duty of the defendants to take reasonable care that the whole of the towing-path was in such a state as not to expose those using it to undue danger, and that for a neglect of such duty the defendants were responsible to the plaintiff although they were a public body receiving their powers for public purposes.*

Held, *per totam Curiam, that the towing-path was not confined to the mere beaten track but included so much of the bank as might ordinarily be used by horses when towing barges.*

Semble, *the defendants would not be liable for the defective state of the towing-paths, if such state were a latent one, of the exist-*

ence of which the defendants might be ignorant though using reasonable care, or if they were to give notice of it to those who pay the tolls, or to inform them that they must take the towing-paths as they find them.

The defendants were constituted for the purposes of the upper navigation of the Thames by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), with the powers of the commissioners under the previous Acts relating to the upper navigation, and this action was brought for so negligently managing part of the towing-paths of the river Thames, under the management and control of the defendants, that the same was not reasonably safe and fit for the purpose of towing barges, whereby certain horses of the plaintiff, whilst using it for towing a barge, for which the proper toll had been paid to the defendants, fell into the river and were drowned.

It appeared at the trial that the place where the accident occurred was part of the natural bank of the river, which was used as a towing-path, and which had got into a dangerous state by the action of the water, so that it gave way and caused the horses which were towing the plaintiff's barge to fall into the river. The jury found that the towing-path was not in a proper condition, and that the accident was caused by its defective state, and that there was no contributory negligence by the plaintiff's servants. A verdict was entered for the plaintiff subject to questions as to the liability of the defendants in point of law; and a rule *nisi* was accordingly obtained by them to enter the verdict for them or a nonsuit on the ground that there was not shewn any liability in them to repair or keep in proper condition the spot where the bank gave way.

The Court of Common Pleas held that the defendants were liable, and discharged this rule. The case is reported 41 Law J. Rep. (N.S.) C.P. 241. From this decision the defendants appealed, and the case was argued by

Prentice (*Joyce* with him), for the appellants.—No duty to repair the towing-paths is imposed on the defendants either by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), or the statutes ap ing and relating to the commiss whose powers were transferred t defendants by the Act of 1866. [statutes are fully referred to and mented on in the judgment of the below, and in the judgment in the I quer Chamber of Cleasby, B.] statutes gave the commissioners, defendants who represented them, discretionary power to do what ir opinion was necessary for the im ment of the navigation of the rive the discretionary power given t trustees under the Turnpike Act i *King* v. *The Inhabitants of Nethe* (1). The cases of neglect to repair b or other works of that kind stan very different footing. In those such a duty may reasonably be im but that is very different with resp the natural banks of a river. Tha tinguishes the present case from *Pa* v. *The Lancaster Canal Company* (2 owners of land the defendants coul be liable for any injury sustained person whom they have allowed to on their land in consequence of the da ous state of part of such land, unles were aware of the existence of dangerous state and omitted to giv warning. The present case is dif from that of *The Mersey Docks* v. (3). There is no such absolute dut upon the commissioners to maint repair, as was relied on by Blackbu in *Coe* v. *Wise* (4). Next the place the accident occurred here was no of the towing-path; the horses were time beyond the beaten track.

McLeod (*English Harrison* with for the respondents.

[BRAMWELL, B.—We think that place in question was one which ordinarily be used by horses in towir defendants' liability, if at all, would to it. You need not answer the las taken by Mr. Prentice, but confine

(1) 2 B. & Ald. 179.
(2) 11 Ad. & E. 223; s.c. 7 Law J. Re Q.B. 258.
(3) 35 Law J. Rep. (N.S.) Exch. 225; s. Rep. 1 Eng. & I. App. 93.
(4) 5 B. & S. 440; s. c. 33 Law J. Re Q.B. 281.

the defendants' liability for the
f the towing-paths.]
r from its being necessary for the
dent to shew that the statutes under
the powers of the defendants arise
a duty to keep the towing-paths
ably safe for those who use it,
us is on the appellants to shew
hese statutes except them from
uty. The defendants under the
given to them by these statutes
purchase, hire or otherwise, the
-path throughout the whole naviga-
the river, and they have full powers
ll that is necessary to make such
-path safe. Then where is the dis-
n between such a towing-path and
ng an artificial canal? The toll is
for the use of the whole towing-
nd it is all more or less artificial;
re bridges and locks, and the pro-
towing itself is artificial. The
nts invite the public to use the
nd they receive a toll for such use.
why are they not liable? If they
be liable, if they were individuals,
e not the less so because they are
body—*The Mersey Docks* v. *Gibbs*

tice, in reply, referred to *Nicholl* v.
5).

Cur. adv. vult.

following judgments were de-
on May 13.

SBY, B.—This is an appeal from a
n of the Common Pleas discharg-
ule to enter a nonsuit or verdict
defendants. The rule (which was
l by leave reserved) was to enter
dict on the ground that there had
m shewn any liability on the de-
s' part to repair or keep in proper
n the spot where the bank gave
The question, therefore, is one of
mportance both to the defendants
e public, involving as it does the
ibility of the defendants for the
l proper condition of many miles
ng-path (it may be 100 miles or
of which we know parts are
ally covered by floods, and other
parts encroached upon by the action of the stream.

It appears to me that the liability of the defendants depends wholly upon the proper construction of the various Acts of Parliament under which they exercise their powers for the improved navigation of the river. I quite agree that if certain duties are imposed upon the defendants the circumstance of their being a public body receiving their powers for public purposes only, does not protect them from the consequences of the neglect of those duties if danger arises to any person by that neglect. This is settled by *The Mersey Docks* v. *Gibbs* (3). I also think that if the defendants could be regarded as having the towing-paths all along the river under their control and management, and inviting the public to make use of them upon payment of tolls to them, then if this was done with knowledge that the towing-path was insecure or with the means of knowledge not attended to, there would still be responsibility—*Parnaby* v. *The Lancaster Canal Company* (2). But the question in the present case is whether the conservators occupy this position at all. Because if the public use the towing-path not by the permission of the defendants, who could neither grant or withhold it (except in certain portions of it where they have purchased the ground and constructed works requiring reparation), but in the same right as they did originally and before the commissioners existed, then there is no responsibility, and the public went on the path at their peril. It is necessary therefore to examine the Acts of Parliament. It will no doubt be found that the defendants have certain powers connected with the towing-path, that they have power to purchase land, and construct towing-paths and other works in such parts as they in their discretion think necessary for the purposes of the navigation. And whenever they have constructed a towing-path or works for the use of the public they would be under an obligation to take care that they were not in a dangerous state. There is nothing in the case to shew to what extent this has been done; indeed the case, as it is called, is so imperfect, merely setting out a quantity of evidence,

3. & S. 934; s. c. 31 Law J. Rep. (N.S.)

that, in my opinion, it ought to go back to be properly stated, but taking the case as it is there can be little doubt that the towing-path and other works, the property of the defendants, would occupy a very insignificant part of the great distance between Staines and Cricklade. In other parts of the line of navigation the powers of the defendants extended to take care that the public had the undisputed use of the existing towing-paths without payment to the owners of the land (which had formerly led to great exaction), and, as in the present case it is not disputed that at the place where the injury was sustained, from the defective state of the towing-path, the defendants had not constructed the towing-path or in any way interfered with it, except by agreeing with the owner for a price to be paid for the privilege of going over it, the question which arises is what is their position and responsibility as regards this portion of the towing-path. The defendants are conservators of the upper part of the river by virtue of the 29 & 30 Vict. c. 89. That Act transfers to them the property and powers of the former commissioners. Two sections of the Act were particularly referred to in the argument, viz., sections 43 and 88. The first directs that the conservators shall repair the locks, weirs and dams, no mention being made of towing-paths, and the latter one enacts that the moneys raised by the conservators shall be applied (*inter alia*) in the maintenance and repair of the works vested in them or required or constructed under the Act. This it was contended would extend to all cases in which they had purchased land and constructed towing-paths, but not to the miles of towing-paths along the river in which they had no interest. All that can be said of this Act of Parliament is that it treats the works of the conservators as repairable by them, but not the whole length of towing-paths. It cannot be regarded as a legislative declaration that the towing-path is not repairable, or it would be conclusive of the present case, but it affords a strong argument in favour of that view.

The earlier Acts must therefore be referred to. In examining them, the earliest Act, 24 Geo. 2. after reciting among other things that abuses are committed l owners of the towing paths, and b son of such exactions the expense of carriage is increased, authorises commissioners to settle the rates taken by the tenants of the land f use of the towing paths (section 2 also prevents any alterations of the paths without the consent of the p tors of the land. Under this Act it quite clear the commissioners app by it were under no liability as r the condition of the towing-paths. 11 Geo. 3. c. 45, after reciting, amon things, that exactions by the own the towing-paths still continue, that for completing the navigatic for preventing abuses and exactio the principal inhabitants of all the ties through which the river pass the members for all the countie mayors of all the boroughs, shall b missioners for putting the Act in tion. These commissioners, who a said to represent the public interes the navigation, are by section 7 rised to purchase lands, and purch make towing-paths, bridges and wa the towing and hauling of barges, fix rates to be paid for the use of t paths, regard being had to the exp purchasing the land, and makin maintaining the said towing-path seems clear that this clause enabl commissioners to construct such wo bridges, carrying the towing-path brooks and ditches, and also to co towing-paths on land purchased they considered this necessary for of the navigation. And as to all works belonging to them there wo a duty to maintain them, but it do apply to the great length of towin in which they have no interest, and they consider that they may have fore. In like manner, section 19, was much relied on by the plainti which enables the commissioners t the towing-paths, and the conditic parations and circumstances thereo not impose upon the commissione obligation as to the towing-path enables them to ascertain when it a necessary to construct bridges or t paths, and to make certain order

the owners relating to the tolls, and also perhaps as to the towing-paths, but certainly not so as to call upon them to repair them. Section 31 shews that this Act relates to the making of new towing-paths. The next Act bearing upon the question is 28 Geo. 3. c. 51, which, after reciting that a certain sum has been spent for making horse towing-paths, enacts (section 2) that all towing-paths, bridges, &c., made on the said navigation, and the ground or soil whereon the same are made, *provided the same have been purchased by the commissioners* for the use of the navigation shall be vested in the commissioners. As far as I can see the commissioners have no interest in the other towing-paths all along the river from Staines to Cricklade, and no power to deal with them as their property. And it appears from the case that the owners of the land and their tenants continued to occupy and use the land between the fence and the water by cutting the grass or turning sheep upon it, though they let the right to pass along it. By the 7th and 19th sections of the Act already referred to (11 Geo. 3 c. 45) there is an authority given to the commissioners to make orders relating to the towing-paths, giving compensation to the owners for the loss which they may sustain. And this authority has been acted upon, as appears by the evidence of Mr. Leech, the engineer, who says, "If I find a towing-path too narrow I apply to the owner to set the fence back." There is no power to compel the owners to repair the towing-paths, nor any authority to the defendants to repair them themselves. And they never appear to have done so, though as regards the bridges and works of that description belonging to the commissioners, they appear to have repaired them regularly. Much reliance was placed upon the 6th section of the 28 Geo. 3. c. 5, by which the commissioners are authorised to take tolls for the use of, among other things, the towing-paths already made, or hereafter to be made, purchased and hired for the purpose of the navigation, and it was argued, with some apparent force, that as the public were to pay tolls to the commissioners for the towing-paths hired by them, as well as for those purchased and made by them, it followed that the commissioners were as much bound to see to the repairs and condition of those hired as of those made. And if the proper meaning of the word "hired" was "leased," so as to give an interest in it, this might be so, but it is plain that the meaning of the word "hired" here is that the right of passage is hired only, so as to relieve the barge-owners from paying to the several land-owners, as was done in the present case. Mr. Evans says, "No part of my land was ever sold or let to the commissioners, but only the right of passing over." It appears to me that the section referred to has not the effect contended for. In the first place it was not intended by this section to give any additional right to the public as against the commissioners, and so heavy a responsibility as the repair of the whole length of the towing-paths ought not to be imposed indirectly but by clear words. The owners of the land were not liable to the public in respect of the condition of the towing-paths, and the commissioners by merely hiring the right of passage cannot be properly held to create and take upon themselves a new responsibility. Besides, the commissioners, by hiring the right of passage, acquire no rights upon the adjoining lands, so as to go upon them and use them for the purpose of repairing the towing-paths. I cannot see why the license granted to the commissioners to use the towing-path might not be revoked, and thus how would the liability in respect of the condition of these continue? The only other clause in the Acts of Parliament referred to as bearing on the present question, was the 35 Geo. 3. c. 106. s. 23. That section, after reciting that it would greatly conduce to the benefit and advantage of the said navigation if a free, continued, uninterrupted and public horse towing-path were made and established throughout the whole navigation, enacts that it shall be lawful for the commissioners to purchase and take any such horse towing-paths as the commissioners shall think convenient and necessary for the navigation. This is merely an enabling clause, and leaves it to the discretion of the com-

missioners to make new towing-paths, but as regards the old towing-paths which they deem sufficient and do not interfere with, it leaves their responsibility as it was before. For the reason given I think the commissioners were under no responsibility for the condition of the whole length of the towing-path. It was argued that there was an inconsistency in holding that they are responsible for some parts, but not for the rest; but I do not think so. In so far as they have constructed bridges, towing-paths and other works to be used by the public, they are responsible for their being in a fit condition for use, but there appears no sound reason for holding that because they have purchased land, and have constructed certain works, a bridge for instance, over a brook of the length of ten yards, for which they are responsible, they are therefore responsible for miles of towing-paths adjoining, in which they have no interest. Bearing in mind that portions of the towing-path are at certain seasons covered with floods, the responsibility is a very serious one, and ought to be imposed by much clearer words than are found in the Acts of Parliament, and the payment of one toll for the use of the navigation, and liberty to pass over the towing-path without a separate payment is only a convenient arrangement for the public, and ought not in any way to affect the question of liability.

The question may be further illustrated thus—When the floods are out, and the towing-path covered, is it the duty of the conservators to give notice of this, or must the public look out for themselves? and so when the floods are subsiding, or when they have just subsided, and the ground has not regained its firmness and consistency for use as a towing-path, are the conservators to give notice of this, or stop the use of the towing-path? I think not. The judgment of the Court not only decides the present case, but imposes a charge upon the defendants if decided in favour of the plaintiff. On that account, having satisfied myself that the charge ought not to be imposed, I feel bound to say so, though hesitating, and unwilling to differ from so many of my learned brothers.

BRAMWELL, B.—The judgment about to read is that of my bre Blackburn, Quain, Archibald, and m —The defendants' rule in this cas to enter a verdict for them on the gr "that there was no evidence that were bound to repair the spot wher accident happened." If this wer question in the case it might be di to answer it adversely to the defen and say that they were bound to the spot in question, for undoul when the towing-paths and the to them were taken by private owners was no such obligation, and none i posed by the statutes in express ter the defendants; and it may be th defendants, as a matter of judicious their funds, might think it inexpedien at what might be the enormous and u fitable expenses of repairing long e of towing-path, where there was sc any traffic. There is no power of pelling them, and they would not be pelled to such enormous outlay. W not go further into this question, think it is not the question, but we to the judgment in *Gibbs* v. *The L Docks* (3). But we think it is enou support this verdict if the defen were, so long as they kept the to path open and took toll for its use, an obligation to those whom they i to use it, to take reasonable care that the towing-path was in such a as not to expose those using it to danger. If the dangerous state path at this spot was latent, so th defendants, though using reasonabl remained ignorant of it, or if, h found it out, they had warned the tiffs of it, they would not have neg this duty, but as it is, if such wa duty of the defendants, the finding jury (which we must here take to b rect) is that they have neglected it. agree with the Court below in thi that since the case of *Gibbs* v. *The L Docks* (3) we must hold the funds corporation (though established fo lic purposes) liable to make good th mages sustained by a private perso any breach of duty on their part, an there is nothing in the statutes to e this corporation from the duties whi

common law would cast upon a private person, or trading corporation, who maintained a similar towing-path along a public navigation, and levied tolls for its use. And we think that *Parnaby* v. *The Lancaster Canal Company* (2) and *Gibbs* v. *The Mersey Docks* (3) establish that such a duty is by common law cast upon those who invite persons to use a towing-path like this, and receive pay for the use of it. It was argued that those cases were not applicable, because the part of the towing-path where the accident happened was on the natural soil, only worn into a track made by the horses' feet, leading from a bridge over one ditch to a bridge over another, and it was argued that the common law only imposed this duty on those who maintained artificial works, such as canals, or docks, or bridges. We wish to guard against being supposed to decide that in every case where a license is given for money to go over land in its natural state, this obligation results. Much may depend on the circumstances of each case. But we think that in this case, where persons pay one toll for the use of one entire towing-path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the path to take reasonable care of the artificial and the natural parts, or at least warn those who use them of defects in them. The defendants can in future, if they think fit, announce to those who pay the tolls, that they must take the paths as they find them. If this is done there could be no liability for a defective state of repair, even though wilful. Whether, if they gave such notice, and left the banks unrepaired, they could be compelled to repair them, is a question that could then be directly raised and decided.

Judgment affirmed.

Attorneys—Frere & Co., for appellant; Wilkinson & Howlett, for respondent.

1874. April 17, 18. } STOWE *v.* JOLLIFFE (NO. 1).

Parliamentary Election — Petition against Return of Candidate—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *Sch.* 1, *Part* 1, *Rules* 40, 41, 42—*Inspection of Marked Register, Rejected Ballot Papers and the Counterfoils thereof.*

A petition, praying a scrutiny, was presented against the return of the respondent at a parliamentary election for the borough of P. The petitioner now applied for the leave of the Court to inspect the marked register of voters, the rejected ballot papers, and the counterfoils thereof. These documents had been sealed up together, and the ground of the application was stated to be the saving of expense, for if it could be known who were the voters whose votes had been rejected, it would be unnecessary to incur costs by investigating their qualifications:—Held, *that the petitioner ought to be allowed to inspect the marked register, but,*

Held, *per* GROVE, J., *and* DENMAN, J. (BRETT, J., *dissenting*), *that he was not entitled to the production of the rejected ballot-papers and the counterfoils thereof.*

This was a petition under the Parliamentary Elections Act, 1868, impeaching an election for the borough of Petersfield, in the county of Southampton.

The following were the material allegations in the petition—

The petitioner was a person who had voted at the election. The election was holden on the 30th of January, 1874, when the Hon. S. H. Jolliffe, who was the respondent, and W. Nicholson were candidates, and the poll was taken at such election on the 3rd of February, 1874, and the returning officer returned the respondent as being duly elected. It was charged that the respondent was by himself and his agents guilty of bribery, treating, undue influence and corrupt practices.

7th Par. "Your petitioner further says, that many persons voted at the said election and were reckoned upon the poll for the said Hon. S. H. Jolliffe, who were guilty of bribery, treating, undue

influence or corrupt practices, and who were by bribery, treating and undue influence or corrupt practices induced to, and did vote thereat for the said Hon. S. H. Jolliffe, and the votes of all such persons were null and void, and ought now to be struck off the poll."

8th Par. "Your petitioner further says, that at the said election many persons who were registered as voters for the said borough were admitted to vote and did vote at the said election for the said Hon. S. H. Jolliffe, who were and had been disqualified by legal incapacity to vote, and were prohibited from voting by virtue of divers statutes in force at the time of such election, and the votes of all such persons were null and void and ought to be struck off the poll."

9th Par. "Your petitioner further says that many persons voted for the said Hon. S. H. Jolliffe at such election who were disqualified to vote at such election by reason of their holding or having held disqualifying employments, or having been retained, hired or employed for all or some of the purposes of such election for reward by or on behalf of the said Hon. S. H. Jolliffe at the said election as agents, canvassers, clerks, messengers or other like employments, and such votes were admitted and entered as good votes for the said Hon. S. H. Jolliffe, and ought now to be struck off the poll."

10th Par. "Your petitioner further says that many persons voted at such election for the said Hon. S. H. Jolliffe, who were not legally qualified or entitled to vote, but who personated or voted for other persons duly entitled to vote at such election, whose names appeared upon the register of voters, and who did not vote at such election, and that such votes ought now to be struck off the poll."

11th Par. "Your petitioner further says that many persons voted at the said election for the said Hon. S. H. Jolliffe, who had become disqualified to vote and were incapable of voting at the said election on the ground of their having received parochial or other alms or relief, and that such votes ought now to be struck off the poll."

12th Par. "Your petitioner f says that certain persons voted said election for the said Hon. Jolliffe who were not duly qualifie on the register of voters for th borough, or who were on the regis not entitled to vote at the said el and such votes ought now to be off the poll."

13th Par. "Your petitioner f says that the said Hon. S. H. Jolli tained an apparent and colourab jority over the said William Nicl whereas in truth and in fact th William Nicholson had a major legal votes of the electors of tl borough who voted at the said el and who were at the time therec qualified by law to vote, and wa elected as a member to serve in ment for the said borough of Pete and ought to have been returned a member."

The prayer was as follows—

"Wherefore your petitioner pra it may be determined that the sai S. H. Jolliffe was not duly elec returned, and that his election a turn were wholly null and void, ar the said W. Nicholson had a m of legal votes over the said Hon Jolliffe, and was duly elected a election, and ought to have be turned."

A rule was obtained calling up respondent to shew cause why a mandamus should not issue to the of the Crown in Chancery directi to exhibit to the petitioner or his a the marked register of voters Petersfield Borough Election, the terfoils of the ballot papers, and jected ballot papers, subject to suc ditions as the Court may think exp Notice of the rule was to be given Clerk of the Crown in Chancery.

The affidavit upon which the r obtained was sworn by F. L. Soan attorney for the petitioner, and follows—

"First. I issued on the 17th March, 1874, and caused to be se summons, requiring the respond shew cause why the petitioner, torney or agent, should not be at

ect the ballot papers and counter- the custody of the Clerk of the in Chancery, relating to the last n for Petersfield, pursuant to the nd 41st sections of the Ballot Act,

econd. The said application was by the Lord Chief Justice of Eng- and Mr. Justice Grove, sitting to- at chambers, on the 9th day of inst., and was opposed by the dent, both the petitioner and espondent being represented by l.

hird. In support of the said appli- was read an affidavit made by me, pponent, in which, after stating that etition contained amongst others lowing allegations, viz., that many s voted for the respondent at the lection who were, first, disqualified al incapacity; second, disqualified son of holding disqualifying em- ents, or being employed for the ses of the election for reward; not entitled to vote, but who per- d persons entitled who did not fourth, disqualified on the ground eipt of parochial or other alms; not qualified to be on the register of , or being on the register were not d to vote, I deposed that 'in my ent and belief it was requisite for urposes of the said petition, and for ng me duly to prepare the case of titioner, that I, as his attorney or , should be allowed to inspect and l inspect the rejected ballot papers, unted ballot papers and the coun- s of ballot papers now in the cus- of the Clerk of the Crown in cery.'

Fourth. My reason for desiring an ction of the ballot papers and coun- ls, as stated in argument on the ng of the said application, was that ght know with certainty the names persons who voted. The borough tersfield comprises upwards of six hes, and extends over a large dis- The number of names on the re- r is 896. Many voters from distant of the borough were personally un- n to the agents of the defeated can- s who attended at the takng of the poll, and the record kept by them is consequently untrustworthy and imperfect. In these circumstances I do not know accurately who were the persons who voted. Without precise information on this point it is likely that I shall incur expense in getting up evidence and bringing witnesses to the trial with reference to the qualifications of persons on the register who did not in fact vote; and as the number of objections, of which the petitioner has given notice and on which he intends to rely, is large, and each separate objection will in almost all cases have to be supported by evidence relating to itself alone, the expense thus uselessly incurred may be very considerable. In some instances a number of witnesses will be required in support of a particular objection. At the hearing of the said application, I through counsel stated that the production of the counterfoils would be sufficient for my purpose, though they would not enable me to discover the names of the persons who actually voted, but merely the names of those who applied for ballot papers.

"Fifth. The Lord Chief Justice and Mr. Justice Grove held that no case had been made out for the production of the ballot papers or counterfoils, because the information sought would be afforded by the marked copy of the register, which by the 38th section of the first schedule to the Ballot Act the returning officer is required to forward to the clerks of the Crown in Chancery, and which is amongst the documents that under the 42nd section of the said schedule are to be open to public inspection at such time and under such regulations as may be prescribed by the Clerk of the Crown in Chancery, with the consent of the Speaker of the House of Commons.

"Sixth. It was alleged by counsel for the petitioner, and conceded on behalf of the respondent, that in fact access could not be had to the marked copy of the register, inasmuch as the Clerk of the Crown in Chancery maintained that he was not entitled to open the package which contained the marked register as well as the ballot papers and counterfoils, and therefore declined to produce it, but the Judge held that

though this might be a ground for applying to the Court for a mandamus it could not affect the present application, and they made no order on the summons.

"Seventh. On the day before swearing this my affidavit, I made personal application at the office of the Clerk of the Crown in Chancery for inspection of the marked register; but its production was refused on the ground that the returning officer for Petersfield had included in one package all the documents, which under the 38th section of the first schedule to the Ballot Act he is bound to forward to the Clerk of the Crown, and that the Clerk of the Crown considered he had no right to open this package. I was further told that in this matter the returning officer for Petersfield had acted in accordance with what has been the invariable practice of returning officers since the Ballot Act, and has been considered at the office of the Clerk of the Crown to be the correct practice.

"Eighth. As I cannot in the circumstances obtain access to the marked register, it is in my judgment requisite for the reasons hereinbefore set forth that I should be allowed an inspection of the counterfoils, and I say that though the production of the marked register or of the counterfoils would be sufficient for my present purpose, it would not, as I am advised and believe, be sufficient for the purposes of the trial, at which it will be necessary to prove that a particular person has actually voted before evidence can be given to invalidate his vote. The general rule of the 19th of December, 1868, made under the Parliamentary Elections Act, 1868, whereby it is required 'that after notice given the Clerk of the Crown in Chancery shall, on or before the day fixed for the trial, deliver or cause to be delivered to the Registrar of the Judge who is to try the petition or his deputy, the poll books,' does not, as I am advised and believe, apply to ballot papers and counterfoils."

W. G. Harrison and *Couch* shewed cause.—The plaintiff is not entitled to the inspection sought for. The decision of the Court depends upon the construction to be placed upon the 4 and 42nd rules in the Ballot A (35 & 36 Vict. c. 33), sch. 1 The affidavit in support of this closes no sufficient ground for n absolute. The object of the L would be defeated if the produc ordered of the documents which tioner wishes to see.

[BRETT, J.—The intention of t Act, 1872, was to keep secret elector had voted, and we are bound to carry out this object, b other matters the modern pr allowing the inspection of d ought to prevail.]

J. O. Griffits in support of th The Legislature clearly contempl under some circumstances the d relating to a parliamentary should be inspected. It will be for the petitioner's purpose if t will make the rule absolute for duction of the marked register, t of the rejected ballot papers counterfoils of the rejected ballo It will be unnecessary to shew of the rejected ballot papers. means it will be ascertained electors are whose votes have jected without disclosing for whi candidates they voted, and the expense of investigating their tions will be avoided.

W. G. Harrison was then heard cause against making the rule ab the form now proposed by Griffi counterfoils of the rejected ballo ought not to be seen, for that volve an examination of the cou of the counted ballot papers.

[BRETT, J.—We may order t of Crown in Chancery to take the counterfoils of the counte papers shall not be seen.]

The Court have no jurisdi make the rule absolute in t suggested.

[BRETT, J.—The argument ag rule goes to establish that we n order the counterfoils to be exam

The petition does not allege as to the rejected ballot papers; t prayed for is not contemplated petition.

BRETT, J.—In this case the application was originally made for an order directing the Clerk of the Crown in Chancery to open the packet containing the marked register, the counterfoils of the ballot papers, and the rejected ballot papers, so that the petitioner or his attorney might have inspection thereof. The order now asked for is to open the sealed packet in order that inspection may be given of the marked register, the counterfoils of the rejected ballot papers, and the rejected ballot papers; the petitioner being willing that only the back of each rejected ballot paper shall be shewn, and that the face of it shall not be seen. I think that he is entitled to the order prayed for. Independently of the Ballot Act, 1872, inspection ought to be allowed as in an ordinary action; discovery stands upon a different ground, but inspection of documents in civil proceedings ought to be allowed. If it were not for the Ballot Act, 1872, either party would be allowed an inspection at the earliest moment. Before the Ballot Act all information as to voting was open to everybody; but that statute has made a great difference. The only object is to preserve secrecy as to the way in which an elector has voted, and the public are interested in preventing bribery, and the constituency is interested in having for its member the candidate who has been legally elected. Every facility ought to be given for ascertaining who has been duly elected, provided that it does not do away with secrecy. Clearly the marked register ought to be shewn. The 29th rule of the first schedule contains in my opinion mere divisions of subjects, and I cannot think that all the documents relating to the election when they are forwarded to the Clerk of the Crown in Chancery ought to be put into one package; it does not seem to me to be a proper mode of securing them. After examining the construction of this statute I think that we ought to direct that the packet of documents shall be opened, but in my judgment the faces of the rejected ballot papers ought not to be exposed, for to allow this would be contrary to the principle which the Ballot Act seeks to carry out. The order ought to be subject to the condition that the backs only of the rejected ballot papers shall be shewn. The official, who shews the ballot papers, ought not to allow them to go out of his hands. The packet need not be opened in the presence of the agents of the parties. It is necessary that the petitioner should see the counterfoil of the rejected ballot papers; they will give the names of the voters whose votes have been rejected. I think that such an order will save expense, and will give to the petitioner assistance in the conduct of his case without disclosing how the voters have voted, which it was the object of the Ballot Act to conceal. I think that the order ought to be made upon the conditions which I have mentioned. It may be said that this order can also be made at the hearing of the petition, but in my opinion not only have we jurisdiction to make the rule absolute in the form which I have mentioned, but also justice requires us so to do.

GROVE, J.—I regret to say that I differ from my brother Brett as to one portion of his judgment, although I agree with him as to the rest of it. By the 42nd rule in the first schedule of the Ballot Act, 1872, the marked register ought to be open to public inspection, but in this case it has been sealed up in one packet with the counterfoils and the ballot papers. This is suggested to have been done under the powers of the 29th rule. I hardly think this a correct view of its operation, and in my opinion this rule can be read so as to be perfectly consistent with the rest of the Act. In this case the documents have been put together into one packet. I think that the marked register ought to be open to the public, although I had a doubt whether the Court under the 42nd rule had power to direct an inspection. I am not quite sure that a Judge at chambers would have that power, but this Court has in my judgment power to order the production. As to the rest of the rule in the shape now asked for, I regret to have to differ from my brother Brett. I think that no sufficient cause has been made out. Is this Court upon every scrutiny to order production of the counterfoils and the backs of the ballot papers? If this had been the intention

of the Legislature it might have been expressed in a few words, and there would have been an express provision allowing the inspection. I think it plain upon an examination of the rules that except under special circumstances it is not to be disclosed how a person whose vote is rejected has voted. By the 23rd rule only the returning officer, his assistants and clerks, and the agents of the candidates are to be present at the counting of the votes, unless the returning officer sanctions the admission of other persons. By the 34th rule the returning officer, while counting the votes, is to keep the ballot papers with their faces upwards, and to take all precautions for preventing any person from seeing the numbers printed on the backs of such papers. By the 36th rule the returning officer shall indorse the word "rejected" on any ballot paper which he may reject, and shall make a report to the Clerk of the Crown in Chancery of the number of ballot papers rejected, and shall allow any agent to copy it. By the 37th rule, upon completion of the counting, the returning officer is to seal up in separate packets the counted and rejected ballot papers. Now it seems to me that the legislature intended that when the Clerk of the Crown in Chancery receives the documents relating to the election under the 38th rule, he should not see any part of the ballot papers; for if he saw the backs he would have the opportunity of seeing the whole. If we comply with this rule in its modified form, an order might be made to allow any petitioner to see the rejected ballot papers and might thereby frustrate the object of the Act. In the 41st rule the words "any tribunal having cognizance of petitions complaining of undue returns or undue elections" are a little uncertain; at first sight they may mean either an election Judge or this Court. By this rule express provision is made forbidding the inspection of the sealed packet of counterfoils except by order of the House of Commons or of such tribunal as aforesaid. This provision would have been unnecessary if the Legislature had intended them to be seen as a matter of course, and in my judgment this was not the intention of the Legislature. I think this Cou tribunal within the meaning of tl rule, but we ought not to make a this kind absolute except upon grounds. In this case no sufficient has been stated. The names migl been given of those voters to whos the petitioner objects. Without of the counterfoils and the backs ballot papers he may learn whet elector voted. Extreme care ha taken by the legislature to prevent closure of how a person voted; no the election Judge is entitled to until it has been ascertained th voter has been tampered with, an the vote is invalid. No case ha made out as to the counterfoils a rejected ballot papers. The pet urges that he may be preparec evidence which may turn out to a a person whose vote has been re The hardship is of the slightest even if this application is *bon* All that the petitioner really sta need of is, that the marked registe be shewn to him; the backs of the papers and the counterfoils ought be seen.

Denman, J.—I agree with the the Court as to the marked re With regard to the rejected ballot and the counterfoils, I think tl spection of them ought not to be a The question as to the rejected papers depends upon the 40th ru cording to which they are not to l merely upon demand; but it m shewn that the production is re No evidence has been really adduc inspection is requisite. I wish to that the summons originally tak was for inspection of the ballot and counterfoils. This original gro application has been partially abar for the rule was for the inspection marked register, the counterfoils ballot papers and the rejected papers, and this has been modified rule for production of the mark gister, the backs of the rejected papers and the counterfoils of the r papers. The summons appears been taken out in the belief th marked register could not be seen

case now set up seems to me to be a new one. I agree with my brother Grove that the counterfoils and the backs of the rejected ballot papers ought not to be inspected.

Rule absolute that the Clerk of the Crown in Chancery be at liberty to open the sealed packet which is alleged to contain the marked register of voters of the Petersfield Borough Election, and permit the petitioner and respondent respectively, or their agents, to inspect such marked register, and take copies if required, upon paying for the same, and that the Clerk of the Crown in Chancery do not permit any other papers than the said marked register to be inspected.

Attorneys—F. L. Soames, agent for J. Soames, of Petersfield, for the petitioner; Rogerson & Fordham, agents for Albery & Lucas, Midhurst, for respondents.

1874. April 22, 23. } LOCKWOOD *v.* WILSON AND ANOTHER.

Landlord and Tenant—Tithe Rentcharge—Agreement by Tenant to pay all Charges during the Term—6 & 7 Will. 4. c. 71. s. 80.

By a lease, the tenant agreed to pay the rent, "without any deduction in respect of any taxes, rates, assessments or charges whatsoever, the landlord's property tax only excepted:"—Held, *that the tenant was bound to pay the tithe rent-charge imposed upon the demised hereditaments.*

The writ was issued on the 3rd of February, 1874.

The first count of the declaration stated that the defendants seized and took the plaintiff's goods, that is to say, a rosewood loo table, and carried away the same, and disposed of the same to their own use, whereby the plaintiff was deprived for some time of the use of her said goods, and sustained loss in procuring the liberation of her said goods, and was injured greatly in her credit and reputation, and suffered much mental distress and anxiety, and was and is otherwise damnified. The second count was for money paid by the plaintiff for the defendants at their request.

Pleas, 1. As to the first count, not guilty. (By statute 11 Geo. 2. c. 19. s. 21, Public Act); 2. As to the second count, never indebted.

Joinder of issue.

The cause came on for trial during the sittings for Middlesex during Easter Term, 1874, before Keating, J., and the following appear to be the material facts of the case.

By an indenture of lease, bearing date 20th July, 1872, the defendant Wilson had demised to the plaintiff a cottage, at the yearly rent of 60*l.*, and the plaintiff covenanted to pay "the said net yearly rent of 60*l.* hereinbefore reserved, without any deduction in respect of any taxes, rates, assessments or charges whatsoever, the landlord's property tax only excepted," and the plaintiff further covenanted to "pay as well the land tax (if any), as also the sewers rate, and all rates, taxes and assessments, parliamentary, parochial or otherwise, now charged, or hereafter to be charged, upon the said premises or any part thereof, landlord's property tax only excepted."

The plaintiff, as occupier of the demised cottage, paid to the owner of the tithes the sum of six shillings and five pence, as one half-year's rentcharge in lieu of tithes, and, upon payment of the rent to the defendant Wilson, the plaintiff deducted that sum from the amount thereof. The defendant Wilson refused to allow this deduction, and distrained upon the plaintiff's goods. The warrant stated the distress to be "for the sum of six shillings and five pence, being for one half-year's rentcharge in lieu of tithe, due to me for the same on the 1st day of October, 1873." The notice of distress contained a similar statement. The distress having been paid out, the present action was brought. A verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for her, on the ground that by the terms of the lease the defendant Wilson was bound to pay the rentcharge in lieu of tithe.

G. R. Kennedy (on April 22) moved to enter a verdict for the plaintiff on the above ground, and also for a new trial, on the ground that the warrant and the notice of distress were informal. With respect to the entering the verdict, this depends on the question whether the plaintiff had a right to deduct from the rent the amount of tithe rent-charge which she had paid. It is enacted by section 80 of 6 & 7 Will. 4. c. 71, the Tithe Commutation Act, that "every tenant or occupier who shall occupy any lands by any lease or agreement, made subsequently to such commutation, and who shall pay any such rentcharge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord." In *Jeffery* v. *Neale* (1) the owner of land, who was also the owner of the tithe rentcharge thereon, had let the land at a specified rent, payable without any deduction, except in respect of level tax, property tax and land tax, and the tenant had covenanted to pay "all taxes and assessments whatsoever for and in respect of the said land, which should be taxed, charged or assessed on the same, or on the landlord in respect thereof, except level tax, property tax and land tax," and it was held that the tenant was not liable on such covenant for not paying the tithe rentcharge. So also *Tidswell* v. *Whitworth* (2) shews that a covenant by a tenant "to pay all taxes, rates, assessments and impositions whatsoever, except property and income tax," does not include the expenses of paving before the house incurred by a corporation under a local improvement Act, which the corporation had the power to call on the owner of the house to pay for. There is no case in which tithe rentcharge has been held to be comprised under "rates, taxes and assessments."

[BRETT, J.—Here the rent is reserved, "without any deduction in respect of any taxes, rates, assessments or charges." What meaning do you give to the word "charges" if it does not include a tithe rentcharge?]

(1) 40 Law J. Rep. (N.S.) C.P. 191; s. c. Law Rep. 6 C.P. 240.

(2) 36 Law J. Rep. (N.S.) C.P. 103; s. c. Law Rep. 2 C.P. 326.

Whenever a tenant has been to pay a tithe rentcharge, th always contained an agreeme should so pay it, and such charge has been specifically m

[BRETT, J.—If "charges" in rentcharge, then the tenant h pressly agreed to pay it. A *Parish* v. *Sleeman* (3), a tithe is an outgoing which the ten deduct from rent which he ha pay, "free of all outgoings."]

Next, there ought to be a n the distress warrant for the was illegal, and therefore t under it was illegal, and c the learned Judge ought to h a verdict for the plaintiff.

[LORD COLERIDGE, C.J.—T deducted 6*s*. 5*d*. from the rent deduction was wrong, then rent due, which would supp tress.]

Then it comes back to t whether the plaintiff was ent duct from the rent in respect rent-charge.

Cur.

The following judgments we upon April 23rd.

LORD COLERIDGE, C.J.—Fir point reserved, the language is very clear. The plaintiff ag the rent without any deductio of any taxes, rates, assessment the landlord's property tax on and she further covenanted land tax, the sewers rate, an taxes and assessments, parlian rochial or otherwise, the lan perty tax only excepted. If did include the tithe rentcha fendant Wilson was entitled I think that there is no the plaintiff's contention. "charges" must be so read a the liability of the landlord rentcharge in lieu of tithes. that the tithe rentcharge doe to have been ever considere an assessment, as was said by

(3) 1 De Gex, F. & J. 326; s. c. (N.S.) Chanc. 96.

in *Jeffery* v. *Neale* (1); but the tithe rentcharge does certainly seem to be a charge within the meaning of the demise. It was asked of the plaintiff's counsel during his argument how he would satisfy the word "charges," if it were not sufficient to include the tithe rentcharge, and to this question no satisfactory answer could be obtained. As to the second point, the plaintiff gave no proof of injury resulting from the irregularity complained of. Upon both the grounds urged before us the rule must be refused.

BRETT, J.—This was an action for an illegal distress. The plaintiff alleged that no rent was due: the defendants contended that the plaintiff had agreed to pay the tithe rentcharge. When the lease was produced, it was found that the plaintiff had thereby covenanted to pay all the charges upon the demised property, except only the landlord's property tax. The minuteness of the exception shews that the parties did not intend to exclude the tithe rentcharge from the number of burthens to be discharged by the tenant. It was further contended that the warrant and the notice of distress being irregular the distress was unlawful; but no injury resulted to the plaintiff from the irregularity, and the action is not maintainable for an informality of this kind.

DENMAN, J., concurred.

Rule refused.

Attorneys—Webb, Stock & Burt, for plaintiff; Prideaux & Son, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Common Pleas.*)

1873. June 20. 1874. May 13. } PEGGE *v.* THE GUARDIANS OF THE LAMPETER UNION.

Lunatic Prisoner—Liability of Guardians of Union—Presumption from long Payment—3 & 4 Vict. c. 54.

The keeper of a private asylum received an insane prisoner, by virtue of a warrant of a Secretary of State, under 3 & 4 Vict. c. 54, and the guardians of a union, to which the prisoner was chargeable during thirteen years, paid for maintenance a certain weekly sum, which was a reasonable sum in that behalf:—Held (*reversing the judgment of the Court of Common Pleas*), *that no inference could be drawn, either that there had been an order of justices under 3 & 4 Vict. c. 54. ss. 1 & 2, for payment of that sum, or that an arrangement had been made to pay that sum, or a reasonable sum, so long as the lunatic should be kept.*

This was an appeal from a decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the plaintiff. The arguments and the judgments in the Court below are reported in 41 Law J. Rep. (N.S.) C.P. 204.

The facts are stated in the first of the judgments hereinafter reported.

Kingdon (on June 20th, 1873), for the appellants.—The plaintiff was bound to receive this lunatic sent by the order of the Secretary of State, made under 3 & 4 Vict. c. 54, provided an order was also made by justices for the payment of weekly sums in respect of her maintenance. He was not bound to take her without such latter order, and if he did so it was his own fault, and he must keep her until further order. The defendants cannot be liable at all, unless the justices make an order, for guardians usually act under statutory authority alone.

[QUAIN, J.—But they have paid, and are ready to continue to do so.]

The plaintiff failed, in the first instance, to obtain an order of justices, and the moment the defendants ceased to pay the larger, and wished to pay the smaller sum, he might have gone before two justices, and asked for an order.

[KELLY, C.B.—Suppose they would not make one?]

They are bound to do so. Willes, J., said the case is like *Shadwell* v. *Shadwell* (1). But guardians of the poor are a public body, going out of office every year, and the effect of the judgment below is that the guardians of 1856 might bind the succeeding guardians in perpetuity.

(1) 9 Com. B. Rep. N.S. 159; s. c. 30 Law J. Rep. (N.S.) C.P. 145.

[BLACKBURN, J.—Why not? Assuming the sum to be reasonable, that effect would not be obviously absurd.]

The Court can draw inferences of fact. Was there an agreement, in fact, between the guardians and the plaintiff for the payment of 16*s.* per week so long as the lunatic was confined in the plaintiff's asylum? No order of justices was produced, which would have been evidence.

[QUAIN, J.—Are they bound to pay the 11*s.* 1*d.* under the letter of the 19th of October?]

No. It would be *ultra vires* to make such a contract. The contract should have been under seal, for the making of such contracts was not the very purpose for which they were incorporated, as in *Nicholson* v. *The Bradfield Union* (2). They had indeed no power to enter into it at all.

[QUAIN, J.—Is not a contract to be inferred from their paying 16*s.* during so long a time? But you have a much stronger point, for was not this contract determinable?]

Although they may have paid the sum, yet if they did so unjustifiably, without an order of justices, then no contract is to be implied.

[BLACKBURN, J.—Might it not be a contract to pay until an order of justices was made altering the amount?]

The application to the justices for an order is not to be by the defendants but by the other side. This was a mere voluntary payment, which the guardians were entitled to discontinue. Supposing it to be any evidence of a contract, the contract suggested was not of a kind to bind the guardians. It was no part of their ordinary duties to make it—4 & 5 Will. 4. c. 76. s. 49.]

Sir Henry James, for the plaintiff.—First, there was ample evidence of a contract. The defendants are but in the position of ordinary individuals. A contract to pay a particular sum is often inferred from payment of that sum as rent. The fact that 16*s.* has been paid is sufficient proof that the persons who allowed the pauper to go to that asylum contracted to pay that amount. True, this obligation of sending criminal

(2) 35 Law J. Rep. (N.S.) Q.B. 176; s. c. Law Rep. 1 Q.B. 620.

pauper lunatics to an asylum
ginally cast upon the Secretary
who had to fix the amount payab
by 3 & 4 Vict. c. 54. ss. 1 and 2,
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to have it properly refixed, and t
tiff was under no obligation to ta
steps. Lastly, no seal was neces

Kingdon, in reply.—If the noti
by the letter of October, 1869,
plaintiff were valid, there is no
consideration.

judgment of Blackburn, J.; y, B.; Quain, J.; and Archibald, s (on May 13, 1874) delivered by ASBY, B.—This is an appeal from gment of the Court of Common

case was tried before Baron Bram- at Bristol, when the following facts admitted or proved.

woman, called Mary Hughes, was in- d for murder at the Carmarthen mer Assizes, 1847, and upon arraing- t was found insane. Upon the 16th October, 1856, the then Secretary of te made an order authorising and uiring the superintendent of the mon House Lunatic Asylum at Briton rry to receive her in custody at the d lunatic asylum, there to remain until ther order. At that time a Mr. Leach s the proprietor of the asylum, but in 54 the plaintiff became so. She was a per, and chargeable to the Lampeter ion. From the time she was admitted wn to the autumn of 1869 the guardians the union (the defendants) regularly d for her care and maintenance in the lum at the rate of sixteen shillings a ek. On the 19th of October, 1869, the fendants caused a letter to be written the plaintiff to the effect that they uld not longer pay for her care and intenance more than eleven shillings d a penny per week, such being the rate ich they then paid for the maintenance lunatics at the joint counties asylum at rmarthen. The plaintiff replied on the nd of October that his terms for pauper natics were sixteen shillings a week. In bruary, 1870, the defendants wrote to plaintiff that they had been advised resist this payment, and were prepared defend any action for a claim beyond ven shillings and a penny per week. e action is brought to recover 46*l.* . 4*d.* for the care and maintenance m December, 1870, to 1871. The plain- admitted that as to 10*l.* 8*s.* 9*d.*, being the period from December, 1870, to rch, 1871, the second plea was an wer; but he insisted upon his right to ver 31*l.* 6*s.* 6*d.* for the period between rch, 1871, to December, 1871, being at rate of sixteen shillings per week. defendants paid 21*l.* 12*s.* 3*d.* into Court, being at the rate of eleven shillings and a penny for the same period. The plaintiff claimed the difference, 9*l.* 14*s.* 1*d.* It was admitted by the defendants that sixteen shillings a week was a reasonable sum to be paid to the plaintiff for the care and maintenance of the pauper lunatic. No order of justices, as required by the 3 & 4 Vict. c. 54, was produced in evidence by the plaintiff. The learned Judge directed a verdict to be entered for the defendants with leave to the plaintiff to move to enter a verdict for the sum of 9*l.* 14*s.* 1*d.* A rule to shew cause was obtained in the Court of Common Pleas, which was afterwards made absolute, and this appeal is against that judgment.

The legal and proper mode of payment for a pauper criminal lunatic is prescribed by the statute 3 & 4 Vict. c. 54. ss. 2 and 3. It is thereby provided that the justices shall by order under their hands, amongst other things, order that the guardians of a union shall pay such sum as they shall from time to time direct for the maintenance of the lunatic in the asylum, in which he or she shall be confined. Upon this state of facts the Court of Common Pleas made the rule absolute, and they appeared to consider that it was either a proper inference from the facts stated that the guardians had entered into a contract to pay sixteen shillings a week for the pauper's maintenance, to continue until they had obtained an order from the justices to alter the rate of payment, or that the facts even warranted the conclusion or presumption that there was in point of fact an order of justices to pay after that rate. With respect to the latter head it appears to us that no such conclusion or presumption could be properly arrived at with respect to a matter so recent and capable of proof as the supposed order of justices. The payment of sixteen shillings a week during the period named was completely accounted for by the liability of the defendants to pay something, and by the fact that sixteen shillings was a reasonable sum for them to pay, and the sum which the plaintiff demanded, and which the defendants assented to until the letter of the 19th of October, 1869. And further

the plaintiff by his letter of the 22nd of October rests his claim not upon any order of justices, but upon his terms being sixteen shillings per week.

With respect to the inference of the particular contract first mentioned, it appears to us that there is no sufficient ground for making it. The guardians had no legal right to enter into such a contract; it was their duty to act upon the statute, and no inference or presumption should be drawn that they acted contrary to law. In our opinion the just and reasonable inference from the facts stated is that the guardians knowing that they were liable to pay for the maintenance of the lunatic paid the sum of sixteen shillings per week, being a reasonable and proper sum, without any order of justices at all, and that it was competent for them at any time to put an end to their liability for that payment, and put upon the plaintiff the necessity of obtaining an order of the justices; the guardians did not place the pauper lunatic in the asylum of the plaintiff or of his predecessor. The plaintiff fails in making out a case for sixteen shillings a week, because he cannot rest it upon contract as the defendants did not agree to it; and he cannot rest it upon legal liability independent of contract, because the order of justices, which is the proper foundation for such liability, is wanting.

A second objection was made on behalf of the defendants, that assuming the inference to be a proper one, that the defendants had contracted to pay sixteen shillings a week until they obtained an order of justices to vary the amount, such contract should have been under seal to be binding upon the corporation. After what has been said, it is unnecessary to give any decision upon this objection (3).

The result is that in our opinion the judgment of the Court below must be reversed.

CLEASBY, B., also read the judgment of

(3) As to the liability of boards of guardians upon contracts not under seal, see *Austin* v. *The Board of Guardians of the parish of St. Matthew, Bethnal Green*, ante, p. 100.

KELLY, C.B.—I agree so
judgment of the Court of Com
that it was competent to the
to waive the order by the
specifying the amount to be
plaintiff for the maintenance of
lunatic in question, and that
waive that order and agree to
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and that the plaintiff is not
more than the eleven shillings a
a week.

The judgment of the Court o
Pleas must, therefore, be rever

Judgment

Attorneys—J. H. Wrentmore, agent f
of Neath, for plaintiff; Humphrey
agents for D. Lloyd, of Lampe
fendant.

1874. April 21. } DAVIES *v.* DUNCAN AND ANOTHER.

Libel—Privilege—Comments upon Behaviour of Persons attending a Public Meeting in a Private Capacity—Question for Jury.

Comments made without express malice upon the behaviour of persons attending a public meeting fall within the rule of privilege and are not actionable, even although the persons go to the meeting in a private capacity.

The plaintiff went with two friends to a public meeting, held for the purpose of hearing a candidate at a parliamentary election, and of discussing political questions connected with the election. The plaintiff and his friends, whose object in going to the meeting was merely to listen to the proceedings, dissented from the views expressed therein, and a disturbance occurred which resulted in their leaving the meeting under protection of the police. A newspaper, which was represented by the defendants, commented in disparaging terms upon the conduct of the plaintiff and his friends, and used language capable of meaning that two of them were intoxicated, and that they were given into the custody of the police for misconduct. The plaintiff having sued for a libel, at the trial the Judge directed the jury that the comments upon the behaviour of the plaintiff and his friends were privileged if made in a fair spirit, and that it was for the jury to say whether the alleged libel imputed intoxication, and also misconduct requiring the interference of the police:—Held, *a proper direction.*

The declaration stated that the defendants falsely and maliciously printed and published of the plaintiff, in a newspaper called the "South Wales Daily News," the words following, that is to say—"The contest at Swansea.—In our yesterday's issue we reported two successful meetings held by Mr. Dillwyn at Morriston and Landore. After the despatch of our telegram we learn with regret that an unseemly scene took place at the Landore meeting. Just before the close of the meeting three members of the Established Church clergy (meaning thereby the plaintiff and two other clergymen of the Established Church) made an appearance in the chapel—two of them (meaning thereby the plaintiff and one of the said two other clergymen) having appearances, which were certainly consistent with the belief that they had imbibed rather freely of 'the cup that inebriates.' Their conduct (meaning the conduct of the plaintiff and the said two other clergymen) in the chapel also led one to such a conclusion. One of the reverend gentlemen (meaning thereby the plaintiff) essayed to speak, but met with a reception that was anything but pleasant. Persisting in interrupting the meeting, these headstrong supporters (meaning thereby the plaintiff and the said two other clergymen) of the 'blue' candidate were handed over to a couple of gentlemen attired in an uniform of that colour, who had considerable difficulty in protecting the reverend gentlemen (meaning thereby the plaintiff and the said two other clergymen) when they got outside, as the crowd were incensed at the disturbers (meaning thereby the plaintiff and the said two other clergymen), and were anxious, it would seem from their conduct, to give them (meaning the plaintiff and the said two other clergymen) some punishment, which they unquestionably deserved. Such proceedings on the part of ministers of the Gospel (meaning thereby the plaintiff and the said two other clergymen) cannot be too highly condemned, and it is to be hoped that the three reverend gentlemen alluded to (meaning thereby the plaintiff and the said two other clergymen) will receive such a reprimand from their superiors as will prevent a similar disgraceful disturbance."

Pleas—1. Not guilty; 2. That the said alleged words are true in substance and in fact.

Joinder of issue.

The cause was tried at Gloucester, before Lord Coleridge, C.J., and the following were the material facts of the case.

The plaintiff was a clergyman of the Church of England, residing out of the parliamentary borough of Swansea. In February, 1874, a general election was being held, when Mr. Dillwyn was the

candidate in the Liberal interest for the borough of Swansea, and Mr. Bath was the Conservative candidate. The plaintiff, who was a personal friend of Mr. Bath, on the 20th of February had met with two friends of his, who were also clergymen of the Church of England, and the three had gone together to Swansea —one of them went for a purpose connected with a county election, another for the purpose of consulting his medical man, and the plaintiff at the invitation of his friends. The plaintiff and his friends were Conservatives in politics. They partook of some refreshments during the day. Mr. Dillwyn was to address the electors at Siloh Chapel, which was situate upon the road leading to the homes of the plaintiff and his friends; they therefore stopped at it, in order to hear Mr. Dillwyn speak. Upon entering the chapel, the plaintiff and his friends were beckoned into a sitting. A person was speaking to the audience assembled in the chapel upon various political subjects, and the plaintiff and his friends objected to some of the opinions which were enunciated. When they expressed their dissent some confusion and disturbance ensued, and warmth of feeling was displayed by both the plaintiff and his friends, and also the persons present at the meeting. Ultimately, the police were called in, and the plaintiff and his friends left the chapel under their protection.

The publication of the libel was proved.

The Lord Chief Justice, in summing up, told the jury that the comments alleged to be libellous referred to a matter of public interest, and were privileged if made in a fair spirit. He also left it to the jury to say whether the words complained of imputed to the plaintiff and his friends intoxication, or merely excited behaviour, and also whether it was intended to state that the plaintiff and his friends were guilty of misconduct calling for the interference of the police. The jury found a general verdict for the defendants.

Huddleston now moved for a new trial. The grounds and nature of the motion sufficiently appear in the following judgment of Brett, J.

Brett, J.—In this case I am
that there ought to be no r
Huddleston has moved for a ru
upon the defendants to shew c
there should not be a new trial
grounds of misdirection by the I
Justice, and on the ground tha
dict was against the weight of e

The first of the alleged misdir
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think it was very proper to tell
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rule of privilege. I think that
was quite right in this respect.

Mr. Huddleston further conte
part of the article referred to the
of the plaintiff before the meetin
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friends at the moment of arrivi
meeting presented the appearan

obriety. If that be the meaning of the article, it obviously refers to their conduct before they went to the meeting. But the meaning of the article was a question for the jury, and if the Lord Chief Justice had told them that the meaning of the article was such as Mr. Huddleston contends it to have been, he would have misdirected them: a Judge, even in an action for a libel, has no right to put a meaning upon an alleged libel, as a matter of law; by the construction put upon Mr. Fox's Act, as it is called, 32 Geo. 3. c. 60, the right of interpretation is taken from him, and is given to the jury. My Lord was right in leaving it to the jury to determine the meaning, and the jury were well justified in thinking that the passage in the article did not apply to the moment when he and his friends entered the chapel, but referred to their behaviour during all the time they were present at the meeting. The direction to the jury of the Lord Chief Justice appears to have been to the following effect—"You must look at the article as a whole, and, taking a broad view of it, you must determine its meaning; and if you think that it is only a fair discussion, it is not a libel, for it relates to a matter of public interest; but if you are of opinion that the article goes beyond the bounds of fair discussion, you must consider whether the article, in its broad meaning, has been justified." This seems to me to have been the substance of the direction, and I cannot conceive a direction more correct.

Mr. Huddleston has contended, as a third ground of misdirection, that my Lord ought to have told the jury that in the article the plaintiff and his friends were represented to have been given into the custody of the police. The Lord Chief Justice left it to the jury to determine the meaning; and the jury appear to have found that the article did not charge the plaintiff with having been given into the custody of the police, but that it intended to state that they were handed over to the police, to be protected from violence likely to happen to them in consequence of their own indiscretion. I think the jury were right in attributing this meaning to the article, which clearly does not intend to state that the plaintiff was charged with an offence. I think that the direction was entirely correct, and that really no foundation exists for saying that there was any misdirection on the part of my Lord.

I am glad to hear that these gentlemen were not suggested by any one to have been intoxicated, but it cannot be doubted that they acted indiscreetly. The meeting was not composed of their political friends, and they acted indiscreetly in going to the chapel; they were equally indiscreet after their arrival there in interfering with the discussion which was taking place.

DENMAN, J.—I also think that there should be no rule in this case. I entirely agree with my brother Brett as to what was the real meaning of the alleged libel, and in my opinion, the defendants having pleaded "not guilty," the jury were justified in finding that the article was not a libel. I think that there was no misdirection by the Lord Chief Justice. If the jury had expressly found a verdict for the defendants upon the plea of justification, I should have thought it warranted by the evidence. The only matter upon which I felt a doubt was the question as to privilege; and inasmuch as the jury did not expressly find either a verdict for the defendants upon the plea of "not guilty," or a verdict that the plea of justification was proved, we might have been bound to grant a rule if the direction as to privilege had not been accurate; but, upon the whole, I entertain no doubt that if the words complained of were a fair comment upon the conduct of persons attending a meeting held for the purpose of hearing a candidate at a parliamentary election, they were privileged. There is no express authority upon the subject, and indeed *Davidson* v. *Duncan* (1) does to a certain extent look like an authority against our ruling; but that case was very much discussed in *Wason* v. *Walter* (2), and I am not sure that it can now be considered unqualified law. *Kelly* v. *Tinling* (3) is an authority for

(1) 7 E. & B. 229; s. c. 26 Law J. Rep. (N.S.) Q.B. 104.

(2) 8 B. & S. 671; s. c. 38 Law J. Rep. (N.S.) Q.B. 34.

(3) 35 Law J. Rep. (N.S.) Q.B. 231; s. c. Law Rep. 1 Q.B. 699.

the view which we are taking of the law applicable to this subject: it was there held that comments upon the conduct of a clergyman in the management of his church were privileged, as they related to a matter of public interest. It was for the jury to say whether the language used in the article went beyond the boundary of fair discussion, and we ought not to interfere with the verdict upon any of the grounds brought before us.

LORD COLERIDGE, C.J.—I entirely agree with my learned brothers. I thought at the trial, and I think now, that I was right in asking the jury whether the article was a libel; the occasion justifying fair comment, whether the fair limit of public discussion was exceeded; and whether the alleged libel was in substance proved. The jury found a general verdict for the defendants, without specifying upon which of these questions they had decided. It would have been very unfortunate if the verdict had been for the plaintiff. I do not believe that the plaintiff and his friends were intoxicated, but they conducted themselves with singular indiscretion—they caused all the mischief. I do not entertain the slightest disposition to interfere with the verdict.

Rule refused.

Attorneys—Gover & Norton, agents for C. Norton, Swansea, for plaintiff; Field, Roscoe & Co., agents for B. Matthews, Cardiff, for defendants.

1874. April 27. } HENDRICKS *v.* THE AUSTRALASIAN INSURANCE COMPANY.

Marine Insurance—General Average—Foreign Adjustment.

The plaintiff insured a cargo (consisting of bags of sugar in series) with the defendants by an English policy which contained these words—"to cover only the risks excepted by the clause warranted free from particular average unless the vessel be stranded, sunk or burnt, to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland, being warranted free from particular average unless amounting to ten per cent. on each series." The plaintiff had pre insured the same cargo with Dutch writers, and the defendants knew t cargo was insured, but not where, terms of the Dutch policy. The vesse course of the insured voyage took the under circumstances which made it a ing according to English law, but not ing to Dutch law. An average st was made by a Dutch dispacheur ac to the principle of the Dutch law, sh particular average loss, and for t plaintiff sued:—Held, *that the pol to be construed according to Engli and without reference to the Dutch other policy, but that as the def were to pay all claims according to average stater the stranding of th must be determined according to Du and the defendants were liable to average loss as stated by such average adjuster according to the law.*

This was an action brought to the sum of 503*l.*, the amount of ticular average loss, alleged to ha sustained by the plaintiff as own cargo of unclayed brown sugar or the British ship, *Perpetua*. And sent of the parties and by a Judge' the following case was stated opinion of the Court without plea

CASE.

The plaintiff is a merchant carr business at Amsterdam, in Holla the defendants are a company c on business as underwriters in the London.

On the 1st of March, 1870, the under the name of "A Hendr Company," effected with the defen policy of insurance upon sugars, th of the British ship *Perpetua*.

In that policy the insured vo described as follows—"Lost or at or from any port or ports of o in Java, and (or) Sumatra in any backwards and forwards, forwa backwards, to the vessel's port or discharge in Holland," and the matter insured and the risks against are described as follows said ship and goods and merchand

for so much as concerns the assured by agreement between the assured and the said company in this policy are and shall be rated and valued at 2,000*l.* on 6,715 bags unclayed brown sugar

{being in 22 series of 300 bags each
and 1 „ 115 „}

valued at 4,000*l.*

To cover only the risks excepted by the clause "Warranted free from particular average unless the vessel be stranded, sunk or burnt, to pay all claims and losses on Dutch terms, and according to statement made up by official dispacheur in Holland, being warranted free from particular average unless amounting to ten per cent. on each series."

The risk so described except as to the words commencing with "to pay," and ending with "series," is a risk well known among English underwriters as a P.A. risk only. The term P.A. only means that the insurance is to cover only the risk excepted from what is called an F.P.A. policy. The term F.P.A. means that the insurance contains an exception in the following terms—"warranted free from particular average unless stranded, sunk or burnt." The P.A. risk only with the addition of Dutch terms or an exception of average under ten per cent. is not a usual insurance.

Previously to the making of the before mentioned policy the plaintiff had effected a policy of insurance upon the same cargo with Dutch underwriters in Amsterdam.

At the time when the defendants executed the policy now sued upon they knew that the goods had already been insured, but they had no notice where the previous insurance was effected, or what were its terms unless the Court shall be of opinion that the terms of the policy amount to such notice.

On the 6th of January, 1870, the *Perpetua* sailed on the insured voyage from Probolingo, in Java, bound for Amsterdam, and while descending the river about midnight of the 11th of January, 1870, took the ground at Oostook, near the mouth of the river.

The following extract from a protest made by the master at Sourabaya correctly describes the means used to get the ship off.

"Got the gig out and ran the stream anchor out with seventy fathoms of a 4½ inch warp and hove. A strain on it when the ship canted with her head to the eastward, the water falling could do no more till the next flood. At eight, strong gales and squally, with rain from S.W. At ten same weather, set all canvas that could draw, the ship striking but very lightly—hoisted the long boat out and sounded round the ship and found deep water all round, pumps attended all the while, the ship making one inch of water per hour, being half one inch more than before striking. Noon squally with rain, wind from S.W. The 12th of January began with squally weather from the W. to the S.W. At one p.m. the ship drew a head about ten or fifteen feet, and held fast again, got the starboard bower in long boat with fifty fathoms of stream chain, ran it out and hove a strain upon it but without any effect, the ship to all appearance laying fast a little before the mizen rigging upon the port side, the ship making ten inches of water per hour from midnight to four a.m., the ship striking heavily, on the stern post being past high water could do no more till the next flood. About two p.m. heavy rain and squalls. The 13th of January began with heavy squalls of wind and rain, every stick set at one p.m., the ship began to move, manned the windlass and hove all possible strain, when a heavy squall coming on at the time the ship slipped off and swung to her anchor, the pumps all the time constantly going, clewed up all the small sails, veered away upon the starboard anchor to fifty fathoms and seventy fathoms upon the warp."

The ship having been got off in the manner described in the last paragraph sailed for Sourabaya. The cargo was there discharged, and the repairs to the hull of the ship rendered necessary by her taking the ground at Oosthook were effected. The cargo was then reloaded, and about the end of March, 1870, the ship sailed for Amsterdam where she arrived in due course and delivered her cargo.

The sugars on being unshipped at Amsterdam were found to have received damage from the ship having taken the

ground at Oosthook, and thereupon the owners of the ship *Perpetua*, and the plaintiff as owner of the cargo, made an application to Dr. James Wertheim to draw up a statement of average. Dr. Wertheim is an official dispacheur at Amsterdam, that is an average adjuster appointed to prepare average statements by the association of underwriters and shipowners at the Exchange at Amsterdam.

In pursuance of the before-mentioned application, Dr. Wertheim prepared, amongst other things, and signed a statement dated 28th of March, 1871, of particular average, shewing a sum of 503*l.* as payable by the defendants to the plaintiff under the policy, now sued upon. [A copy of this statement was given in the appendix to this case.] The figures upon which this adjustment is made are to be taken for the purposes of this case to be correct.

By the expression "series" in the policy sued on was meant the packages in which the sugars were packed. The loss amounted to or exceeded ten per cent. on each series upon which a loss has been adjusted in the statement so prepared by Dr. Wertheim.

At Amsterdam and Rotterdam there are regulations in force as between underwriters and shipowners. These regulations are made by the Association of underwriters and shipowners in each of those towns, and are altered from time to time. These regulations are recognised by the Dutch law as binding in the sense that they are taken to be imported into every policy of insurance made at Amsterdam and Rotterdam, respectively, unless the terms of the policy exclude them.

The regulations of Amsterdam at the times of the making of the policies hereinbefore mentioned, contained and still do contain provisions as to particular average of which the following is a translation:

"In insurances contracted with the condition 'free from particular average,' the insurer has to indemnify the damage that has occurred only when the vessel has suffered shipwreck, the ship and cargo, or the cargo alone, has taken fire, or in case of stranding provided that such damage amounts to ten per cent. or more.

"By stranding is understood that a ship having got aground remains fixed and can be got off only by extraordinary measures. In the sense of this clause are regarded as extraordinary measures the cutting of masts, the heaving overboard or landing of the cargo, &c., and as ordinary measures, the winding on the anchors or on the shore, the working with the sails and the like."

The regulations of Rotterdam contain provisions identical with these, except that for ten per cent. is substituted three per cent. It is agreed that according to the regulations, assuming them to be applicable to the policy now sued upon [which the defendants deny], the ship had not, under circumstances stated in the case, stranded.

At the time of the making of the policy now sued upon at the time of the commencement of the risk, and until and at the time of the happening of the loss described in this case, the plaintiff was interested in the sugars to the amount of the valuation in and of the sum insured by the policy.

It is well known among underwriters that the adjustment of particular average in Holland is more favourable to the underwriters than an adjustment in England.

The Court may draw inferences of fact.

The question for the opinion of the Court is whether the plaintiff is entitled to recover in this action.

Butt (*Cohen* and *Witt* with him), for the plaintiff.—The policy sued on expressly referring to Dutch terms ought to have given the defendants notice of the existence of the Dutch policy, especially as the defendants knew the cargo had been insured. The risk insured by the policy sued on was, as the defendants must therefore have known, the risk excepted out of the Dutch policy. The defendants by the policy sued on agreed to pay all claims in Dutch terms, and according to the statement of the Dutch average adjuster. They therefore agreed to pay all such claims as would be valid according to the Dutch law and regulations, and conse-

quently the plaintiff's claim in this case, since, according to such law and regulations, the vessel was not stranded by taking the ground under the circumstances of this case, and the plaintiff had sustained a particular average loss. The statement of the Dutch average stater is conclusive on the defendants, and they are precluded from disputing it. The cases of *Harris* v. *Scaramanga* (1) and *Stewart* v. *The West India and Pacific Steamship Company* (2) are in point, and shew that the plaintiffs are entitled to recover.

Watkin Williams (*J. O. Matthew* with him), for the defendants.—This policy is to be construed without reference to the Dutch or any other policy, and being an English policy it must be construed according to English law and rules. Then what is the meaning of the phrase in this policy, "to cover only the risks insured by the clause warranted free from particular average unless the vessel be stranded?" These are familiar words to English underwriters, and are well understood and must be construed by English law, and they exclude the expression to pay all claims according to the Dutch average stater. The policy covers the risk only as interpreted by the English law. What follows afterwards relates only to the mode of adjustment, that is to be a Dutch average stater, but the clause to pay all claims stated by such official dispacheur is governed by the antecedent clause, and is dependent on there being a loss according to the policy. Such average stater is not empowered to say whether the vessel has stranded or not, and he cannot give himself jurisdiction by finding the vessel has not stranded, when in fact it has. Here there has been no loss at all under this policy, and therefore no claim or loss to be made up by the Dutch average stater.

Cohen replied.

LORD COLERIDGE, C.J.—In this case I am of opinion that the plaintiff is entitled to recover. The question is whether the defendants are to pay on a policy of insurance which in terms is "to cover only the risks excepted by the clause warranted free from particular average unless the vessel be stranded, sunk or burnt." Now I agree in the argument which has been urged on the part of the defendants that this policy is to be construed as if it stood absolutely alone. Whether the words relied on by Mr. Cohen, viz., "Dutch terms," which afterwards occur in the policy, do or not imply the existence of another policy, is immaterial, as such other policy is not so referred to in this policy as to be incorporated with it, and therefore for the purpose of construing this policy it is immaterial whether any other policy did or did not exist. Now if the clause in this policy ended with the words "stranded, sunk or burnt," which I have just read, the argument which has been addressed to us by Mr. Williams must have prevailed. The policy then would be a policy to cover the risk which is excepted by well-known English terms, and the only claim which could be payable under it would be a claim in respect of particular average, when, according to English law, the vessel had not been stranded, sunk or burnt. But the clause does not end with those words. There follow the words, "To pay all claims and losses on Dutch terms, and according to statement made up by official dispacheur in Holland, being warranted free from particular average unless amounting to ten per cent. on each series." These words would have no meaning unless they be deemed to refer to the former words, and in my opinion the whole sentence must be taken together. The claims and losses which the defendants are to pay are such as are to be considered as accruing according to Dutch law applicable to the feregoing terms in the sentence. The meaning is that the claims would arise when there had been a loss according to the Dutch law, for the Dutch average stater who is to make up the statement of them can be governed only in his consideration of such claims and loss by the Dutch law with which he is acquainted. That being the true construction of this clause we have it found here as a fact that the statement by the

(1) 41 Law J. Rep. (N.S.) C.P. 170; s. c. Law Rep. 7 C.P. 481.

(2) 42 Law J. Rep. (N.S.) Q.B. 84, and in error 361; s. c. Law Rep. 8 Q.B. 88, and in error 362.

average stater was made according to the true principle of the Dutch law, and that according to that law the claim of the plaintiff arose, and there was a loss which the defendants were bound to satisfy. Therefore if this case had stood alone, and had been the first case of the kind, I should have held that the plaintiff was entitled to recover. But it is not the first case, and as it appears to me it is absolutely concluded by the two cases of *Harris* v. *Scaramanga* (1) and *Stewart* v. *The West India and Pacific Steamship Company* (2). In *Harris* v. *Scaramanga* (1) the underwriters had agreed to be bound "to pay general average as per foreign statement if so made up." I should have thought that the words there were clear, and that a general average loss which was found according to such foreign statement must be paid for, but it was argued there by the learned counsel for the underwriter that, according to the English law, there had been, as has been argued in this case, no average loss at all, and that the contract being an English contract was to be governed by the English law as to whether there was an average loss or not, and that it was only in the making up of the details of such loss that the parties were to be governed by the foreign statement. This Court, however, held the contrary, and said that the underwriter had agreed to pay general average according to the statement of the foreign adjuster, made according to the law of his own country. That case came under the consideration of the Court of Queen's Bench in *Stewart* v. *The West India and Pacific Steamship Company* (2). There the words were "average if any to be adjusted according to British custom," and it was contended that there was no liability to pay, because although it was admitted there had been a general average loss, it was one which the defendants would not be bound to pay according to British custom. The Court of Queen's Bench said that in their judgment the custom and the English law were in this respect different, but as the parties had made the custom part of the contract, the plaintiff was bound by it, and therefore they decided that he could not recover, and the Court of Exchequer Chamber, without determining whether the Queen's Bench were right in saying that the English custom and law were different, affirmed the decision upon the ground that the plaintiff had agreed to be bound by the English custom. In the case now before us it is admitted that the "claims" and "losses" would be such as these of the plaintiff according to the Dutch law, and that this statement has been properly made up according to such law. It therefore seems to me that whatever might be the English law as to such, the plaintiff would be entitled to our judgment even without the authority of those two cases, but that with such authority it is impossible for our judgment to be otherwise.

BRETT, J.—It has been argued on the part of the assured that the case shews that there were two policies of assurance, and that therefore the proper mode of construing the policy on which the action was brought was to treat it as covering all that was not covered by the other policy, and next, if the policy sued on was not to be so construed, the risk was intended to be covered by it, and although as in the ordinary case of an English policy stranding was excepted, yet the risk was enlarged by the subsequent words to pay all claims and losses on Dutch terms. On the part of the defendants it was argued that the policy in question should be construed as if no other policy existed, and that the risk insured was limited to what was contained in the phrase "to cover only the risks excepted by the clause warranted free from particular average unless the vessel be stranded, sunk or burnt," and that that was to be construed according to English law, and that the subsequent phrase "to pay all claims and losses on Dutch terms," &c., did not alter the construction of the former but only shewed the mode of carrying it out. Now in the first place, I am of opinion that as the policy sued on does not refer to any other policy, it is to be construed as if no other policy were existing, and I further think that the risk insured is what is a well-known exception in English policies and is to be construed strictly according to

English law, and therefore if that part of this policy had stood alone, the policy would cover only an average loss when the vessel had not been stranded, sunk or burnt, and as in this case there had been a stranding of the vessel, there would therefore have been no loss according to English law. But the clause as to risk does not end with the words "stranded, sunk or burnt," and some meaning must be given to the other words which follow—"To pay all claims and losses on Dutch terms." Those words do not apply, I think, to all claims which may be made but only to those in respect of a particular average loss when the vessel has not been stranded, and which is to be stated by a Dutch average stater, in other words according to the Dutch law. If this be so, then one would have to enquire when, according to Dutch law, a vessel would be considered stranded with reference to the application of such a claim to average loss. The application of English law does not exist here because there is this condition annexed to the title of the plaintiff that he can only enforce a claim which has been made up according to a Dutch average adjuster, and the natural inference is that such Dutch average adjuster will do that in accordance with the only law with which he is acquainted, namely the Dutch law, and consequently the claim will only be according to Dutch law. Therefore on the true construction of this policy, if it stood alone, I think, the plaintiff is entitled to recover. But the matter is not one without authority. In *Harris* v. *Scaramanga* (1) the contract was "to pay general average as per foreign statement," and it was argued on the part of the defendant that before such statement had to be considered, the plaintiff must prove that there was a general average loss according to the law of England, but this Court declined to act on that argument, and said it must be a general average as made up by a foreign adjuster according to foreign law. That case was followed by that of *Stewart* v. *The West India and Pacific Steamship Company* (2), where by the terms of a bill of lading, "average if any," was "to be adjusted according to British custom," and where again it was argued that a loss must be shewn according to English law, and where again both the Court of Queen's Bench and the Exchequer Chamber rejected such argument, and said that the adjustment involved the question of whether there was an average loss. So in the present case it seems to me that although there had been a stranding according to the English law, yet as the average statement was to be made up by a Dutch average stater, it was for him to find the fact whether there had been a stranding according to the Dutch law, and as he found that the vessel was not stranded, and it is admitted that in this he acted properly according to the Dutch law, I think both on authority, and on the true construction of this policy, the plaintiff is entitled to recover.

DENMAN, J.—I am of the same opinion. I concur in thinking that we are bound to construe the policy which is sued on according to English law and without reference to the Dutch policy. The second question is what is the meaning of this policy. [The learned Judge here read the clause beginning with the words "to cover only the risks" and ending "on each series."] Now leaving out the first part of this clause, what is the meaning of "to pay all claims and losses on Dutch terms?" Surely that must mean to pay according to the Dutch practice and regulations which are set out in the case. It is said that this would have the effect of extending the risk to what is expressly excepted by the policy, namely, where the vessel was stranded. If we had to construe the words "unless the vessel be stranded," according to what they ordinarily mean in an English policy, I admit the force of this argument, but we cannot take those words as standing alone, but we must take them with what follows, and when we do so "stranded" must mean according to the Dutch meaning of that word, and then our decision must be for the plaintiff except as to one point. The plaintiff says the statement of the official dispacheur is conclusive, but I think that there is great force in Mr. Williams's argument that as such statement is made as to the law it cannot

be conclusive. But in the present case it is admitted to have been made according to the construction of the policy which we think is the true one, namely, according to the Dutch law, and therefore it is one on which I think the plaintiff ought to recover.

Judgment for the plaintiff (3).

Attorneys—Prichard & Sons, for plaintiff; Waltons, Bubb & Walton, for defendants.

1874. May 4. } COLE AND ANOTHER *v.* THE NORTH WESTERN BANK, LIMITED.

Principal and Agent — Factors Act, 5 & 6 Vict. c. 39—"Agent intrusted"— Broker and Warehouseman—Pledge.

Notwithstanding the general words of section 1 of the Factors Act (5 & 6 Vict. c. 39) a person, in order to be "an agent intrusted with the possession of goods" within the meaning of that enactment, must either be intrusted with the goods for sale, or he must be a mercantile agent whose ordinary business is to sell, and who has received the goods in the ordinary course of such business; and therefore a person who carries on the business of a warehouseman, and in that character gets possession of the goods for the purpose of warehousing, is not an agent within the Factors Act although he also carries on the business of a broker, and consequently a pledge of the goods by such person without the authority in fact of his principal either to pledge or sell them is not protected by the Factors Act, 5 & 6 Vict. c. 39. s. 1.

Quære, *whether there may be a good pledge within 5 & 6 Vict. c. 39. s. 1, without a delivery of the goods or of the documents of title to the goods.*

This action was brought to determine the right as between the plaintiffs and defendants to various parcels of wool, and by consent of the parties order of a Judge, the facts were without pleadings for the opinion Court on the following

CASE.

1. The plaintiffs are merchant ing on business in London und style of W. H. Cole & Co. The ants are bankers at Liverpool.

2. Edwin Slee, up to the time becoming bankrupt as hereinafte tioned, carried on business as broker, at Lancaster Buildings, Ti Street, Liverpool. He did not ordinary course of his business consignments of wool for sale. had three warehouses, one at 17, Street, Liverpool, known as Grant's warehouse, and another Temple Street, Liverpool, and an Luton Street, Liverpool, known a son's warehouse.

3. The plaintiffs are large im of wool, and at Liverpool were habit of warehousing their w the said warehouses belonging to aforesaid, under the circumstance inafter mentioned, and paying wa rent in respect thereof. These consisted of two classes, sheep's w goats' wool. Slee usually sold the wool under specific instructions fi plaintiffs according to the course ness hereinafter appearing, but goats' wool was never sold by through Slee, he not being a goa broker.

4. The course of business the plaintiffs and Slee was as Shortly before the arrival of a Liverpool bringing wool belongin plaintiffs, whether sheep's wool o wool, they sent down the bill of la Slee for the purpose of his receiv wool from the ship and ware it (1). Slee, after the wool had received and warehoused, sent up

(3) *Cohen* applied for interest, and the Court gave it for two years.

(1) The bills of lading were sent wit copies of which accompanied the case, a them are set out in the judgment of L ridge, C.J., *post*, p. 198, as sufficiently their general nature.

plaintiffs a report of valuation thereon and then awaited their further instructions as to disposal.

5. As the plaintiffs effected sales of the goats' wool, deliveries were made by Slee to the buyers, plaintiffs paying Slee the warehouse rent in respect thereof. As to the sheep's wool, Slee had no general authority from the plaintiffs to sell, but always awaited instructions and acted only under specific authority given to him from time to time in each case; and when such last-mentioned sales were effected, Slee received the proceeds and rendered account sales to plaintiffs in the ordinary way, charging them the warehouse rent and accounting to them for the net proceeds.

6. On the days stated in the Schedule set out below, the plaintiffs sent to Slee the bills of lading of wool therein specified. The entries in the various columns correctly shew in addition the dates when the bills of lading were received by Slee, when the wools mentioned in those bills arrived at Liverpool, when they were received by him, and where they were warehoused—

No. of Bales of Wool.	Ships' Names.	Description of Wool.	Bills of Lading.		Ships' arrival at Liverpool.	Receipt of wool from Ships.	Wool warehoused.	
			Sent by Plaintiffs.	Received by Edwin Slee.			Date.	Where.
			1872.	1872.	1872.	1872.	1872.	
88	Albanian	Mohair	12 March	13 March	26 March	2 April	2 April	Luton Street.
58	Bavarian	Egyptian	13 March	14 March	27 March	2 April	2 April	17 Temple St.
68	Hecla	Mohair	25 March	26 March	3 April	5 April	5 April	Luton Street.
114	Grecian	Egyptian	2 April	3 April	6 April	9 April	9 April	17 Temple St.

7. All the wools mentioned in the above schedule (except twenty out of the sixty-eight bales ex *Hecla*, as to which twenty no question arises) remained in the places where they were warehoused until after the commencement of this action.

The parcel of 114 bales ex *Grecian* was not received by Slee until after the letter of the 5th of April, 1872, hereinafter set out.

8. Of the wools specified, the two parcels of mohair (88 ex *Albanian* and 68 ex *Hecla*) are goats' wool, and the remainder are sheep's wool.

9. The defendants claim to be entitled to the said wools (except the 20 out of the 68 bales per *Hecla*) as being the four parcels lastly described in the letter of the 5th of April, 1872. Upon the other parcels of wool comprised in this letter no question arises in this action.

10. On the 5th of April, 1872, Slee obtained from the defendants an advance of 7,000*l.*, giving them a letter of which the following is a copy—

"Liverpool, 5th April, 1872.

"To the North Western Bank, Limited.

"In consideration of your advancing to me against bills to be got hereafter the sum of 7,000*l.* for two months, I agree to hold the produce hereunder specified as trustee for you, and as security for the said advance (with interest and commission), and to sell the same under your orders, and pay to you the proceeds thereof, as and when received in or towards repayment of the said advance, and I further agree that I will, whenever you request me so to do, deliver the produce to you to enable you to sell the same and to apply the proceeds to the payment of the said advance.

"The property is fully insured by floating policies with the Royal for the sum of *l.*, the policy for which I hold for your behalf.

"I am, Sir, your obedient servant,

"Edwin Slee."

Marks.	Description.	Classification and Value.	Where Si
TK	155 bales greasy, ex *Hecla*, greasy	Kassapaslu Wool, value	£1,60
	55	Albanian Wool	50
FNA	58	Egyptian Wool, value	1,20
SG	88 bags	Mohair Wool, value	1,76
	48 bags	Mohair Wool, value	1,00
FNA	114 bales	Egyptian Wool, value	1,90
			£7,96

"Warrants for which I lodge to-morrow."

11. No warrants or other documents of title in respect of any of the goods comprised in this letter were handed to the defendants at the time or subsequently, but Slee promised to hand them dock warrants for the same the next morning, and upon that promise the defendants then gave him 7,000*l.* in cash, which was used by him in the usual course of his business.

On the morning of Saturday, the 6th of April, Mr. Archibald, one of the defendant's clerks, was sent by them to Slee's office with the said letter and saw Slee, and asked him for the warrants mentioned at the foot of the letter, or for possession of the wools. Slee excused himself on the ground of being very busy and said he would attend to the matter. On Monday, the 8th, and Tuesday, the 9th, Slee was pressed for the warrants and delivery of the wool, and on the 10th Mr. Archibald went to Slee's office in order to obtain the warrants, and was informed that Slee was out of town but would be back the next day, and that it would be all right.

12. The defendants through their officers made various applications to Slee for the warrants referred to in the letter of the 5th of April, 1872, and continued to press him for the same until he absconded in consequence of such pressure. On Wednesday, the 10th of April, 1872, the defendants sent a clerk, Mr. Archibald, for the warrants, when he was informed by Mr. Meikle, Slee's cashier, that Slee was out of town, but would be back the next day. That day Slee absconded with intent to defeat and delay his creditors, and nothing further has been heard of him except as stated in the next paragraph.

13. On the next day, the 11th o a telegram was received at Slee' purporting to come from him fr Derby Railway Station, of which t lowing is a copy—

"I am coming home now. I h seven thousand pounds for the ba Meikle tell Archibald. Send wor my wife. I expect to be at Live ten to night. I am very well."

Slee never came home as stated telegram, nor was anything furthe from him. Mr. Meikle, his cashier, t telegram to the bank and shew the manager and also to Mr. Ar The following morning, Friday, the April, 1872, Mr. Archibald again pursuance of his former instruct Slee's office, and found he had not re and upon enquiry was informed t bulk of the wool mentioned in th of the 5th of April was in the wa No. 17, Temple Street. He wen with Wm. H. Slee, a brother o Slee, who was in the latter's emp clerk, and examined the parcels stored there, and ascertained t bulk of the wool referred to in th of the 5th of April was lying the he was assured by the said Wm. that the remainder of the said w in Slee's warehouse in Luton Str

14. On Saturday, the 13th o 1872, the defendants again sent liam H. Slee, who on attending t saw Mr. Moss one of the direct Edmondson the manager, and M the sub-manager, and was questi them as to Edwin Slee's private after W. H. Slee had told all he kn Moss enquired how it was he Slee) knew so little about his b

ial arrangements. W. H. Slee re- that he was merely a clerk in the and that beyond the sample room ss and the shipping department he nothing. Mr. Arnold, the chairman defendant's bank, then sent word . H. Slee to come into his (Mr. d's) room. W. H. Slee went there, panied by Mr. Moss, Mr. Edmon- nd Mr. Innes, and after similar ons to those put by Mr. Moss Mr. d produced to W. H. Slee the letter 5th April, 1872, before set out, and nded from W. H. Slee the keys of arehouses in which the wools were . W. H. Slee told him he had no to deliver up the keys to anybody. rnold then asked him to read the of hypothecation which W. H. Slee and Mr. Arnold pointed out the agreeing to deliver the goods to ank when they required. Mr. W. ee said he did not know what to do. rnold then asked, did he mean to up the keys or not? W. H. Slee d, certainly not; upon which Mr. ld said if the keys were not given up olice would be communicated with, he would have him taken into dy. W. H. Slee asked if they would Mr. Archibald to accompany him to Ragg, his brother's salesman, with tter of hypothecation, and he would Mr. Ragg's advice and act accord- . Mr. Archibald accompanied W. ee to E. Slee's office, and in his Archibald's) presence, W. H. Slee Mr. Ragg that the defendants de- ed the keys of the warehouses in the wools were stored, and asked what should be done, as Mr. Arnold tened to have him taken into dy if he would not give them up, Mr. Ragg said "we shall just have what the bank wants," whereupon eys of the Luton Street warehouses then delivered over to Mr. Archi- and shortly afterwards on the same he keys of the Temple Street ware- were, at the request of Mr. Archi- delivered to him by the direction of Ragg. Neither W. H. Slee, Mr. , nor anyone else on Slee's behalf ny authority to hand over such keys e defendants, but the defendants having so obtained possession of them, took and kept possession of the warehouses until after the wools, the subject of this action, were sold by arrangement as hereinafter mentioned.

The case set out other facts, which need not be here specified in detail. It appeared from these that on the 19th of April, 1872, Slee was adjudicated a bankrupt, and that on the 20th of April notice on behalf of the plaintiffs was given to the defendants that the wools in question were the property of the plaintiffs, and their delivery to the plaintiffs was then formally demanded of the defendants. The defendants declined to give them up, and after action they were sold by arrangement between the parties, and the nett produce, 5,191*l.* 3*s.* 10*d.*, was paid into the London Joint Stock Bank to abide the result of the action.

The plaintiffs claimed 6,661*l.* 17*s.* 0*d.*, being the value of the wools on 20th of April, 1872, the date they were so demanded, together with interest thereon at 5*l.* per cent. from that time.

The question for the opinion of the Court was whether the plaintiffs were entitled to maintain this action for any of the above matters.

Herschell (*English Harrison* with him), for the plaintiffs.—Slee was not an agent so intrusted with the wool as to give the defendants the protection of the Factors Act, 5 & 6 Vict. c. 39, at all events he was not such as regards the goats' wool, for that was always sold by the plaintiffs themselves. Both kinds of wool were in fact received by Slee to warehouse, and until he received instructions from the plaintiffs to sell he never sold even the sheep's wool, and in this case he had had in fact no authority to sell either kind of wool at the time of the alleged pledge. The authorities establish, that to be an agent intrusted under either of the Factors Acts, 6 Geo. 4. c. 94, or 5 & 6 Vict. c. 39, the person must be intrusted with the goods for the purpose of, or in connection with their sale—*Monk* v. *Whittenbury* (2), *Baines* v. *Swainson* (3),

(2) 2 B. & Ad. 484.
(3) 4 B. & S. 270; s. c. 32 Law J. Rep. (N.S.) Q.B. 281.

uentes v. *Montis* (4), *Vickers* v. *Hertz* (5), and *Wood* v. *Rowcliffe* (6). The case of *Monk* v. *Whittenbury* (2) is expressly in point, and it shews that if a person receives the goods in a character which does not authorise him to sell them, he is not an agent within the Factors Act, notwithstanding that he carries on a business which, if he had received the goods in the course of that business, would have authorised him to have sold them. Next there was no pledge by Slee within the meaning of the 5 & 6 Vict. c. 39. A mere contract is not sufficient. In order to entitle the transaction to the protection of the Act there must be either an actual delivery of the goods themselves, or what is equivalent thereto, a delivery of the warrants or documents of title to them. Here there was neither.

Benjamin (*R. G. Williams* with him), for the defendants.—The letters which accompanied the bills of lading shew that the plaintiffs contemplated a sale of the goods by Slee, and giving him the bills of lading put Slee in the complete apparent possession of the goods, with the ostensible authority to sell them. Before the Factors Acts a broker who was intrusted by the owner with goods could give a good title to a *bona fide* purchaser, even though the sale was prohibited by the owner—*Pickering* v. *Busk* (7), *George* v. *Clagett* (8). This power was restrained by the first of the Factors Acts, 4 Geo. 4. c. 83, which uses the words "intrusted for the purpose of sale." That was followed by 6 Geo. 4. c. 94, which says "intrusted for the purpose of consignment, or of sale." These words are purposely omitted by the last Act, 5 & 6 Vict. c. 39, and the only words now are "agent intrusted with the possession of goods." *Monk* v. *Whittenbury* (2) was decided on the Act 6 Geo. 4. c. 94, and therefore does not apply to the present case. The cases of *Phillips* v. *Huth* (9), and *Hatfield* v. *Phillips* (10), were likewise before the 5 & 6 Vict. c. 39, which was passed to meet all such cases. *Fuentes* v. *Montis* (4) only shews that the agent in this case was not intrusted at the time of the pledge, and he had ceased then to be an agent, and had only the wrongful possession of the goods. Lord Westbury, in *Vickers* v. *Hertz* (5), differs from some of the dicta of Willes, J., in *Fuentes* v. *Montis* (4). To be within the Act the person intrusted must be an agent; a warehouseman is only employed as bailee to keep the goods in safety, and is not therefore an agent; and *Lamb* v. *Attenborough* (11) shews that the Factors Act does not extend to where the relation of master and servant exists. The agent must be a mercantile agent. A broker, such as Slee, who had been in the habit of selling wool for the plaintiffs was such agent, and *Baines* v. *Swainson* (3) strongly supports what the defendants in the present case contend for. Next, assuming Slee was an agent, intrusted within the meaning of the Act, there was here a valid pledge. It is sufficient for that purpose if the person who has the control over the goods, such as Slee had here, undertakes to hold them as security for the person who advances the money—*Langton* v. *Waring* (12), *Portalis* v. *Tetley* (13).

Herschell replied.

Lord Coleridge, C.J.—I am of opinion that our judgment should be for the plaintiffs. It appears that the plaintiffs, who are merchants in London, are importers of wool. The defendants are bankers at Liverpool, and this action has arisen in consequence of the misconduct of a person of the name of Slee, who for some purposes was an agent of the plaintiffs. Slee was a warehouseman, and he

(4) 37 Law J. Rep. (N.S.) C.P. 137; and in error 38 Law J. Rep. (N.S.) C.P. 95; s. c. Law Rep. 3 C.P. 268; and in error Law Rep. 4 C.P. 93.

(5) Law Rep. 2 Scotch App. 113.

(6) 6 Hare 183.

(7) 15 East 38.

[illegible] 359.

(9) 6 Mee. & W. 572; s. c. 9 Law J. Rep. (N.S.) Exch. 326.

(10) 9 Mee. & W. 647; s. c. 11 Law J. Rep. (N.S.) Exch. 425.

(11) 1 B. & S. 831; s. c. 31 Law J. Rep. (N.S.) Q.B. 41.

(12) 18 Com. B. Rep. N.S. 315.

(13) 37 Law J. Rep. (N.S.) Chanc. 139; s. c. Law Rep. 5 Eq. 140.

was also a wool broker, and the question has arisen with respect to wool, and but for his being such broker no question perhaps would have arisen. It appears that Slee had both sheep and goats' wool sent to him on the part of the plaintiffs, in order to be warehoused. They were sent, accompanied by certain letters of the plaintiffs, of which I need select only two as a fair specimen of the rest, and as sufficient for the purposes of our decision. One of these letters is dated London, 12th of March, 1872, and is as follows:

"Dear Sir,—Enclosed please find bill of lading for S. G. 76/163 88 bales Mohair per *Albanian*, of which please take charge as usual for our account, sending us report and valuation at your early convenience, and following our instructions as regards disposal. The parcel is comprised of 76/137 62 bales fair average, 138/143 6 B. second quality, 144/148 5 B. fair average yellowish, 149/154 pinky, 155/156 2 B. grey, 157/160 4 B. inferior yellow, 161/163 3 B. waste or coarse."

The other letter, which I will read, is dated London, 2nd of April, 1872, and is as follows:

"Dear Sir,—Enclosed please find bill of lading for F.N.A. 114 bales of wool per *Grecian* (7 in bad order), of which please take charge for our account, and send us report and valuation as usual, for our instructions as to disposal."

The sheep and goats' wool both came to Slee on the same terms, that is to say, he was to take charge of it, and to wait for instructions as to disposal; and it is admitted that no question arises as to the goats'wool, because Slee was not a broker as respects goats' wool, and never had anything to do with the selling of goats' wool. Now Slee, having thus got the wool from the plaintiffs, went and obtained 7,000*l.* from the defendants, upon the agreement contained in the letter of 5th of April, 1872. [His Lordship here read the letter, as set out in paragraph 10 of the special case.] Upon that a question has been raised, upon which, as at present advised, I do not propose to offer any opinion. The question has been whether, assuming Slee was an agent within the Factors Act, the wool was in fact ever pledged by him. It has been said that, at all events, as regards the wool, of which he had not the possession at the time, it could not be a sufficient pledge; and that even, as regards the wool of which he had the possession, it was not a good pledge, because there had been no delivery of it within the meaning of section 4 of the statute—"till the period subsequent thereto." On that the case of *Portalis* v. *Tetley* (13) has an important bearing; but, without saying anything further on this subject, except that it is one which requires much consideration, I do not propose to give any opinion, because, in my judgment, the first point has not been made out, namely, that Slee had authority, under the Factors Act, to pledge these goods. It is said, on the part of the defendants, that he had such authority, and that he was clothed with it by the plaintiffs, and that the plaintiffs must therefore bear the loss. That depends on the question whether he was an agent "intrusted with the possession of goods, or of the documents of title to goods," so as, according to 5 & 6 Vict. c. 39. s. 1, to be "deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement, by way of pledge, lien or security *bona fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance or payment made upon the security of such goods or documents as, &c." Now it has been argued that the requisites of this section have been fulfilled. In the first place, it has been said that Slee was an agent; which is true. Next, that he was an agent intrusted with the possession of goods. That is also true, for, in the capacity of warehouseman, he received these goods, or, at least, a large portion of them. Then it is further said, that he had received the documents of title to these goods. That is also true, for he had received the bills of lading for them. Therefore, in one sense, the words of the Act were complied with; the question is whether they were in the sense intended by the Act. Mr. Benjamin has contended that Slee was an agent "intrusted," within the meaning of the Act, and he has cited, in support of his contention, authorities which had occurred

before the passing of the Act. He said, that when a principal allows his agent to deal with his goods, and such agent does so within the scope of his general authority, with a person who does not know of any restriction of such general authority, the principal is bound by the act of his agent. No doubt that is correct, as a general principle. Then it is said that, under these circumstances, the Factors Act of 4 Geo. 4. c. 83 was passed, by which it was enacted that any person "intrusted for the purpose of sale, with any goods," &c., and by whom such goods shall be shipped in his name, or in whose name any goods shall be shipped by any other person, is to be deemed the owner, so as to entitle the consignees of such goods to a lien thereon, in respect of moneys advanced for the use of the person in whose name such goods were shipped. Then that Act was followed by the 6 Geo. 4. c. 94, and that uses the words—"any person or persons intrusted, for the purpose of consignment or of sale, with any goods," &c. Now, upon that state of the law, the case of *Monk* v. *Whittenbury* (2) was determined, and Mr. Benjamin admits that it was properly determined, according to the law as it then existed; but he says that, since 5 & 6 Vict. c. 39, that case has no application; and he relies on the preamble to that Act, and on the absence, in both section 1 and section 4, of such words as "intrusted for the purpose of sale," or "intrusted for the purpose of consignment or of sale," and contends that that enactment has altered the law, and brought it back very much to what it was before these Factors Acts were passed. Now, is he warranted in this? In *Monk* v. *Whittenbury* (2), Cramp was a factor as well as a wharfinger, and when the case was tried before Lord Tenterden, his Lordship thought that if the sale was made by Cramp in the ordinary course of business, and the defendant, the purchaser, was not apprised at the time that Cramp was unauthorised to sell, the defendant was protected by the Factors Act, 6 Geo. 4. c. 94. s. 4, and he left it to the jury whether or not the sale was in the ordinary course of business. The jury were of opinion that it was not, and a verdict was found for the plaintiff. On a motion for a new trial, Lord Tenterden delivered the judgment of the Court in these words—"The material question in this case is whether Cramp was or was not an agent intrusted with the goods in respect of which the action is brought, within the meaning of 6 Geo. 4. c. 94. s. 4. It is difficult to say precisely what is meant in this section by 'an agent intrusted with goods,' but we are clearly of opinion that a wharfinger is not such a person. If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer was not; and although it is true that Cramp transacted business as a factor with some persons, we do not think that can avail the defendant in the present case." Now, supposing that 5 & 6 Vict. c. 39, had not been passed, that case is almost identical in principle with the present one. The plaintiff there had intrusted his goods with a person who carried on two businesses, viz., a wharfinger and a factor, and because the plaintiff had not intrusted them with him in his capacity of factor, the Court held that he was not an agent intrusted within the Factors Act. If that state of the law had remained, that case of *Monk* v. *Whittenbury* (2) would have expressly applied. It is said, however, that the law has been altered. The words of the last Act are—"agent intrusted with the possession of goods." Are those words to be construed as limited? and if they are to be limited, then does it matter, if Slee received the goods in a capacity which did not authorise him to sell, that he had another business which gave him a power of sale? I should have thought, if the matter had been *res integra*, that there was clearly some limit to be put on these words, for in *Learoyd* v. *Robinson* (14) a distinction is made between "intrusted with possession," and "enabled by possession," but the matter is not *res integra*. It came before the Court of Queen's Bench in *Baines* v. *Swainson* (3), and there the Judges all say that a limitation must be put on the word "agent" in the Acts. Wightman, J., referring to section 4 o

(14) 12 Mee. & W. 745; s. c. 13 Law J. Rep. (N.S.) Exch. 213.

6 Geo. 4. c. 94, says, "The section does not apply to every person who, though acting as an agent, would have authority to sell; the contract must be made in the ordinary and usual course of business." In that case the plaintiffs, cloth manufacturers, were told by Emsley, who was a factor and commission agent, that if the plaintiffs would send him a sample of their cloths, he could get them a purchaser. A sample was sent, and the plaintiffs required to know the firm before they delivered any goods. Emsley said the firm was Sykes & Son, and the plaintiffs sent the goods to Emsley, who was to pass them on to Sykes & Son. Emsley had no authority from Sykes & Son, and he sold the goods to the defendants. Wightman, J., and Crompton, J., held that Emsley was an agent "intrusted" with the cloths within the meaning of the Factors Acts, 6 Geo. 4. c. 94. s. 4, and 5 & 6 Vict. c. 39. s. 4; and Blackburn, J., held that Emsley being in possession of the goods, he was, according to 5 & 6 Vict. c. 39. s. 4, to be taken to be "intrusted" with them by the owner, unless the contrary was shewn. In that case Crompton, J., in the course of his judgment, said, "In *Monk* v. *Whittenbury* (2), Lord Tenterden remarked that it was difficult to say precisely what the legislature intended by these general words, 'an agent intrusted with goods,' but from the first it has been understood that they do not apply to every species of agent;" and Blackburn, J., said, "I do not agree with the counsel for the defendants that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner, knowing that he carries on such a business, amounts to an 'intrusting' him as agent, though I think that under that part of section 4 of 5 & 6 Vict. c. 39, to which we have referred, the fact of a person being found in possession of goods calls upon the person who gave him possession to explain and shew that it was not an intrusting." Therefore, in *Baines* v. *Swainson* (3), the Court, founding their decision to some extent on that of Wigram, J., in *Wood* v. *Rowcliffe* (6), considered the question under 5 & 6 Vict. c. 39 as very much the same as under 6 Geo. 4. c. 94, namely, what sort of agent the person was, and whether he had been intrusted with the goods for sale, or whether he was a person whose general business was to sell such goods as those with which he had been intrusted. Then there is the further decision of *Fuentes* v. *Montis* (4), which Mr. Benjamin had some difficulty in dealing with, not so much with regard to the facts of that case, which are different from those of the present, as with respect to the reasoning of the Judges there. In that case the goods had been intrusted to an agent to sell, but his authority to sell had been countermanded, and at the time of pledging the goods his character of agent to sell had ceased to exist, and it was held by this Court that such character must continue down to the time of the pledge to make the pledge valid, as otherwise he was not an agent intrusted within the Act. That case puts a strong limitation on the words of the Act, for there the words were strictly satisfied, inasmuch as the agent there at one time had been an agent intrusted with the goods for sale, and the defendant with whom he pledged the goods did not know that that character had ceased to exist at the time of the pledge. It is also to be observed that in that case, which was afterwards affirmed on appeal by the Court of Exchequer Chamber, the case of *Monk* v. *Whittenbury* (2) was treated by the Judges as a subsisting authority. We therefore have arrived at this point, that some limitation is to be put on the word "agent" in 5 & 6 Vict. c. 39, and that that is one which is substantially the same as under the former Acts. In order to make him "an agent intrusted" within the meaning of the statute, the goods must have been entrusted to him for sale, or he must be one whose ordinary business is to sell such goods. That being, then, the present state of the law, the facts found in this case will not sustain what the defendants have contended for. Although Slee dealt in the buying and selling of wool, yet it is found that he did not in the ordinary course of his business receive consignments of wool for sale, and that the plaintiffs were in the habit of warehousing their wool in Slee's ware-

house, and it is also stated in the case that Slee usually sold the plaintiffs sheep's wool under specific instructions from the plaintiffs, but that their goats' wool was never sold through him. I therefore understand it to be found as a fact that it was no part of Slee's business to receive consignments of wool for sale, but to receive them to warehouse, and that he so received wool from the plaintiffs, and that when he had so received such wool he acted, as regards the goats' wool, only as a warehouseman, but that as regards the sheep's wool, he acted also, though under specific directions, as the plaintiff's broker; still it was not as such broker that he received it. Then that being so, and the law under 5 & 6 Vict. c. 39, being substantially the same as under 6 Geo. 4. c. 94, the case of *Monk* v. *Whittenbury* (2) applies, and Slee is not shewn to be an "agent intrusted with the possession of the goods," so as to be able to make a pledge binding on the plaintiffs against their real authority. Therefore, as it appears to me, the defendants must fail, because they have not made out that the wool, assuming it to have been pledged with them, was pledged by an agent of the plaintiffs, who had been intrusted with the wool or with the documents of title to it, within the meaning of the Factors Act. As to the argument on the 4th section, that the mere receipt of the bill of lading according to that section would have the effect of extending the 1st section so as to make Slee "an agent intrusted" within the 1st section, it is enough to say that the 4th and 1st sections are independent sections, and that the fact that Slee received the documents under the 4th section, which he did not pledge, will not enlarge his power to pledge the goods under the 1st section. Judgment should therefore be for the plaintiffs.

Brett, J.—This action was brought to determine the right to certain wool. It is admitted that the property in all the wool is in the plaintiffs, and that it has not passed to the defendants by the authority of the plaintiffs; but it is suggested that the defendants are entitled to hold the wool as pledgees, because it was pledged, they say, with them by Slee, in whose possession it was put by the plaintiffs, that is to say, that the defendants are protected by the Factors Act. Now it appears from the case that the plaintiffs sent wool to Liverpool by certain ships, and that on the arrival of the ship the plaintiffs sent instructions to Slee respecting the wool. Slee's character is described in the case, and when the matter was first before the Court, it being contended that he was a factor, and it not clearly appearing whether he was or not, the case was sent back to the arbitrator, and he has now found that it was not in the ordinary course of Slee's business to receive wool for sale, that is to say, that Slee was not a factor. It is found that he was a wool broker, and further, that he also carried on as an independent business, the business of a warehouseman. Bills of lading for the wool were sent to him, with letters which accompany the case, but the bills of lading were sent not in order to pass the property in the wool, or to enable him to deal with the wool otherwise than to get it and warehouse it. At least that is the construction I should put on the letters enclosing the bills of lading. Then having so used the bills of lading by receiving thereunder goods in order to warehouse them, the bills of lading were exhausted, and were no longer documents of title to the goods. Now on the 5th of April Slee assumed to pledge the goods with the defendants. That was in fraud of the plaintiffs. The defendants made an advance to Slee, but none of the goods were delivered to them at the time. They afterwards took possession, but there was no delivery to them by Slee of any of the goods. It appears from the case that as to the sheep's wool, Slee acted as broker under specific instructions from the plaintiffs, but inasmuch as he was not authorised when he received the goods under these bills of lading to sell them, and it was not in the ordinary course of his business to sell them, and he never received specific instructions to sell the goods in question, he never in fact was intrusted with such goods for the purpose of selling them. It further appears from the case that although Slee was a broker with respect to sheep's wool, he did not

from the business of a broker of goats' wool, and that he never sold goats' wool at all. Now what is the construction to be put on the Factors Act? If goods are intrusted to a person for sale, he is within the Act, and if he sells or pledges them contrary to the authority given to him by his principal, nevertheless the sale or pledge is protected. The present case does not come within that rule for two reasons—first, because Slee was never intrusted at all with the goods for sale; and secondly, because he was never intrusted with possession of the goods otherwise than as a warehouseman. It has been sought to bring him within the Act on other grounds. And I think if a person who is a mercantile agent, and whose ordinary course of business is to sell, be intrusted with goods in that business, and pledges or sells them, the pledgee or vendee when acting *bona fide* is protected. It has been argued that Slee was such mercantile agent, and as such had the goods to sell; but a broker is not a mercantile agent whose ordinary business is to sell, and besides, though Slee was intrusted with the goods, it was not in the business he carried on as broker, but in that of a warehouseman. He got possession of the goods under the bills of lading, in order that he might warehouse them, and he did so warehouse them, and it is not denied that if he had them only in his capacity of warehouseman, that the case would not be within the Act, because a warehouseman is not an agent whose business is to sell. It is said, however, that as he was a broker as well as a warehouseman, one may join the two independent characters together, and so bring the case within the Act. The case of *Monk* v. *Whittenbury* (2) decides the contrary, and that case has not been overruled, but has been constantly recognised as a binding authority. Therefore, construing the statute according to *Baines* v. *Swainson* (3) and *Fuentes* v. *Montis* (4), and relying on *Monk* v. *Whittenbury* (2), I think that this case is not within the Act, and consequently that the defendants cannot defend themselves as being protected by the statute. I do not think it necessary to decide the second point, whether the pledge by the letter of the 5th of April was a sufficient pledge, and I decide this case only on the first point.

DENMAN, J.—I also agree that our judgment should be for the plaintiffs. I say nothing on the point as to the pledge on which the question discussed in *Portalis* v. *Tetley* (13) arises. I think that both on law and facts the plaintiffs are entitled to our judgment on the other point. On a dry construction of the last Factors Act, 5 & 6 Vict. c. 39, it might be contended that Slee was an agent intrusted with the possession of the goods within the Act, but I agree with the rest of the Court that the statute cannot be so construed, and that we are bound to construe it with reference to decided cases which shew that the person, to use the words of the Judges in *Baines* v. *Swainson* (3), must be a person intrusted *qua* agent to deal with the goods as such agent. Slee might have been such agent in two or three ways, and if it had been doubtful in what character he had possession of the goods, whether *qua* warehouseman or *qua* broker, it would have been, I think, with my brother Blackburn, a question for a jury to determine, but in the present case there is no doubt about the matter. It is found that he did not receive the wool in the ordinary course of his business for sale; that as to goats' wool, he never sold such at all; and that as to sheep's wool, he only acted under specific instructions from the plaintiffs. On reading the letters which accompany the case I think it clear that they do not contain any specific authority to deal with the sheep's wool. Indeed, so far from containing any such authority, they actually negative it. Therefore, it being established that the words of the Act are to be construed not according to their dry meaning and without limitation, but according to the construction which has been placed on them by the decided cases, I think on the facts which appear here, our judgment should be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys—Clarke, Son & Rawlins, for plaintiffs; Chester, Urquhart & Co., agents for Laces, Banner & Co., Liverpool, for defendants.

1874. April 21. } STEWART *v.* EDDOWES. HUDSON *v.* STEWART.

Sale of Goods—Contract in Writing—Assent to Alterations after Signature—Statute of Frauds (29 *Car.* 2. *c.* 3), *s.* 17.

E., as agent to H., agreed to sell a ship to S., and a written contract was signed by S. The contract was forwarded to H., who made an alteration therein, and returned it to E., who thereupon produced the written contract as altered by H. to S., who assented, without re-signing the contract:—Held, *that parol evidence was admissible to shew that S. assented, without re-signing, to the alteration made by H. in the contract after S. had affixed his signature.*

In the first of these actions the declaration was for money received, for money lent, for interest, and for money due on accounts stated.

Plea—never indebted, upon which issue was joined.

In the second action the first, second and third counts of the declaration alleged breaches of contract as to the sale of a ship. The declaration also contained *indebitatus* counts for goods bargained and sold, for money paid, for interest, and for money due on accounts stated.

The defendant by his pleas traversed the chief averments in the first, second and third counts; he also pleaded to these counts a plea, alleging alterations of the written contract, and to the residue of the declaration, never indebted.

The plaintiffs joined issue upon the pleas.

The two causes involved the same question, and came on for trial before Amphlett, B., at the Spring Assizes, 1874, held at Liverpool, and the following appear to be the material facts of the case.

Mr. Stewart, the plaintiff in the first [illegible] the defendant in the second, [illegible] shipowner, carrying [illegible] Messrs. Eddowes acted as agents for Messrs. Hudson, who were the owners of a vessel called *The Amsterdam*, and Messrs. Eddowes, on the 13th of November, agreed to sell her to Mr. Stewart; and the following memorandum of agreement was signed by Mr. Stewart.

"Liverpool, 13th of November, 1873.

"George Winlow Hudson, for self and partners, has this day sold, and G. C. Stewart has this day purchased, the ship *Amsterdam*, about 731 tons register, as per certificate endorsed, and as she now lies in the Brunswick Dock, with all stores belonging to her, on board and on shore, *as she arrived from sea*, for the sum of 2,100*l.*, say two thousand one hundred pounds; payment to be made by cash within thirty days from date of coming off gridiron or graving dock, within ten days from above date, say 23rd of November, 1873 (1). A deposit of 10*l.* per cent. to be paid upon the signing of this contract. Sellers guarantee ceiling under the ballast sound, and this contract is made on the understanding that they are to replace any damaged or rotten ceiling under ballast, and to allow an equivalent. Purchaser may place the vessel on gridiron or in graving dock, at his own risk and expense, and if she be then and there found wormed or broken in the bottom, from having been on shore, the sellers to make same good or cancel this contract, at sellers' option. If contract be so cancelled, the sellers to pay expenses of the inspection, and all charges incurred. On payment of the whole of the purchase money, as above agreed, a legal bill of sale shall be executed to the purchaser at his expense, and the ship, with what belongs to her, shall be delivered to him. The ship, with her stores, shall be taken with all faults and errors of description, without any allowance or abatement. Should the whole of the purchase money not be paid, as herein stipulated, the vessel may be resold by public or private sale, the deposit forfeited, and all loss and expense

LORD COLERIDGE, C.J.—I am of opinion that there ought to be no rule. Mr. Stewart put into the printed form of contract signed by him certain interlineations. Mr. Eddowes told Mr. Stewart that it was useless to send the form to Messrs. Hudson with the interlineations. The form, however, with the insertions, was sent to them at Sunderland, and they ultimately acquiesced in all the interlineations, except the words "as she arrived from sea." This interlineation was struck out by them, and the words "as she now lays" were substituted; in that shape it was sent back to Liverpool. Mr. Eddowes having signed the form on behalf of Mr. Hudson, Mr. Stewart is found by the jury to have, in effect, said that he would accept the contract as interlined with the one alteration made by Messrs. Hudson. This is the state of facts, giving rise to the question which has been argued before us. It is suggested, that at the trial there was an improper reception of evidence as to the striking out of the words "as she arrived from sea," and the substitution "as she now lays," and Mr. Stewart's assent thereto. There was no contract between the parties until the form proposed by Mr. Stewart should have been finally assented to by Messrs. Hudson. The verbal testimony merely shewed which were the written words that formed the agreement between the parties. As it often happens, when the facts are known, it becomes unnecessary to discuss the question of law. The evidence as to Mr. Stewart's assent was properly received by my brother Amphlett at the trial. It is clear that there ought to be no rule.

BRETT, J.—Messrs. Hudson were compelled to rely upon an agreement binding Mr. Stewart to accept the ship. At the trial they produced a paper with the name of Mr. Stewart written at the bottom of it. If the paper was to be construed according to the form in which it then appeared, it was against Mr. Stewart. But he said that it was not in the condition in which it had been when he signed it. Mr. Eddowes, who was acting for Messrs. Hudson, proved that no agreement had, in effect, been arrived at when Mr. Stewart wrote his name at the bottom of the paper, but that the terms upon which the ship was to be sold were concluded at a subsequent time. If the paper was to be taken in the condition in which it was at the trial, Mr. Benjamin's client was necessarily defeated. When the paper was first written out it was a mere proposal, but it ultimately became an agreement, for there was a proposal by Mr. Stewart and a counter-proposal by Messrs. Hudson accepted by him. There was no agreement until the 15th, when Mr. Eddowes and Mr. Stewart again met. Our decision does not break through the rule that oral testimony cannot be admitted to vary a written contract. I think that there should be no rule.

DENMAN, J.—The evidence admitted at the trial only went to shew what the signed document contained at the time when the parties arrived at an agreement.

Rule in each action refused.

Attorneys—Gregory, Rowcliffes & Co., agents Hull, Stone & Fletcher, Liverpool, for plaintiff in the first action; and for defendant in the second action; Field, Roscoe & Co., agents Bateson & Co., Liverpool, for defendant in the first action; and for plaintiff in the second action.

1874. April 28. } ALLAN AND OTHERS *v.* ROYDEN AND ANOTHER.

Inspection of Documents—Private and Confidential Letters between Plaintiffs— 14 & 15 *Vict. c.* 99. *s.* 6.

The Court, in the exercise of its discretion, will refuse to order the production of private and confidential letters passing between plaintiffs relative to the projected litigation with the defendants.

This was a motion on behalf of the defendant Alexander for a rule to allow the inspection of certain letters in the custody of the plaintiffs.

The action was brought in the Common Pleas at Lancaster, in respect of an al-

leged breach of contract as to the construction of a steamship. By an order of Nisi Prius the cause was referred to arbitration. Some of the plaintiffs resided and carried on business at Liverpool, and others at Glasgow. The plaintiffs having made an affidavit of documents, objected to produce certain letters mentioned in the second schedule thereto, on the ground that they consisted of confidential communications passing between the plaintiffs residing at Glasgow and the plaintiffs residing at Liverpool relative to the projected litigation with the defendants, and of instructions for the conduct thereof. The first of the letters specifically mentioned in the second schedule was dated 12th of March, 1873, and the last 29th of August, 1873. The first intimation given to the defendant Alexander of the plaintiffs' intention to sue was by a letter from their attorneys, dated 12th of June, 1873, and the declaration, containing four counts, was dated 30th of June. By an order of a prothonotary inspection was allowed the defendant Alexander of the letters mentioned in the second schedule, written before the 7th of June, 1873. Both parties appealed to Cockburn, C.J., at Chambers: the plaintiffs' appeal, which claimed exemption from inspection for all the letters contained in the second schedule, was dismissed, except as to a letter dated 20th of May, 1873, of which the Lord Chief Justice disallowed inspection; the defendant Alexander's appeal, which was to vary the order of the prothonotary, was dismissed.

G. Bruce now moved for a rule *nisi* in the above form.—*Fenner* v. *The London and South Eastern Railway Company* (1) contains a review of the law as to the inspection of documents, and establishes the principle, that communications with any person, not being the solicitor or counsel to the party, from whom discovery is sought, are not necessarily privileged, although they may have been made after litigation was threatened; and if such communications fall short of being rough notes of the case which is to be proved, and are not substantially materials for the brief, the Court ought, in its discretion, usually to grant the inspection. *Goodall* v. *Little* (2) is a strong authority in favour of this application; it was there held, upon a motion for production of documents, that letters from one defendant, the manager of a firm in Teneriffe, to a co-defendant, the agent in London, for the purpose of being communicated to his solicitors with a view to litigation, were not privileged. So in *Woolley* v. *The North London Railway Company* (3), it was held that the Court, in the exercise of its discretion, may order the production and inspection of reports made by a servant to his master in the ordinary course of duty, irrespective of litigation, whether they be made before or after litigation, and whether they contain matters of fact or of opinion.

LORD COLERIDGE, C.J.—We think that the rule asked for ought not to be granted. The Court will not order private and confidential documents to be produced, and letters written when litigation is in view fall within the rule established by the cases. We are guided by former decisions, where the distinctions have been carefully examined, and we must exercise our discretion. We are of opinion that the letters mentioned in the second schedule are private and confidential, and that inspection of them ought not to be granted.

BRETT, J., and DENMAN, J., concurred.

Rule refused.

Attorneys—Gregory, Rowcliffes & Co., agents for Duncan, Hill & Co., Liverpool, for plaintiffs; Neal & Philpot, agents for Jenkins, Rae & Jenkins, Liverpool, for defendant Alexander.

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(1) 41 Law J. Rep. (N.S.) Q.B. 313.

(2) 1 Sim. N.S. 155; s.c. 20 Law J. Rep. (N.S.) Chanc. 132.

(3) 38 Law J. Rep. (N.S.) C.P. 317; s. c. Law Rep. 4 C.P. 602.

1874. May 2. } WILLIS *v.* HARRIS.

Prohibition—Jurisdiction—Information by Stranger—Lord Mayor's Court Act, 1857 (20 & 21 *Vict. c. clvii.*).

In order to allow the Mayor's Court, London, to entertain a suit, the cause of action must have arisen within its jurisdiction, even although the amount in dispute is less than 50*l.*, *and the defendant carries on business in the City of London. An attorney is sufficiently a stranger to the suit in the Mayor's Court to entitle him to apply for a prohibition, although the defendant himself can only raise an objection to the jurisdiction by plea* (20 & 21 *Vict. c. clvii. s.* 15).

This was a rule obtained on behalf of Lewis William Gregory, an attorney, calling upon the plaintiff in the above action to shew cause why a writ of prohibition should not issue to the Lord Mayor's Court of London, to prohibit all further proceedings against the defendant, and why the plaintiff should not pay to L. W. Gregory, or his agent, his costs of and occasioned by the rule.

The defendant was served with process issuing out of the Mayor's Court, London, at the suit of the above-named plaintiff, to recover the sum of 8*l.* 10*s.* for dilapidations and injuries alleged to have been committed by him to a house situate and being No 46, Tavistock Crescent, Westbourne Park, in the county of Middlesex, and an appearance was entered in the action. The following is a copy of the declaration—

"In the Mayor's Court, London. The 4th day of December, A.D. 1873. Thomas Willis, by John Ivic Gribble, his attorney, sues William Harris, for that the defendant became and was tenant to the plaintiff of a messuage and premises, on the terms that he would during the said tenancy keep the said messuage and premises in tenantable repair, order and condition; yet the defendant afterwards and during the said tenancy did not keep the said messuage and premises in tenantable repair, order and condition. And the plaintiff claims 10*l.*"

The supposed causes of action accrue to the plaintiff within the tion of the Mayor's Court, bu Tavistock Crescent above-m which was within the jurisdictio Marylebone County Court.

The defendant carried on bu America Square, Minories, in th London, at the time of bring action.

Lewis Glyn shewed cause.—T of prohibition ought not to iss the Mayor's Court Procedure A (20 & 21 Vict. c. clvii.) s. 15 fendant is to object to the ju of the Court, in or by any pr whatsoever, except by plea, a v. *Clark* (1) is an authority th fendant cannot have a prohibitio v. *Gill* (2) at first sight ma to be in favour of making absolute, but in truth it does n there the party applying for the tion was a garnishee in the p foreign attachment, here the p forming the Court is an attorney instructed by the defendant Moreover in *Cook* v. *Gill* (2) th sought to be recovered was m 50*l.*

Douglas Walker, in support of was not called upon to argue.

LORD COLERIDGE, C.J.—We a opinion that this rule should absolute.

BRETT, J.—Willes, J., was o that an attorney for a defendan far a stranger as to be entitled for a prohibition.

DENMAN, J., concurred.

Rule a

Attorneys—Tillyard & Gribble, for Lewis W. Gregory, for defend

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(1) Law Rep. 8 C.P. 121.

(2) 42 Law J. Rep. (N.S.) C.

1874. April 20. { POOLE ELECTION PETITION. HURDLE AND ANOTHER (*petitioners*) *v.* WARING (*respondent*).

Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 6—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 2 & *sched.* 1, *rule* 44—*Return to the Clerk of the Crown, when made—Presentation of Petition.*

By section 2 *of the Ballot Act*, 1872, *the returning officer at a Parliamentary election is to return the name of the candidate elected to the clerk of the Crown in Chancery, and by the* 44*th rule in the* 1*st schedule to that Act the return is to be made by a certificate of the name of the member under the hand of the returning officer indorsed on the writ of election, and such certificate is to have effect and be dealt with in like manner as the return under the existing law; and the returning officer may, if he think fit, deliver the writ with such certificate endorsed, to the postmaster of the principal post-office of the place of election, who is then to forward the same by the first post, free of charge, under cover, to the clerk of the Crown, with the words "election writ and return" indorsed thereon. By section* 6 *of the Parliamentary Elections Act*, 1868, *the petition against the return of the member is to be presented "within twenty-one days after the return has been made to the clerk of the Crown in Chancery in England:"*—Held, *that the return has not been made to the clerk of the Crown within the meaning of these enactments, until he or some clerk in his office has had an opportunity of recording the receipt of it, and making the proper return to the clerk in Parliament; therefore, where the certificate of return was received at the office of the clerk of the Crown at eight in the evening, after office hours, by only a woman in charge of the office, who had authority to receive the same and to give a receipt for it, but not to do any other act with reference to it, the return was held not to have been made before the following day.*

This was a rule calling on the petitioners to shew cause why the petition should not be struck out, on the ground that it was not presented in due time.

The following are the facts:

The election for the borough of Poole took place on the 3rd of February, 1874, and on the 4th of February the returning officer declared the respondent, Mr. Charles Waring, to be duly elected. On the same 4th of February, at twelve o'clock at noon, the returning officer delivered the writ of election, with his certificate indorsed, by which the return is now made, to the postmaster at Poole, who forwarded the same to the clerk of the Crown in Chancery by the mid-day mail, which leaves Poole about one o'clock. Such writ and certificate duly reached the General Post-office in London shortly after six o'clock in the evening of the said 4th of February, and were, with other election writs and ballot papers, sent to the office of the clerk of the Crown in Chancery at the House of Lords by a special messenger, who arrived with them at such office a few minutes after eight o'clock the same evening. The only person who was then in charge of the office was one Kate Phipps, the servant of Ellen Lovegrove, the housekeeper, and to her the messenger delivered the said writs and ballot papers, taking her receipt for the same. It was stated on affidavit by the chief clerk to the clerk of the Crown in Chancery, that during the recent general election the usual practice of closing the Crown office for public business at two o'clock in the afternoon was not observed, and that on various days the office was kept open, and either he or some other principal clerk was attending to business there occasionally, up to as late as six o'clock, and any returns of election writs which might reach the office up to the time of any such clerk leaving would, as a matter of course, be entered as having been received or returned on that day. It was also so stated by such chief clerk that the housekeeper or other attendant at the office was authorized to take in letters or parcels which should arrive after the office was closed for public business. The housekeeper is appointed by the Lord Chamberlain, and not by the clerk of the Crown, and her duties are to light the fires and clean the office, and no person in the office authorised to deal with the return saw it before the 5th of Febru-

hen the writ was accordingly in-
d "Crown office, 5th February,
" opposite the certificate, as the date
the latter was received. The peti-
against the return of the respondent
presented on the 2nd of March, 1874,
ich would be in time if the 5th of
bruary was the day when the return
as made to the clerk of the Crown, but
ot in time if such day was the 4th of
ebruary.

H. Giffard and *W. G. Harrison* shewed cause against the rule.—The question arises under section 6 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), and rule 44 in the first schedule of the Ballot Act, 1872 (35 & 36 Vict. c. 33). By the 6th section of the Parliamentary Elections Act, 1868, the petition is to be presented "within twenty-one days after the return has been made to the clerk of the Crown in Chancery in England," and by the 44th rule in the Ballot Act, 1872, schedule 1, it is declared that the return "shall be made by a certificate under the hand of the returning officer, indorsed on the writ of election, and such certificate shall have effect and be dealt with in like manner as the return under the existing law, and the returning officer may, if he think fit, deliver the writ with such certificate indorsed, to the postmaster of the principal post-office of the place of election," who is to "forward the same by the first post, free of charge, under cover, to the clerk of the Crown, with the words, 'election writ and return,' indorsed thereon." The return was not made to the clerk of the Crown until the 5th of February, and therefore the petition in this case was presented in due time. The petitioners find, on going to the proper office, that the return is recorded by the proper officials there as having been received by the clerk of the Crown on the 5th of February, and the petitioners calculate their time for presenting their petition as running from that date, and are guilty of no default. Under the old practice, when the return was made by an indenture, no one could have received it but the person who was authorised to do so by the clerk of the Crown. Here it was not received until it was received by some one w
was authorised by the clerk of the Cro
to record that it had been received. K
Phipps was not so authorised: she w
only an animated letter box.

[BRETT, J.—The 44th rule of the Ba
Act is to carry out the mode by wh
the return is to be made to the clerk
the Crown, from which time the twe
one days prescribed by 31 & 32 Vic
125, sec. 6 are to be calculated. Now
44th rule says the return "shall be m
by a certificate, under the hand of
returning officer indorsed on the writ
election." It says nothing about
return being made to the clerk of
Crown, and the other side may say t
the return is made when the certificat
signed.]

The petitioners would have no mean
knowing when the returning officer
signed the certificate if he did not cho
to inform them, and it never could
intended that they should be placed
that difficulty. Although the 44th ru
has altered the practice of making t
return by an indenture and facilitated
transmission of it by means of the us
the post-office, it did not intend that
time when the return was made sh
date either from the time when the
ficate was signed or from the ti
reached the office of the clerk
Crown. Signing the certificate
analogous to executing the ind
The return is not complete unti
been handed to the clerk of the C
to some one in his office who can r
Until then the return has not be
and the member cannot sit. I
which regulates appeals from
(20 & 21 Vict. c. 43) the word
the time for the appellant t
appeal case to the Superior
"within three days after rec
case, transmit the same to the
in *Banks* v. *Goodwin* (1) it w
it is not transmitted to th
it has come into the hands
and that merely sending
not sufficient. This case,
Mayer v. *Harding* (2) is

(1) 3 B. & S. 548; s. c. 32
M.C. 87.
(2) 9 B. & S. 27; s. c. Law

Justice, Title Appeal, 13th ed. p. 265. So in *Garlick* v. *Sangster* (3) an insolvent's petition is said to be filed when it reaches its place of final custody, and not when it first comes to the hands of the officer of the Court.

McIntyre, *Chandos Leigh* and *Charles Bowen*, in support of the rule.—The 2nd section of the Ballot Act, 1872, after stating the duties of the returning officer with reference to the ballot boxes and to ascertain the result of the poll, says, that he is to "forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the clerk of the Crown in Chancery." Now when was that done in this case? The respondent was declared on the 4th of February to be duly elected, and on that day the writ with the certificate of the return indorsed was sent by the post, and reached the office of the clerk of the Crown on the evening of that day. It was, no doubt, after office hours, but it was received by a person there who was expressly authorised to receive letters and papers for the clerk of the Crown after office hours, and who gave a receipt for the same. There is nothing in the statute about the clerk of the Crown indorsing the writ, or making any entry of the day when he has received it. The practice might be to make the entry recording the receipt of the return on certain days only. Surely the twenty-one days prescribed by the Parliamentary Elections Act, 1868, are to be reckoned from the time the return reaches the clerk of the Crown or person authorised by him to receive it, and not from the time the receipt of it has been recorded. The 44th rule says that if the returning officer deliver the writ and certificate to the postmaster, he is to take a receipt from the postmaster for the same; therefore this would seem to make the postmaster for that purpose the agent of the clerk of the Crown, so as to make delivery to the postmaster equivalent to the clerk of the Crown. In that case the return was clearly made on the 4th of February. *Doe d.* v. *Demben* (4) is an authority that service of a notice to quit on a servant at a tenant's dwelling is sufficient; in other words, that the delivery to the servant on the premises is equivalent to a delivery to the tenant.

[BRETT, J.—By the Registration Act, 1843 (6 Vict. c. 18, sec. 100) there is an express enactment for service of notices of objection by the post, and for making the production of a stamped duplicate, evidence of the notice having been given on the day on which, in the ordinary course of post, it would have been delivered; and in consequence of such enactment it has been held that such duplicate is conclusive evidence that the notice was so given, although, in fact, it was not delivered until a later day—*Hornsby* v. *Robson* (5); but that is against you, as it shews that it required such an enactment.]

Rule 44 says, "and such certificate shall have effect and be dealt with in like manner as the return under the existing law." That means, when the certificate is made it is to have the same effect as when the return is made. At all events, the return is made when it is forwarded, if not by the returning officer, at least when it is forwarded by the post-office to the clerk of the Crown. It is not a question as to what is done with the return after it has reached the office, but whether Kate Phipps was not authorised to determine the transit. Surely she was, and the transmission from the returning officer to the clerk of the Crown was at an end as soon as she had received the writ.

LORD COLERIDGE, C.J.—In this case an application has been made to us to take the petition off the file, on the ground that it was not presented twenty-one days after the return of the member had been made to the clerk of the Crown in Chancery in England. The facts shew that the election for Poole took place there on the 3rd of February, and that on the 4th of February the returning officer added up the number of votes given to each candidate and declared Mr. Waring (the respondent) to be elected, and he sent up by post, at noon

(3) 9 Bing. 46.
(4) Moo. & M. 10.
(5) 1 Com. B. Rep. N.S. 63; s. c. 26 Law J. Rep. (N.S.) C.P. 25.

of that day, in the way prescribed by rule 44 of the Ballot Act, 1872, a certificate of the return indorsed on the writ of election. Such writ so indorsed arrived in London at about six o'clock of the evening of the 4th of February, and was sent by special messenger from the post-office to the office of the clerk of the Crown in Chancery, which was reached at about eight o'clock on the same evening. The clerks were not then there, and the only person who received the writ and indorsement from the messenger was Kate Phipps, a person in the employment of the housekeeper, who herself was appointed and paid by the Lord Chamberlain, and not by the clerk of the Crown. Now the fact that the certificate of return reached the office of the clerk of the Crown at eight o'clock of the evening of the 4th of February, but was not dealt with by the clerk of the Crown until the following day, raises the question which we have to determine, namely, whether the return was made to the clerk of the Crown on the 4th of February (in which case the petition would not have been presented in time) or on the 5th of February (when the petition would have been presented in time). What we have to do is to construe section 6 of the Parliamentary Elections Act, 1868, and section 2 of the Ballot Act, 1872, and to see whether the 44th rule, in schedule 1 of the latter Act, throws any light on the subject. The 6th section of the Act of 1868 says, "The petition shall be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery in England," and section 2 of the Ballot Act says that the returning officer shall do certain things as to ascertaining the result of the poll, "and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the clerk of the Crown in Chancery." Now those words, "return their names to the clerk of the Crown," and "twenty-one days after the return has been made to the clerk of the Crown," are, for all the purposes of the present question, substantially the same, and the question is what do they mean? An ingenious argument has been mad[illegible] founded on the language of the 44[illegible] rule, that the return is complete wh[illegible] made by the returning officer to the off[illegible] of the clerk of the Crown through [illegible] instrumentality of the Post-office. [illegible] Bowen, when pressed, was obliged [illegible] admit that, according to such argum[illegible] the return would be complete when [illegible] certificate was handed to the postmast[illegible] though he rather declined to accept th[illegible] as the consequence of his argume[illegible] Without saying that the matter is c[illegible] which is free from difficulty, I am [illegible] opinion that that argument cannot pr[illegible] vail. I think the return is to be ma[illegible] to the clerk of the Crown in such [illegible] sense that he can then act upon it. Wh[illegible] is the clerk of the Crown to do on th[illegible] return being made to him? He is [illegible] copy it into a book, and to furnish a cop[illegible] of it to the clerk in Parliament, and [illegible] until that has been done can the memb[illegible] take his seat. As my brother Brett h[illegible] pointed out to me when a new Parliame[illegible] meets, the first thing the members h[illegible] to do is to elect a Speaker, and this th[illegible] do before they are sworn, and before th[illegible] have taken their seats. What author[illegible] have they for so acting but the return [illegible] the clerk of the Crown to the clerk [illegible] the House of Commons? It seem[illegible] me, therefore, that as the return to [illegible] clerk of the Crown has to be follo[illegible] by consequences which are so seri[illegible] the return is not complete until it [illegible] reached him in such a shape that [illegible] himself or his deputy can act upon [illegible] It may be said that by so construing [illegible] enactment, I am importing into the wor[illegible] "return has been made," the con[illegible] quences which follow when it has be[illegible] made. But the argument that the retur[illegible] is complete when the certificate of th[illegible] return has been signed by the returning [illegible] officer, and delivered to the postmaster [illegible] or at all events, when it has been delivere[illegible] to the office of the clerk of the Crown [illegible] is addressed to us on a reasoning which [illegible] is to be deduced rather from the duty o[illegible] the person to whom it is delivered tha[illegible] from the words themselves. The words [illegible] are "return has been made," and we ar[illegible] to determine what is their reasonabl[illegible] construction, and it seems to me that i[illegible]

mercy of the clerk of the Crown in Chancery; and that if he neglects his duty, members may be prevented from taking their seats so early as they might. But the answer is that if he neglects his duty he will lay himself open to an action. However, we have not to consider these consequences, but to put the best interpretation we can on the words of the Legislature, and according to the meaning of these words, and what was the law as to returns before the Act; I agree with my Lord that this rule should be discharged.

DENMAN, J.—I am of the same opinion. By the 6th section of the Parliamentary Elections Act, 1868, the petition is to be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery. I can scarcely go so far as my Lord in saying that these words are ambiguous. I think, looking at the duties of the clerk of the Crown, we are bound to read them as meaning "effectively made," that is, so made to the clerk of the Crown that he can act on the return at that time. Now that being so, the question then is whether that enactment has been repealed. The general rule is that an enactment is not repealed by a subsequent one, unless the latter is inconsistent with the former one. I find nothing in the Ballot Act, 1872, which is really inconsistent with what I think is the interpretation of section 6 of the Parliamentary Elections Act, 1868, and therefore "return made" should have the same meaning in the one statute as in the other, and consequently the return is not made until it be so made that the clerk of the Crown can take notice of it. Now, under these circumstances, the receipt of the certificate of return by Kate Phipps, and her receipt for it, did not make it a receipt by the clerk of the Crown, and therefore, in my opinion, this rule should be discharged.

Rule discharged without costs.

Attorneys—Cope, Rose & Pearson, for petitioners; Ellis & Crossfield, for respondent.

1874. Jan. 24. April 30. } PETROCOCHINO AN[illegible] v. BOTT.

Ship and Shipping—Bill of [illegible] Delivery of Goods — Custom o[illegible] Delivery.

The plaintiffs shipped goods, o[illegible] several bales, on board the defend[illegible] vessel at Calcutta, under a bill [illegible] by which the goods were to be d[illegible] the plaintiffs or their assigns at [illegible] London, the bill of lading con[illegible] terms that the goods were "to be d[illegible] the like good order and condition [illegible] ship's deck where the ship's res[illegible] shall cease." The custom of [illegible] London was proved to be for [illegible] coming from a foreign port to [illegible] their cargo on a quay of one of [illegible] and for the Dock Company to [illegible] put the goods into the lighters o[illegible] signees free of charge, if the consi[illegible] for them within a certain limited [illegible] if they send after that time the [illegible] have to pay the dock charges. T[illegible] ant's vesssel duly arrived with the [illegible] goods at the port of London, and [illegible] to the custom landed the goods [illegible] the quays of the Victoria Dock, [illegible] dock company loaded the plaintif[illegible] It was proved that although all the [illegible] bales were landed on the quay o[illegible] was lost and was never put into the [illegible] lighter:—Held, *that by the ter[illegible] bill of lading the defendant's liabi[illegible] when the goods left the ship's [illegible] that he was therefore not liable fo[illegible] delivery of the missing bale to [illegible] tiffs.*

The first count of the delarat[illegible] that the plaintiffs being mer[illegible] London and Calcutta, carrying [illegible] ness under the firm and style [illegible] cochino Brothers, shipped on [illegible] ship of the defendant, called t[illegible] certain goods, to wit, hides to b[illegible] from Calcutta aforesaid to Lo[illegible] there delivered on the terms of [illegible] lading which was as follows:

"Shipped in good order and [illegible] by Petrocochino Brothers, of Ca[illegible] the steamship *Zeno*, whereof i[illegible]

for this present voyage Owen, lying in the port of Calcutta and bound for London (having liberty to call at any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo and passengers, and for any other purpose, to sail with or without pilots, to tow and assist vessels in all situations and to tranship the goods by any other steamer); sixty-nine bales of hides being marked and numbered as per margin, *and to be delivered in the like good order and condition from the ship's deck where the ship's responsibility shall cease* at the aforesaid port of London, or as near thereto as she may safely get (the act of God, the Queen's enemies, pirates, robbers by land or sea, restraint of princes, rulers or people, vermin, rainspray, insufficient packing, inaccuracies, obliteration or absence of marks, numbers, address or description of goods shipped, leakage, breakage, rust, decay, loss or damage from machinery, boilers or steam however caused, or from collision, stranding or wreck however caused, or from explosion, heat or fire on board in hulk or craft or on shore however caused, or from evaporation or smell from other goods, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers or other persons in the service of the ship whether in navigating the ship or otherwise, risks of craft, hulk or transhipment, and all and every the dangers and accidents of the seas, land and rivers, and of navigation of whatever nature or kind being excepted, and the ship not being liable for any consequences of causes herein excepted however originating) *unto Messrs. Petrocochino Brothers or to his or their assigns*, on payment of freight for the said goods in cash without deduction at the rate of 4*l.* 15*s.* (four pounds and fifteen shillings sterling) per ton fourteen cwt. nett delivered. Average, if any, to be adjusted according to British custom.

"Weight, contents, and value unknown. *The goods to be discharged from the ship as soon as she is ready to unload into hulk, lazaretto or hired lighters if necessary, and to be landed by the master or agent at the risk and expense of the owners of the goods.* If prevented from discharging by weather the goods may be taken on to the next convenient port for transhipment to their destination. Fines and expenses and losses by detention of ship or cargo caused by incorrect marking or by incomplete or incorrect description of contents or weight or of any other particulars required by the authorities at the port of discharge upon either the packages or bills of lading shall be borne by the owners of the goods. In case of quarantine the goods may be discharged into quarantine depot, hulk or other vessel as required for the ship's despatch, or should this be impracticable or the ship not be admitted, the master may land the goods at the nearest safe port in his opinion at the risk and expense of the owners of the goods. In case of the blockade or interdict of the port of discharge, or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at any other port which he may consider safe at the expense and risk of the owners of the goods. The ship's responsibility shall cease when the goods are so discharged under quarantine or landed at another safe port as expressed herein. The master or agent shall have lien on the goods for payments made or liabilities incurred in respect of any charges stipulated herein to be borne by the owners of the goods. In witness whereof the master or agent of the said ship has signed three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void. Dated at Calcutta, the 8th of March, 1872."

Averment, that all conditions were performed and all things happened and times elapsed necessary to entitle the plaintiffs to have the said goods delivered by the defendant to the plaintiffs at London aforesaid, according to the terms of the said bill of lading; yet although the defendant delivered to the plaintiffs part of the said goods in accordance with the terms of the said bill of lading, he made default in this, that although not prevented by any of the excepted perils, the defendant did not deliver the remainder of the said goods whereby the

plaintiffs were deprived of the said goods and were otherwise damnified.

The second count was in trover for the conversion of one bale of hides.

Pleas. As to first count—First. That the goods were not shipped on board the defendant's ship as alleged. Second. Denial of the breach. Third. That the goods were delivered from the ship's deck within the true intent and meaning of the bill of lading.

To Second Count—Fourth. Not guilty. Fifth. Not possessed. Upon these pleas issue was joined.

At the trial which took place before Brett, J., at the sittings in London after Hilary Term, 1873, it was admitted by the defendant that sixty-nine bales of hides were shipped for conveyance to London on board the steamer *Zeno*, as stated in the bill of lading mentioned in the declaration, and that the same were the property of the plaintiffs. Evidence was adduced shewing that the steamer, *Zeno*, arrived in the port of London in the beginning of May, 1872, and went into the Victoria Dock of the London and St. Katherine's Docks Company. She discharged her cargo including the plaintiffs' bales on to one of the quays in that dock. The plaintiffs, upon being informed of the ship's arrival, appointed Culverell, Brooks & Co., wharfingers, as their agents, to receive the bales and to bring them in barges up the Thames to London. During the transit from the dock to the Sun Wharf, London, belonging to Culverell, Brooks & Co., one of the bales was lost, and there was evidence that it had never been put into any of the barges. It was further proved that by the custom of the port of London steamers arriving in a dock from a foreign port discharge their cargoes on to the quays, having previously given notice of their arrival to the consignees, and the dock company take the goods from the quays and load them upon lighters of the consignees for conveyance to London. If the goods are applied for by the consignees within twenty-four hours after the ship's arrival, the shipowner pays the dock-charges, but if the consignees apply after that time they become liable for these expenses.

In answer to questions asked by the learned Judge, the jury fou that the sixty-nine bales were from the ship to the dock co the quay; and secondly, that eight bales were put by the pany into the barges for con the Sun Wharf. The lear thereupon ordered the verd entered for the defendant, wit the plaintiffs to move to enter i for the sum of 41*l.*, the value o ing bale.

A rule *nisi* was accordingly to set aside the verdict, and for the plaintiffs for 41*l.* upon that the second finding of amounted in law to a verdi plaintiffs; or for a new trial on that the first finding was a weight of evidence. Against t

H. T. Cole and *R. E. Webster* (24) shewed cause:—As soon a had been delivered on the q dock company the responsibil defendant, the shipowner, h The plaintiffs must argue tha was the ship's deck, which is a delivery under the terms of lading must be according to and course of trade at the port unless there be something e the bill of lading to cont *Gatliffe* v. *Bourne* (1), and t of Buller, J., in *Hyde* v. *The Mersey Navigation Company* (2

Graham in support of the rul bill of lading the defendant to deliver "unto Messrs. Pe Brothers, or his or their assign the delivery was not to the pl for the shipowner's convenie dock company, who are in fa fendant's agents. Had the del into lighters instead of only quay, the lighterman would ha receipt for them. This adva plaintiffs lose by a delivery t company. The bill of lading co the unloading into lighters, an goods were delivered to the

(1) 4 Bing. N.C. 314, and in e N.R. 1.

(2) 5 Term Rep. 389.

or their lighters the defendant's liability did not cease—*Catley* v. *Wintringham* (3). To hold that there was a complete delivery before there had been a delivery to the consignees or their assigns, would be to contradict the terms of the bill of lading. Next, the first finding of the jury was against the weight of evidence.

[BRETT, J.—I am not dissatisfied with the findings of the jury on either of the questions.]

Cur. adv. vult.

The following judgments were delivered upon the 30th of April.

BRETT, J.—This case has been standing over for consideration owing to the doubts entertained by my brother Honyman; we shall not now have the benefit of his assistance for some time to come, and we must therefore act upon our own judgment.

The action was for a breach of contract to deliver goods. The contract was by a bill of lading for the conveyance of sixty-nine bales of hides from Calcutta to London, "to be delivered from the ship's deck where the ship's responsibility shall cease," and according to the finding of the jury the bales were unloaded from the defendant's steamer, and placed upon a quay in the Victoria Docks by the dock company in the absence of the plaintiffs, the consignees. Sixty-eight of the bales only were put on board barges sent by the plaintiffs' agents to receive them, and thus one of the bales was never delivered by the dock company, and was lost. The cause was tried before me, and I directed a verdict to be entered for the defendant. Upon the argument of the rule obtained by the plaintiffs it has been urged that the shipowner ought to be held responsible for the loss, for there had been no delivery of the bale in question to the plaintiffs who were the consignees. It was contended that the discharging of the cargo upon the quay in the dock and the subsequent loading from the quay into the barges was merely an arrangement for the convenience of the shipowner, and could not be considered as a delivery to the plaintiffs. But on the other side it was said that by the terms of the bill of lading it was provided that the defendant should not be liable for any loss after the goods should have left the ship's deck. The words in the bill of lading are "to be delivered in the like good order and condition from the ship's deck where the responsibility shall cease." These words are important in determining the question in issue in this action, for it is found here that all the bales belonging to the plaintiffs had been delivered from the ship's deck. Now it is a general rule that where goods are to be unloaded at a particular port the usage of that port is to be complied with, and if the ship is to be discharged in a particular manner according to that usage, that manner is to be observed, unless it be inconsistent with the terms of the bill of lading. In the port of London the course of business, as proved at the trial, is for a steamer to unload her cargo at a quay in a dock, and for the dock company to put it into lighters, that it may be forwarded to the consignees. The shipowner pays the dock charges if the goods are applied for within twenty-four hours, otherwise they are put into a warehouse by the dock company, and the consignees become liable for the charge of warehousing. The dock company seem to be proper intermediates on behalf of the owners of the goods, and by the usage of London the cargo of a steamer is not delivered direct to the consignee, but by two steps it is delivered *at* the quay and *from* the quay. The bill of lading clearly was drawn up with reference to the course of business prevailing in London; its terms are aptly used in connection with the usage of that port, and it is provided that when the goods are cleared from the deck, the responsibility of the shipowner is to cease. When the goods are on the quay he is no longer liable for any injury to them.

I give no opinion whether the dock company are liable to compensate the plaintiffs for the loss of the bale, but the shipowner is not liable for it, and inasmuch as the verdict at the trial was entered for the defendant this rule must be discharged.

(3) Peake 202.

DENMAN, J.—Upon the argument of the rule the only doubt which I entertained was occasioned by my brother Honyman's doubt, and, speaking for myself, I see no reason to hesitate as to what our judgment ought to be. I entirely concur with my brother Brett. I need say no more than this. I do not know what my brother Honyman's opinion would be upon full consideration of the case, but with all respect for his view, I am sure that I should not come to any other conclusion than that of my brother Brett.

Rule discharged.

Attorneys—Markby, Tarry & Stewart, for plaintiffs; Lowless, Nelson & Jones, for defendant.

1874. April 30. { NELSON AND OTHERS *v.* THE ASSOCIATION FOR THE PROTECTION OF COMMERCIAL INTERESTS AS RESPECTS WRECKED AND DAMAGED PROPERTY.

Freight—"Ship Lost or not Lost"—Lien on Cargo—Abandonment of Voyage—"Owners of Cargo."

When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage thereof is described as "freight" in the bills of lading.

Goods were shipped on board the plaintiffs' vessel to be carried to L. under bills of lading whereby the "freight" was to be paid at L. "ship lost or not lost." Upon the voyage the plaintiffs' vessel was totally wrecked, and they thereupon abandoned the adventure and took no steps to save either ship or cargo. The defendants under the instructions of the underwriters saved a portion of the goods mentioned in the bills of lading, and forwarded them to L. A dispute having arisen as to whether the plaintiffs were entitled to a lien for the "freight" mentioned in the bill of lading, a memorandum was drawn up between the plaintiffs and the defendants stating that the plaintiffs having claimed a lien "for the original freight" upon the goods saved "without allowance for the forwarding freight and expenses," the defendants, "the owners of such cargo," had agreed to deposit the amount of the plaintiffs' claim to abide the event of an action. A special case having been stated for the opinion of the Court,— Held, *that upon the agreement the only question to be argued was whether the plaintiffs could lawfully claim a lien, that they were entitled to no lien, and that judgment must be given for the defendants.*

Quære, *Whether under the circumstances which had happened the plaintiffs were entitled to recover the amount of the "freight" from the parties to the bills of lading?*

This was a SPECIAL CASE stated for the opinion of this Court, as follows:

In the month of May, 1870, the plaintiffs were the owners of the vessel *John Dryden*, then at Bombay, and bound upon a voyage from that port to Liverpool. A cargo consisting of cotton and other merchandise was loaded on board the said vessel for the voyage, which cotton and merchandise were shipped by divers persons at Bombay under numerous bills of lading. The plaintiffs effected policies of insurance in the usual form upon the freight to the amount of 2,500*l.*, the total amount of the freights payable under the bills hereinafter mentioned being 4,100*l.*

The bills of lading under which the goods were shipped, were in three different forms.

By the bills of lading in the first form the goods were to be delivered at Liverpool subject to the usual exception of perils and accidents of the sea; "freight for the said goods being paid in Bombay by the shippers, as per margin, *ship lost or not lost*," and the amount of freight so payable was stated in the margin.

By the bills of lading in the second form the goods were to be delivered at Liverpool subject to the usual exception as aforesaid: "Freight for the said goods to be paid as customary as per margin, with average accustomed, *ship lost or not lost.*" And the amount of freight so payable was stated in the margin. It was agreed that the words "as customary" referred to the mode of payment of freight at Liverpool, and had no bearing upon the questions in dispute in this action.

perils of the seas from completing her voyage and conveying her cargo to Liverpool.

Upon the arrival at Liverpool of the goods so saved and forwarded, the plaintiffs as owners of the *John Dryden* claimed a lien upon the arrived goods comprised in each bill of lading in either the second or the third form (any part of the goods comprised in which did arrive) for the whole of the freight without any deduction in respect of salvage or forwarding expenses or in respect of the goods lost.

A memorandum of agreement in the following terms was thereupon drawn up and signed by the parties—

"Memorandum.—The owners of the *John Dryden* having claimed a lien on the cargo *ex* that vessel forwarded per *Mid-Surrey* for the original freight of the said cargo from Bombay to Liverpool, without allowance for the forwarding freight and expenses, and having refused to give up possession of the said cargo without payment or security for payment of their claims, the Association for the Protection of Commercial Interests, the owners of such cargo, have under protest, and for the purpose of obtaining possession of the said cargo, agreed to deposit in the joint names of Messrs. Hoddart, Brothers, and Messrs. Baily, Lowndes & Co., of Liverpool, before taking possession of the said cargo at Liverpool, the amount of the said owners' said claim. And it is agreed that the amount so deposited shall abide the event of an action to be commenced by the owners of the *John Dryden* against the said association as owners of the said cargo to recover the said freight so claimed by them, and that any amount which the said owners shall recover in that action shall be paid and satisfied to them out of such deposit, and that the balance, if any, of the said deposit shall be paid to the said association. In case the said owners of the *John Dryden* shall not within a month from the making of the said deposit commence such action as aforesaid, or in case the said association shall obtain judgment in the said action, the said deposit shall be paid to the said association. The costs of the said action shall abide the event thereof."

The salvage and forwarding expen[illegible] of the arrived goods under each bill [illegible] lading (any part of the goods compri[illegible] in which did arrive) exceeded the amo[illegible] of the whole of the freight of all the go[illegible] shipped under that bill of lading, and [illegible] salvage and forwarding expenses of [illegible] whole of the arrived goods exceeded [illegible] whole bill of lading freight of the w[illegible] cargo.

The questions for the opinion of [illegible] Court were, first, Whether the plaint[illegible] were entitled to any, and, if so, to w[illegible] lien upon the goods saved and forward[illegible] or any of them?

Secondly, Whether the plaintiffs w[illegible] entitled to recover from the defenda[illegible] any, and if so, what freight?

If the Court should be of opinion th[illegible] the plaintiffs were entitled to a lien up[illegible] the goods saved and forwarded, or any [illegible] them, or to recover from the defenda[illegible] any freight, then in either of such ca[illegible] judgment was to be entered for [illegible] plaintiffs; otherwise judgment of n[illegible] suit was to be entered with costs of [illegible] fence.

Watkin Williams (*A. Cohen* with hi[illegible]) for the plaintiffs.—The defendants a[illegible] the position of the owners of the go[illegible] and are subject to the same liabili[illegible] For the plaintiffs it is contended, fi[illegible] that they are entitled to the whole freig[illegible] mentioned in the bills of lading of t[illegible] second and third forms, for goods sav[illegible] without any deduction. Secondly, th[illegible] the plaintiffs have a lien on the goo[illegible] brought to Liverpool for the whole freig[illegible] payable under these bills of lading. [illegible] cannot be denied by the plaintiffs th[illegible] freight properly so called is due only upon the performance of the voyage; but in this case the money for the carriage of the goods was to be paid at the por[illegible] of destination by the terms of the bills [illegible] lading in the second and third forms. [illegible] is not a case where the money is to [illegible] paid at the port of shipment, and t[illegible] circumstance renders *Kirchner* v. *Ve*[illegible] (1) distinguishable. The plaintiffs [illegible] entitled to a lien for the sums mentio[illegible] in the bills of lading, for they were [illegible]

(1) 12 Moore P.C. 361.

ship lost or not lost;" and it is clear that the shippers would have no defence in an action at the suit of the plaintiffs to recover the stipulated amount—*Andrew v. Moorhouse* (2).

J. C. Mathew (*Herschell* with him), for the defendants.

[LORD COLERIDGE, C.J.—We do not require any argument on behalf of the defendants as to the question of lien.]

Then the defendants cannot be liable under the bills of lading, for they were not the original owners of the goods, nor were they the shippers or consignees thereof; they were not even indorsees of the bills of lading.

Watkin Williams, in reply.—The defendants have agreed to be in the same position as the owners of the goods, for in the memorandum they so described themselves. The goods having arrived at the port of destination, freight was earned, and it is immaterial whether the vessel herself did or did not arrive.

LORD COLERIDGE, C.J.—The defendants are entitled to the judgment of the Court. The case has been stated for the purpose of ascertaining whether the plaintiffs are entitled to a lien upon the cargo, and whether they are entitled to freight; but the question whether they are entitled to be paid freight by the defendants, depends upon the question whether they are entitled to a lien upon the cargo. This appears from the facts stated. The ship *John Dryden*, upon her voyage from India to England, struck against a reef near the coast of Africa, and became a total wreck. The plaintiffs abandoned the voyage, and took no step to forward the cargo or to save the ship and the cargo; but the defendants, upon the instructions of the underwriters, endeavoured to save the cargo for the benefit of the parties interested, and dispatched to the scene of the disaster Captain Foster, one of their officers, who ultimately forwarded a portion of the cargo to Liverpool. Whether the claim of lien be valid or not depends upon the bills of lading, which provide for the payment of freight, "ship lost or not lost." It is said that freight may be earned upon the arrival of the goods at their destination, and that, whether the ship herself did or did not arrive at the port of discharge, freight was earned, and the shipowner's lien attached. Now, in the ordinary course of business, freight is earned upon the carriage and delivery of the cargo, and may give rise to a contemporaneous lien. Apart from the bills of lading, freight might have been earned so as to create a lien. But it is also claimed under the circumstances which have arisen. Both my learned brothers think that the contention of Mr. Williams is not maintainable. The plaintiffs claimed lien upon the goods comprised in each of the bills of lading in the second and third forms. A memorandum was then drawn up, upon which the judgment of the Court was asked. The question then in dispute between the parties was as to a claim of lien. It is now scarcely contended that there is a claim of lien. There must be judgment for the defendants.

BRETT, J.—The cargo was shipped under an extremely ingenious bill of lading. If the construction were such as the plaintiffs' counsel has contended for, the attention of shippers ought to be called to the terms of similar bills of lading before the loading of the cargo. However, it is not necessary to construe this ingenious document as against the shippers, if freight in the legal sense of the word was not earned. Upon the arrival of the goods at the port of destination, no lien existed, for the goods were forwarded by other persons than the plaintiffs. If the shippers were bound to pay the freight, whether the ship was lost or not lost, there was no lien at all, for the right to lien does not arise unless the payment of the freight is to be on the delivery of the cargo; if the freight is payable without delivery of the cargo, lien does not accrue. The plaintiffs' claim was to hold the goods under an alleged right of lien, first, on the coast of Africa, then in Liverpool. The defendants substantially represent the underwriters, to whom the abandonment of the voyage passed the property in the goods as against the plaintiffs; the defendants, therefore, were substantially owners, but they were not parties to the

(2) 5 Taunt. 435.

bills of lading, nor did their rights accrue under them; they might be bound by a valid lien, but not by the circumstances mentioned in the case, and they properly contested their alleged liability. The memorandum shews that it was the lien which they were to contest as owners. All the matters in dispute before the memorandum was drawn up depended upon lien, and the result of the action turns upon its existence. I do not doubt that the parties came here to try whether there was a right of lien, and the plaintiffs had no lien.

DENMAN, J.—I quite agree that there was no lien, and if that was the only question, I should have no hesitation as to what our decision ought to be. I have felt some doubt about the construction of the memorandum, but the observations of my Lord and my brother Brett appear to me entitled to great weight, and I do not dissent from them.

Judgment for the defendants.

Attorneys—Hollams, Son & Coward, for plaintiffs; Waltons, Bubb & Walton, for defendants.

1874. May 7. } WAKEFIELD AND OTHERS *v.* BROWN.

Practice — Costs — Counsel's Fees — Further Brief without new Matter—Reviewing Taxation.

There is no rule which on the taxation of costs as between party and party forbids the allowance of a further fee to counsel on the occasion of delivering a further brief, although such further brief contain no new matter, but only a new arrangement in a more compendious form of matter which was in the first brief.

Where, therefore, after briefs had been delivered, the plaintiffs' counsel desired to be furnished with a tabulated statement of some of the facts, and the master on taxing the plaintiffs' costs, as between party and party, in the exercise of his discretion allowed additional fees to counsel on the delivery of such tabulated statement, a Judge at chambers ordered the master to review the taxation, and to disallow such fees, on the ground that it was s tent to the master to allow such no new matter had been furnished held that the Judge had acted o neous principle, and set aside suc

Quære, *if the Court will rever cision of a Judge at chambers, u Judge has only reviewed the di the master in the taxation of costs*

This action was tried at the sittings after last Hilary Term verdict for the plaintiffs for agreed to.

The declaration contained a the defendant's promissory note 19*s.* 2*d.*, payable in March, 1 counts for money lent, money re the use of the plaintiffs, for int on accounts stated. The pleas payment; second, set-off; thir money counts, never indebted; a an equitable plea of an agreemen against the unpaid balance on the amount of certain claims b fendant against the plaintiffs, neither party should sue the o plaintiffs for the said balance, th ant for his said claims, and plaintiffs were suing in breac agreement.

The cause was a special jury c there was delivered with the bri plaintiffs, which consisted of fi sheets, a fee of ten guineas to th counsel, and a fee of seven guine junior counsel. At the consultati counsel required the plaintiffs' to furnish them with further info It appeared that the transactions the equitable plea related, were rate transactions, extending over from 1866 to 1872, as to various connected with several ships, they were mixed up with a correspondence, and were of complicated nature, so that coun of opinion that unless they were f with a tabulated statement whic enable them to present the cas Judge at the trial in a short a manner, the cause would have t ferred. In accordance with this the plaintiffs' attorneys prepar

further statement. This consisted of four brief sheets, and was delivered to counsel with a further fee of three guineas to the leading counsel, and of two guineas to the junior counsel. On the taxation of the plaintiffs' costs, the master, after fully considering the particular circumstances of the case, allowed these additional fees, and taxed the costs at 190*l*. Whereupon the defendant's attorney took out a summons to shew cause why the master should not review his taxation. This summons was heard at chambers by Cockburn, C.J., who made an order that the master's taxation should be reviewed, and that the additional fees to counsel should be disallowed.

Field, for the plaintiffs, afterwards obtained a rule calling upon the defendant to shew cause why this order should not be rescinded or varied, and he cited *Lockstone* v. *The Brighton Railway Company* (1).

R. E. Webster now shewed cause on an affidavit by the managing clerk of the defendant's attorneys, which stated, *inter alia*, that on the taxation by the master such clerk had objected that the plaintiffs "were not entitled in an action of such a simple nature as this one to prepare a brief of the immense length they had done, and further that they were not entitled to the further fees charged as paid to counsel, inasmuch as their own explanation in their bill of costs, and affidavit of increase of the necessity for such further fees being paid, shewed that had they prepared their brief in the form of a clear and simple explanatory statement in the first instance, counsel would not have requested any further tabulated statement as mentioned in the bill of costs, and that upon a taxation as between party and party, such further fees were not recoverable against the defendant, who had only to pay strict necessary costs." The affidavit also stated that Cockburn, C.J., "decided that such further fees to counsel ought to be disallowed, and made an order for the master to review his taxation accordingly;" and further alleged that "no affidavit had been made by the plaintiffs or their attorneys; that the further statement requested by counsel was fresh or new matter, or that it could not have been, and should not have appeared in the brief in lieu of what did appear therein."

[LORD COLERIDGE, C.J. — The master exercised his discretion in allowing these fees. A Court or Judge does not interfere unless it appears that the master was clearly wrong, or there is some principle to be laid down in point of law. DENMAN, J.—In *Lockstone* v. *The Brighton Railway Company* (1), the amount of fees to be allowed to counsel is stated to be a matter peculiarly for the discretion of the master. Then if a Judge reviews this and disallows such fees, which is the Court to follow?]

It is the decision of the Judge in that case which ought to stand. On principle the Judge was right in saying that where there is no new matter the opposite party ought not to be put to the expense incurred by the attorney not properly stating the case in the brief in the first instance. In the *Southampton Election Petition* (2), there had been no hearing before a Judge at chambers, and the question which came before the Court was, *inter alia*, whether the master had done wrong in disallowing fees to counsel for consultation, and the Court made absolute the rule to review the taxation as to such fees. In delivering judgment, Bovill, C.J., thus stated the principle—"A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case; and where after properly considering the matter the master has arrived at a decision, it lies upon those who impeach his decision to satisy the Court that he is wrong. Where a principle is involved the Court will always entertain the question, and if necessary, give directions to the master; but where it is a question of whether the master has exercised his discretion properly, or it is merely a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of their officer whose peculiar province it is to

(1) 12 Com. B. Rep. N.S. 243.

(2) 39 Law J. Rep. (N.S.) C.P. 89; s. c. *nom. Hill* v. *Peel*, Law Rep. 5 C.P. 172.

investigate and judge of such matters, unless there are very strong grounds to shew that the officer is wrong in the judgment which he has formed." The Lord Chief Justice acted here on that principle, and being satisfied that the master was wrong in allowing these further fees, he sent it back to the master with that intimation. Can the Court now say that the Chief Justice was wrong?

Field, in support of the rule.—The question in this case, as appears from the two reported decisions which have been referred to, was one peculiarly within the discretion of the master. It was one in which the master did exercise his discretion, and the Court will not review it unless it is satisfied that he exercised it very wrongly. The Chief Justice at chambers in reviewing the taxation laid down a principle which was a wrong principle. The Judge did not review the discretion of the master, but, as appears from the affidavit of the clerk to the defendant's attorney, he decided the matter on principle. The principle was that on which the appeal was made to him from the taxation, namely, that there had been no new matter, and that had the plaintiffs' attorneys "prepared their brief in the form of a clear and simple explanatory statement in the first instance, counsel would not have requested any further tabulated statement."

Lord Coleridge, C.J.—I am of opinion that this rule should be made absolute. The matter has come before us in this way—The plaintiffs by consent recovered at the trial a verdict for 120*l.* and their costs were taxed at 190*l.*, and then a summons was taken out to review the master's taxation which was heard before the Lord Chief Justice at chambers, when it appears that the learned Chief Justice disallowed two items which were in respect of fees to the leading and junior counsel on laying before them fresh papers which consisted of a tabulated statement as to the earnings and matters connected with certain ships in order that counsel might readily refer to the matter at the trial, and avoid the peril of the case being sent to an arbitrator which they saw awaiting them. Now as to these two items the Lord Chief expressed his opinion that the was wrong, and he accordingly dis these fees to counsel, and he did understand from the affidavit shewing cause against this rule ground that there was no new m lay before counsel, and therefore cessity for further fees. Now th be many cases in which a tabulate ment may properly be required t counsel in the conduct of a case, preparing of which may prop charged for as part of the costs action. In this particular case it cessary by reason of the equitable pleaded by the defendant, and be was only a compendious form was already in the brief, it was u the part of the defendant that h not to pay for it. The Chief seems to have acted on that princi to have decided that because the no new matter but only a comp statement of what had been pre stated, therefore additional fees to were not to be allowed with it. the greatest deference and respec Lord Chief Justice it appears to that is not tenable. No case has be in support of it, no such practi been shewn to exist, and reason s me to be against it. That, howeve ground on which the Lord Chief based his decision, and as that d appear to have been a right one, t must be made absolute. It is not ne to express any opinion whether we have reversed his decision if he viewed only the discretion of the It is only on the short ground already stated that this rule will b absolute.

Brett, J.—The Lord Chief overruled the master's decision by down a principle for the guid masters in all cases. The princ laid down it appears is this: that t cessful party in an action shall not case be allowed fees to counsel cond brief which has been *bona* quired by counsel, and has in conse been supplied by the attorney, if tains no new matter from what wa first brief, and that although t

brief was considered by the master to have been reasonably drawn up in due form, and although the counsel required the matter to be put in a new form to enable him to conduct the case to a successful end. If the Court disagrees with the view of the Chief Justice in this matter, the Court must express its own opinion, and, however unwilling one may be to see costs increased or however astonished one may be that costs should amount to so large a sum as compared with the sum recovered, yet I think that such a rule as has been laid down if carried out in all cases might jeopardise a cause, and perhaps even lead to the incurring of larger expense. There is no ground, I think, for maintaining it. Upon the other point I agree with my Lord that as it is not necessary to decide the matter it is better to abstain from expressing any opinion upon it.

DENMAN, J.—I also think this rule should be absolute. If I were satisfied that the Lord Chief Justice had reviewed the discretion of the master, and had so disallowed these further fees, it would have raised a question in which I am not prepared to state what my opinion would be. But I think he did not review the master's discretion, and that he decided as he did on the ground that there was no new matter, but merely a tabulated statement of what was in the original brief. I agree with the rest of the Court that after a brief has been properly drawn, it will occasionally occur that counsel will require some further statement, whether it be in a tabulated form or not, and whether it be to avoid a reference or otherwise for the purpose of conducting the cause. I gather from the facts in this case that the Lord Chief Justice acted on the principle that it was not competent to the master to allow further fees to counsel on furnishing such further statement. I think that that is an erroneous principle, and I therefore agree with the rest of the Court that this rule should be absolute.

Rule absolute.

Attorneys—Field, Roscoe & Co., for plaintiffs; Stibbard & Co., for defendant.

1874. April 27, 30. } CLIFFORD *v.* HOARE.

Easement—Private Way, Enjoyment of —Covenant in Purchase Deed for Right to convey—"Party or Privy."

When a private way is granted over a piece of land of stipulated dimensions, the grantee is not entitled to the use of every square inch of the surface of the land; all that the grant confers upon him, is a reasonable enjoyment of the land as a road.

By an indenture dated 17th May, 1872, *to which the defendant was a party, A. bought a plot of ground for the purpose of building a house, and power was given to A. to erect as part thereof a portico projecting into a private road upon the west side thereof. By an indenture dated 2nd August,* 1872, *to which also the defendant was a party, another plot of ground was conveyed to the plaintiff with a right of way over the private road before mentioned, which was to be forty feet wide; and the defendant covenanted with the plaintiff that he had not "been party or privy to anything," whereby the premises granted by him were or might be "impeached, affected, or incumbered in title, estate or otherwise howsoever." A. erected a house upon the plot of ground bought by her, and built out a portico upon the west side thereof; the columns of the portico stood in the carriage-way of the private road; the bases of the columns were five feet in width and two feet in depth:*—Held, *that by the indenture of the 2nd of August,* 1872, *the plaintiff was entitled only to the reasonable enjoyment of a right of way over the private road, and not to the use of every square inch of the surface of a road forty feet wide; that the portico did not interfere with the reasonable enjoyment of the road by the plaintiff, that the defendant's covenant had not been infringed, and that he was not liable for breach thereof in an action at the suit of the plaintiff.*

Semble, *that if the plaintiff's enjoyment of the right of way over the private road had been interfered with by the portico, the defendant would have been, within the meaning of his covenant, party and privy to a thing, which impeached, affected and incumbered the grant of the right of way to*

the plaintiff, who might therefore have maintained an action against the defendant.

SPECIAL CASE.

Mr. Mitchell Henry at the dates of the execution of the two indentures hereinafter mentioned was possessed of an estate called the Kent House Estate, situate at Kensington, in the county of Middlesex, and at the dates aforesaid had borrowed large sums of money upon the security of the said estate from the defendant, who thereupon became mortgagee in fee of the said estate. In the spring of the year 1872, Lady Ashburton negotiated with Mr. Mitchell Henry for the purchase by her of a portion of the said Kent House Estate, and by indenture of the 17th of May, 1872, the portion of the estate purchased by her was conveyed to her, and the defendant became a party to such indenture as and being mortgagee as abovementioned. The plot of land was purchased by Lady Ashburton for building purposes, and was bounded upon the west side by a private road leading from the High Road in a southern direction, and being the private road hereinafter referred to. By the said indenture Lady Ashburton was empowered to erect a *porte-cochère*, or projection, on the west side of her proposed house, as by the following extract from the said indenture appears:

"And the said Mitchell Henry doth hereby for himself, his heirs, executors and administrators, covenant with the said Louisa Caroline Lady Ashburton, her heirs and assigns in manner following, that is to say, that it shall be lawful for the said Louisa Caroline Lady Ashburton her heirs and assigns, to erect and maintain a *porte-cochère* or projection extending from the west side of the said last-mentioned messuage or dwelling-house over the foot-pavement of the said private road marked A. B.; provided that the plan of any projection or projections be submitted to the said Mitchell Henry, his heirs or assigns, and approved of by him or them."

The said indenture also contained a covenant by Mr. Mitchell Henry in the following terms:

"And further that he the said Mitchel Henry, his heirs or assigns, will befo the 17th day of January, 1873, at his their own expense construct, pave, a complete and make fit for use, and at times (until the burden thereof shall h been adopted by some competent pu authority) maintain in good repair a pr vate road on the western side of the sa piece or parcel of ground first herein before described" (the plot of land befo mentioned), "the site of which priva road is marked 'Private Road A. B.,' the said map or plan drawn in the marg of these presents, and which said ro runs from the high road leading fro Kensington to London, along the wester boundary of the said piece or parcel ground first hereinbefore described to th ground in the rear of Montpelier Squar and will make such road of a width o not less than forty feet throughout it entire length."

Previous to May 17th, 1872, th plaintiff and his wife, who had learnt th the Kent House Estate was to be sold i building plots, were in treaty throug Mr. Frederick Sang with reference to th purchase of certain plots of land formin portion thereof, and on the 24th of Ma 1872, they entered into a contract wit Mr. Mitchell Henry for the purcha thereof. These plots were situate to t south of the piece of ground bought Lady Ashburton, and access to them w gained by the private road running past t western side of her proposed house whi has been already mentioned. The plots land were conveyed to the plaintiff a his wife by an indenture dated the 2 of August, 1872, to which the defenda as such mortgagee as aforesaid was party. By the said indenture of the 2 of August, 1872, there was amongst oth things granted to the plaintiff a right way over certain roads including t aforesaid private road, as follows:

"Together also with full and free ri and liberty for the said Robert Cavendi Spencer Clifford, his heirs and assig and his and their friends, servants a workmen, and the respective tenants a occupiers for the time being of the s pieces or parcels of land and any bui

e erected thereon, respectively, id every other persons and per- e benefit and advantage of the rt Cavendish Spencer Clifford, or assigns, from time to time, times hereafter, at his and their pleasure, and by night and by for all purposes either with or horses, carts and carriages, to repass over and along the roads d roads and ways, which, or led directions whereof, are re- delineated on the said plan."

n accompanying the indenture of August, 1872, shewed the ad before-mentioned marked ith of forty feet, where it passed west side of the piece of ground Lady Ashburton.

the said indenture of the 2nd 1872, the defendant covenanted

he said Peter Richard Hoare, y for himself, his heirs, execu- administrators, covenant with obert Cavendish Spencer Clif- eirs and assigns, that the said ard Hoare hath not done, omit- wingly suffered or been party o anything, whereby the said reinbefore expressed to be here- granted and released, or any f, are, is or may be impeached, incumbered in title, estate or howsoever, or whereby he is in indered from granting and re- e same premises or any part manner aforesaid."

the 24th of May and the 2nd the plaintiff had inspected the dy Ashburton's house, and was er intention to build the said he had a right to do so; but l she had no such right, and his purchase on the faith of

t to the power given to her by are of the 17th of May, 1872, mentioned, Lady Ashburton l to build a portico, which had d as high as the frieze at the nent of August, 1872. The enclosed by a hoarding ten out was visible to any person going upon the works for that purpose. The plaintiff was not aware until the month of September, 1872, that the portico had been commenced. The plan of such portico had been approved by Mr. Mitchell Henry. The bases of the columns stood in the carriage-way and were five feet in width and two feet in depth; the height of the frieze from the ground was sixteen feet. A footway was next Lady Ashburton's house on its west side and ran underneath the portico.

The Court was to have power to draw all inferences of fact.

It was contended on behalf of the plaintiff, but denied by the defendant, that under the circumstances before appearing there had been a breach of the defendant's covenant contained in the indenture of the 2nd of August.

The question for the opinion of the Court was, whether upon the facts stated the defendant was liable to be sued by the plaintiff.

If the Court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiff, for such sum as H. A. Hunt, of Parliament Street, Westminster (or, failing him, some other surveyor to be appointed by counsel on each side), should determine to be the amount of damage sustained by the plaintiff by reason of the breach of covenant as to the right of way, with costs of suit according to law. If the Court should be of opinion in the negative, then judgment was to be entered up for the defendant with costs of suit.

Philbrick, for the plaintiff (on April 27, 30).—The question to be determined in this case is whether there has been a breach of defendant's covenant in the deed of August, 1872, by which the defendant having granted a right of way to the plaintiff covenanted that he had done nothing to impeach the same. In *Sugden's Vendors and Purchasers* (14th ed.), p. 610, after pointing out that a covenant for right to convey would be broken if the seller had not such right, and the purchaser need not in that case wait until he be evicted, it is stated, "but a covenant for quiet enjoyment affords no right of

action until a disturbance: the erection of a gate which obstructs the covenantee's necessary right of way, whether set up by right or by wrong, would be a breach of the latter covenant, for in either case an obstruction ought not to be erected there." To the same effect is *Platt on Covenants*, pp. 328 and 329, citing *Andrews* v. *Paradise* (1) and *Morris* v. *Edgington* (2).

[LORD COLERIDGE, C.J.—Do you say that this covenant is to be construed with the same strictness as in the case of an indictment for an obstruction of the highway?]

Yes. Probably the case of *Harding* v. *Wilson* (3) will be relied on for the defendant, but that is different from the present case, where a right of way has been expressly granted; and in *Hawkins* v. *Carbines* (4), it was held that where premises have been conveyed with right of way thereto it may be a question for the jury what is a reasonable use of such right.

Sir J. Karslake, for the defendant.—The true principle is stated in *Gale on Easements* (4th ed.), p. 573, where it is said —"There is a clear distinction as to the foundation of the right of action for a private nuisance, properly so called, and an action for the disturbance of an easement," and at p. 574—"It is not every interference with the full enjoyment of an easement which amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement." In the present case the plaintiff has not sustained any substantial injury. The grant did not amount to a grant of a right of way over the whole of the land, but only to a grant of a convenient way. If the plaintiff's contention be right, the mere erection of a lamp-post would be an interference with the grant and give a cause of action. *Harding* v. W is directly in point, and *Squire* v. (5) and *Child* v. *Douglas* (6) that the covenant would not be such a projection as the porti case. Moreover the defendant party or privy to the covenan Lady Ashburton was empowere the *porte-cochère* or portico. that he executed the indentur it is contained; but his execut deed was merely a conveyance o estate vested in him as mortgag is not responsible for the co Mr. Mitchell Henry, although contained in the same instrum bind the latter, but not the def

Philbrick, in reply.—It is cle defendant is responsible for a venants in the indenture of t May, 1872. The meaning of "party" and "privy" may b from the judgment of Bayley, J., v. *Middleton* (7).

LORD COLERIDGE, C.J.—I am that the defendant is entitled to ment of the Court. The quest upon a covenant contained in ture dated the 2nd of August which he was a party; for the l in the hereditaments thereby was in him, while the equitable in Mr. Mitchell Henry. Th mentioned in this indenture was tiff, and the hereditaments were with certain rights of way; a to these easements that the pu pute has arisen. No question ha as to the parcels. The defe venanted that he had not don not been privy to doing anythi by the premises in the inde tained could be in any way im affected; and it has been con behalf of the plaintiff that the d covenant was broken by the c to Lady Ashburton, dated th

(1) 8 Mod. 318.
(2) 3 Taunt. 24.
(3) 2 B. & C. 96.
(4) 27 Law J. Rep. (N.S.) Exch. 44.
(5) 1 Myl. & Cr. 459; s. c. 6 Law Chanc. 41.
(6) 1 Kay 560.
(7) 6 B. & C. 295.

May, 1872. It is necessary to look at the two deeds to see whether the defendant has been party to anything, whereby his covenant with the plaintiff has been broken. The deed of the 17th of May contains many covenants by Mr. Henry, one of which is that he will make a road on the western side of the piece of ground conveyed to the Lady Ashburton, of the width of not less than forty feet; Lady Ashburton was also to be at liberty to erect a *porte-cochère*. The road mentioned in the indenture of the 17th of May, was also to be enjoyed by the plaintiff under the indenture of the 2nd of August, and he complains of the *porte-cochère* as an obstruction; he grounds his action upon the assumption that he is entitled to the use of a road forty feet wide, and that the defendant's covenant with him was broken by the defendant being party to the indenture of the 17th of May. For the defendant two points have been urged before us—First, that there has been no interference with the right of way granted to the plaintiff; secondly, if there has been an interference, the defendant's covenant has not been infringed, because he himself did not erect the alleged obstruction. The first point, that there has been no interference, is the more important; for if there has been an interference, an action for nominal damages may at all events be maintained.

The defendant admits that a right of way has been granted to the plaintiff, and that Mr. Henry was bound to construct a road forty feet wide. The extent of the plaintiff's right is to be gathered from the deed, and there is no absolute grant of every part of the road to the plaintiff; he has a right in common with other persons to go to the land granted to him, upon which he may erect buildings. It was pointed out during the argument that by the terms of the grant to the plaintiff Mr. Henry had a right to set out so much of the road as was reasonable for a foot-way and a carriage-way; when these are set out, carriages and horses must be confined to the portion assigned to them, and no carriage or horse is entitled to go upon the foot-way. The plaintiff has all that he stipulated for. His counsel has urged that as the columns of the portico are erected in the road, at all events the carriage-way is narrowed, and that the obstruction is appreciable, although it may be infinitesimal. If the soil of the carriage-way had been vested in the plaintiff by a conveyance setting out boundaries, he might have maintained an action of trespass or ejectment; but the grant to the plaintiff is not of a piece of ground but of an easement, namely, a right of way, and this requires a different consideration. We are to construe the indenture of the 2nd of August, according to the intention of the parties executing it to be gathered from the deed itself. We gather from the indenture that there was a conveyance of an easement to be reasonably enjoyed; for every easement must have some limit, and must not be enjoyed to an excessive degree; and the plaintiff has had in the fullest sense enjoyment of all that the deed purported to convey to him; he has what he bargained for, and the action is not maintainable. What has been done by Lady Ashburton is no interference with the easement granted to the plaintiff, and therefore the defendant has not committed a breach of his covenant.

As the first point fails, it is in strictness unnecessary to consider what would have been our decision upon the second. But I may state that if there had been an interference with the right of way, we should have held that the defendant had been privy to it, for he was party to the indenture authorising the erection of the *porte-cochère*. We express this opinion inasmuch as the question has been argued before us. *Hobson* v. *Middleton* (7) is an authority, when properly considered, for our view. We should have been against the defendant upon this point; but as we are in his favour upon the first point, we give judgment for him.

BRETT, J.—If the only question between the parties had been as to the portico, I should have been sorry that litigation had been commenced as to so small a matter; but if the dispute is as to what the width of the road is to be, a substantial question is at issue. I quite agree with my Lord

that if the plaintiff's rights have been infringed, the defendant would be liable, as he was a party to the deed of the 17th of May.

The first point relates to the right to use the road which Mr. Henry was to keep in repair until the burden should have been adopted by some competent public authority, which in this case is the Metropolitan Board of Works. If we had been asked to construe the grant so as to allow Mr. Henry to narrow the road to less than forty feet, I should have hesitated before admitting such a construction, for by the conveyance to the plaintiff he was to have a right of way over a road forty feet wide, it being described as of that width in the map attached to the conveyance. The road is not his, the exclusive use of it is not granted to him; what was granted to him was an easement and nothing more. The soil has not been conveyed to him, but he has the right to use a road forty feet wide. If the soil of the road had been granted to the plaintiff, any interference with it would have been actionable; but where an easement over a road is granted, only the reasonable enjoyment of the road passes; this seems to be the result of the authorities as to the difference between the right to the soil and to an easement over it. I guard myself from saying that an interference with another's property is not actionable, because the injury is small; the maxim, "*de minimis non curat lex*," does not apply to trespasses committed upon another's freehold; and if the plaintiff had been seised of the soil, I should have been of opinion that any interference therewith would have been actionable, however small it might be. I am of opinion that there has been no infringement of the plaintiff's reasonable use of the road, and that he has no right of action. I agree with the Lord Chief Justice that there must be judgment for the defendant.

DENMAN, J.—I agree with the rest of the Court as to the second point, for the defendant was party to the indenture of the 17th of May. As to the first point, a right of way was granted to the plaintiff; but on looking at the grant it is clear that he is not entitled to go over every square inch of the road, but that he is only to have a reasonable use of the right of way. The defendant has not infringed his covenant. The portico, which has been erected, did not prevent the plaintiff having the full enjoyment of all that he stipulated for. The defendant is entitled to the judgment of the Court.

LORD COLERIDGE, C.J., added.—In the event of the case going to the Court of Error, we wish to state that in our opinion there has been no substantial infringement of the plaintiff's right of way, even if in point of law he is entitled to more than reasonable user.

Judgment for the defendant.

Attorneys—G. C. Sherrard, for the plaintiff; Bockett & Son, for the defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Common Pleas.*)

1874. May 11. } RICHARDSON *v.* STANTON. STANTON *v.* RICHARDSON.

Shipping — Charter-party — Unfitness of Ship—Refusal to load.

The charterer of a specified ship was entitled under the charter-party to ship wet sugar, and provided a reasonable cargo of that commodity, but the ship, in consequence of her pumps not being able to meet the requirements of such cargo, was not reasonably fit to carry it, and the defect as to the pumps could only have been remedied after such a lapse of time as would have frustrated the object of the adventure:—Held (*affirming the judgment of the Court of Common Pleas*), *that the charterer*

entitled to refuse to ship the cargo, and to over damages for the unfitness of the ip.

This was an appeal by the defendant the first action and the plaintiff in the cond action, from the decision of the ourt of Common Pleas, discharging a ule *nisi* obtained by him to enter verlicts for him in both actions, or for a new trial in both actions. The actions were cross suits by the charterers (Richardsons) and owner (Stanton) of a ship. They were, substantially, the one for not providing a fit and proper ship, the other for not loading or reloading a fit and proper cargo. The proceedings in the Common Pleas are reported in 41 Law J. Rep. (N.S.) C.P. 180, where the answers of the jury to the questions put by the Judge at the trial, the arguments and the judgments are set out. In addition to the facts there mentioned, the following are material to be here stated.

Although in the charter party a clause was inserted that "*in and during the voyage* the master shall take all proper means to keep the vessel tight, staunch and strong, well manned and found, and in every way fitted and provided for the voyage," it did not contain a stipulation that the ship should be tight, staunch and strong, and every way fitted for the voyage at the time of loading the cargo. The captain signed bills of lading, wherein it was stated that 31,794 bags of sugar had been shipped in good order and well conditioned upon the *Isle of Wight*, and were "to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted)" at the port of discharge. The captain took all the steps in his power to obtain new pumps for the *Isle of Wight*, but was unable to do so until eight months had elapsed, when he procured and fitted up in the vessel new pumps with sufficient power to clear the ship's hold from the liquid which had accumulated there, as well as to keep the ship clear from any fresh drainage from a cargo of wet sugar.

A. L. Smith, for the appellant.—It may be taken as conceded by the charterers, that the ship *Isle of Wight* was at the time of loading able to carry every kind of cargo to any part of the world, except wet sugar. In the charter-party there was no express warranty as to the seaworthiness of the ship at the time of loading. There was no statement that the ship "being tight, staunch, strong and every way fitted for the voyage," should proceed to her port of loading, as is usual in charter-parties. The omitted words, when inserted, constitute a condition precedent, and their omission makes a great difference in the position of the parties. The master undertook to do all he could to keep the vessel seaworthy during the voyage, but this promise is not a condition precedent binding upon the owner.

[COCKBURN, C.J.—The express stipulation, that the vessel shall be seaworthy when the contract of affreightment comes into force, only expresses what the law implies when it is omitted. BRAMWELL, B.—How could the terms of the bill of lading as to the safe delivery of the cargo be complied with, if the ship was unseaworthy at the time of loading?]

It is contended for the appellant that the quantity of wet sugar to be shipped ought to have been measured by ascertaining how much could be put on board without rendering the ship unseaworthy.

[BRAMWELL, B.—The captain received the cargo. It follows from your argument that he ought not to have allowed it to be shipped.]

No warranty can be implied where the parties have expressed in words the warranty by which they mean to be bound —*Dickson* v. *Zizinia* (1), and therefore the express undertaking as to the seaworthiness of the ship during the voyage excluded any warranty by implication that she should be fit to load the cargo. Further, the charterers were bound to wait until the ship was provided, as she at last was, with proper pumps.

[BRAMWELL, B.—How can the shipowner get over the twelfth finding of the jury, that the captain was not able

(1) 10 Com. B. Rep. 602; s. c. 20 Law J. Rep. (N.S.) C.P. 73.

to make the vessel fit for the voyage within such a time as would not have frustrated the object of the adventure?]

The charterers might have provided a cargo of some other article specified in the charter party, and therefore the object of the adventure was not frustrated.

[MELLOR, J.—The adventure was frustrated as to the charterers' option under the contract of affreightment.]

Sir J. B. Karslake was not called upon to argue for the respondents.

COCKBURN, C.J. — Judgment in both actions must be given for the respondents. If it had been proved that the stipulation as to the vessel being seaworthy at the time of loading was purposely omitted from the charter-party, it might have been proper to consider the effect of leaving it out. As the evidence stands, the shipowner contracted to carry a cargo of wet or dry sugar, because, although in the charter-party sugar is at first mentioned in general terms only, yet afterwards, in fixing the rates of freight, sugar both wet and dry is specified. Upon the ship's arrival at the port of loading, her owner was bound to carry wet or dry sugar at the charterers' option. Wet sugar was tendered and shipped; it was then found that the vessel was in danger, because her pumps were not able to cope with the drainage from the cargo. This defect was occasioned by the fault of the shipowner, who failed to meet the exigency of the contract entered into by him. That is a plain statement of the legal result flowing from the facts arising in the case. The cargo was discharged, and the ship was at last rendered fit to carry wet sugar; but eight months elapsed before she was provided with proper pumps. Part of the cargo was damaged, owing to the insufficiency of the pumps. The judgment of the Court of Common Pleas was right, and must be affirmed.

BRAMWELL, B.—I am of the same opinion. The charterers were not bound to find a second cargo after the ship had been fitted with proper pumps, and the jury have found that the obje adventure was frustrated.

MELLOR, J., CLEASBY, B., Po and AMPHLETT, B., concurred.

Judgment c

Attorneys—Shum, Crossman & Crosen pellant; Waltons, Bubb & Walton, dents.

1874. May 28. } POPE (*appellant*) *v.* TE (*respondent*).

Adulteration of Food—35 & c. 74. s. 3—Sale of Article as a ture.

The second section of the Adult Food Act, 1870 (35 *&* 36 *Vict. c. poses a penalty on a person wh unadulterated an adulterated artic and the third section enacts tha who shall sell any article of food ' the same to have been mixed with substance, with intent fraudulen crease its weight or bulk, and wh declare such admixture to any thereof, before delivering the sam other, shall be deemed to have sold terated article of food" under th* Held, *that a person commits no p offence under the third section, if h come under the second section, by adulterated article as unadulterat*

Semble, *that the third section require the seller of an admixture the ingredients of such admixtu purchaser.*

[For the report of the above 43 Law J. Rep. (N.S.) M.C. 129.

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4 }
5 } GUNN *v.* ROBERTS.

ing—Authority of Master— Ship's ries—Liability of Owner upon Con- Supplies to Ship in Foreign Port, gent has been appointed.

master of a ship has no power to he owner's credit for requisite sup- the ship in a foreign port, at which a agent for her has been appointed; ship-chandler who, in ignorance of ing an agent at the port, furnishes or advances money for the ship's use n order given by the master without the authority, cannot recover the price of goods or the amount of the loan from the owner, if at the time of supplying the goods or advancing the money he had the means of knowing that an agent able and willing to furnish what was requisite for the ship had been appointed by the owner to act at the foreign port.

Quære, *whether a merchant, who being in "invincible ignorance" of the appointment of an agent, furnishes requisite supplies to a ship upon an order given by the master without the owner's sanction, can recover the price thereof from the owner?* Semble, *that he cannot.*

The declaration contained common counts for money lent and advanced to, and paid, laid out and expended for the use of the defendant at his request, for goods sold and delivered, for work done and materials provided, for interest, and for money due upon accounts stated.

Pleas—Except as to 98*l.*, first, Never indebted; second, Payment. As to 98*l.*, third, Payment into Court.

Joinder of issue upon the first and second pleas.

The cause came on for trial at the sittings in London, after Trinity Term, 1873, before Bovill, C.J., and a special jury, and the following appear to be the material facts of the case.

The plaintiff was a ship-chandler, resident at Quebec in the dominion of Canada, and the defendant was a merchant and shipowner, resident at Liverpool. During the year 1871 he was the sole owner of the ship *Aracana;* she was dispatched upon a voyage to Quebec, under the command of Charles Morrison, and was consigned by the defendant to Messrs. Ross & Co., of that port, who were likewise appointed the defendant's agents for disbursing her. The *Aracana* arrived at Quebec on the 12th of October, 1871, and during her stay there her captain contracted a debt with the plaintiff for goods supplied and cash advanced for the ship's use. Payment of this debt was demanded of the defendant, who refused to liquidate it on the ground that Morrison, the master, had no authority from the defendant to contract the above-mentioned debt as his agent. The master obtained sums of money from Ross & Co., but in his accounts he debited himself with a greater amount than the sums received from them; the surplus above the sums obtained from Ross & Co. had not been returned by the defendant. It was proved that Ross & Co. had funds in hand wherewith to supply necessaries to the *Aracana*, and that they would have been quite ready to make all proper advances for her use. It was admitted by the plaintiff that he had abundant means of finding out, before supplying the goods and advancing the money, that Ross & Co. were the consignees, and authorised to supply the *Aracana* with all that was required.

In answer to questions put by the learned Judge, the jury found that the plaintiff before and at the time of making the advances and supplying the goods, did not, in fact, know that Ross & Co. had the means and authority to furnish the ship with everything required for her use, and that he did not, in fact, know that they were acting as her agents; but that he ought in the ordinary course of business to have ascertained whether there was an agent to provide advances and supplies. The jury were further of the opinion that the debt sued for by the plaintiff was in respect of things reasonably necessary for the ship, but that Morrison, contrary to his instructions, obtained them, or the money to pay for them, from the

plaintiff; they found a verdict for the plaintiff for 113*l.* beyond the sum paid into Court.

A rule was obtained to enter a verdict for the defendant, pursuant to leave reserved, on the ground that, on the facts proved and found by the jury and admitted, the defendant was not liable in point of law for any part of the plaintiff's claim, or beyond the sum paid into Court.

J. P. Benjamin and *Wormald* shewed cause.—The plaintiff was unaware that the captain's authority was limited by the fact of there being agents for the *Aracana* at Quebec; he is therefore entitled to recover for necessaries supplied for the ship's use. In *Grant* v. *Norway* (1), the judgment of the Court was delivered by Jervis, C.J., and after remarking that masters of vessels have a general authority to sign bills of lading with respect to goods put on board, and that if a more limited authority is given a party not informed of it is not affected thereby, proceeds to cite the following passage from *Smith's Mercantile Law*, p. 59—"The master is a *general agent* to perform all things relating to the usual employment of his ship, and the authority of such an agent to perform all things *usual in the line of business* in which he is employed cannot be limited by any private order or direction not known to the party dealing with him." Therefore, it is immaterial for the plaintiff's case that the captain, Morrison, ought to have obtained every thing required from Ross & Co.

[BRETT, J.—In *Grant* v. *Norway* (1) the question was, whether the master of a ship signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The principle recognised by that decision does not seem to go further than this; namely, the captain has authority to sign bills of lading when the goods mentioned therein are on board the vessel, and this authority cannot be limited by any secret instructions from t owner. In the present case th advanced and the goods suppli plaintiff were "necessaries" in that the *Aracana* required th could they have been deemed ' ries" if the defendant himself l at Quebec? The owner of a ve be liable for "necessaries" obt her at a foreign port, although have secretly given peremptory tions to the master not to buy although there may be an agent who either is insolvent or r supply them; but Ross & Co. vent, and were willing to furnish with everything required whilst lying at Quebec.]

The plaintiff was not bound t whether an agent had been a for the *Aracana;* the law as to "necessaries" for an infant h bearing upon the present case, a action against an infant for the necessaries furnished to him, en the plaintiff as to the defendant's stances is not a condition precede right to recover—*Brayshaw* v. *E* Even in a home port as well as a one the master has implied aut borrow money for the necessar the ship if the owner is absent communication with him can without great prejudice and *Johns* v. *Simons* (3). A ship liable for necessary repairs done by the master's order, and the w cessary" means such as are fit per for the vessel upon her and such as a prudent owner if present, would order—*Webste kamp* (4).

[BRETT, J.—That case is not i it merely explains a part of the attached by law to the term " ries." In *Arthur* v. *Barton* (

(1) 10 Com. B. Rep. 665; s. c. 20 Law J. Rep. (N.S.) C.P. 93.

(2) 5 Bing. N.C. 231; s. c. 8 Law J. C.P. 153.

(3) 2 Q.B. Rep. 425.

(4) 4 B. & Ald. 352.

(5) 6 Mee. & W. 138; s. c. 9 La (N.S.) Exch. 187.

Abinger, C.B., in delivering the judgment of the Court of Exchequer, said—"Under the general authority which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required." In *Maclachlan on Merchant Shipping*, p. 133, it is said that—"the law throws upon the person seeking to recover for money advanced or supplies furnished, the burden of shewing that they were necessary for the ship at the time."]

The opinion expressed by the Court of Exchequer in the passage cited from *Arthur* v. *Barton* (5) was an *obiter dictum*.

[BRETT, J.—In *Maclachlan on Merchant Shipping*, p. 131, it is stated on the authority of *Arthur* v. *Barton* (5) that, "in cases where the owner, or his agent, is at the port of the ship's anchorage, or so near to it as to be reasonably expected to interfere personally, the master cannot, without special authority for the purpose, pledge the owner's credit for the ship's necessities."]

That proposition is erroneous. The master is a general agent for the owner —*Bristow* v. *Whitmore* (6).

[BRETT, J.—The master is an agent to obtain "necessaries."]

The extent of the master's authority has been enlarged by several cases decided since *Arthur* v. *Barton* (5), of which instances may be found in *Williamson* v. *Page* (7) and *Edwards* v. *Havell* (8). The goods supplied and the money advanced by the plaintiff were proved to be necessaries, and therefore *Mackintosh* v. *Mitcheson* (9) is not an obstacle in his way. *Webster* v. *Seekamp* (4), already cited, appears to have been recognised and adopted in *The Alexander* (10) and *The Riga* (11). In *McCready* v. *Thorn* (12) it was held that one part owner of a ship may bind the others in the absence of any known limitation upon his authority or expressed dissent upon the part of the other owners, for necessaries and supplies suitable and proper for the ship; and the decision appears to have proceeded upon the ground that a part owner has the same authority as the master. Further, the defendant has ratified the contract of the master with the plaintiff, for the defendant must have gathered from the master's accounts that he had obtained money from other persons than Ross & Co., and the defendant has not repudiated the loan by returning the difference to the plaintiff.

C. Russell and *A. Cohen*, in support of the rule.—In *Williams and Bruce's Adm. Prac.*, p. 38, it is said that, "to render a bottomry bond valid the necessity must be twofold; not only must there be, as we have seen, a necessity for obtaining supplies in order to prosecute the voyage, but also a necessity for raising the money by hypothecation arising from the impossibility of obtaining it in any other way." The same rule holds good when the owner is sued in an action at law for goods supplied for his ship's use. On behalf of the plaintiff it has been contended that the debt contracted by Morrison was incurred in respect of "necessaries;" but the question, whether the money advanced and the goods supplied by the plaintiff were "necessaries," depends upon the question whether it was "necessary" for the master to enter upon the contract with the plaintiff. It has not been proved to have been compulsory upon the master to pledge the owner's credit, for Ross & Co. would have fur-

(6) 9 H.L. Cas. 391; s. c. 31 Law J. Rep. (N.S.) Chanc. 467.

(7) 1 Car. & K. 581.

(8) 14 Com. B. Rep. 107; s. c. 23 Law J. Rep. (N.S.) C.P. 8.

(9) 4 Exch. Rep. 175; s. c. 18 Law J. Rep. (N.S.) Exch. 385.

(10) 1 W. Rob. 346.

(11) 41 Law J. Rep. (N.S.) Adm. 39; s. c. Law Rep. 3 A. & E. 516.

(12) 6 Sickels (New York Court of Appeals) 454.

nished the ship with everything required for her use.

BRETT, J.—The plaintiff supplied at Quebec to the captain of the defendant's ship goods and money, which for the purposes of our judgment may be taken to have been necessaries in the sense that the *Aracana* could not have safely sailed from that port without them. Ross & Co. had been appointed by the defendant agents for the ship during her stay at Quebec. It is clear that they had been supplied with sufficient funds, and had been instructed to advance whatever money might be required for her use; moreover, they were willing and able to furnish everything proper to equip her for a voyage. The captain fraudulently gave orders to the plaintiff, and I may here remark that fraud in him is immaterial: the plaintiff is an innocent party, he was wholly unaware that Ross & Co. were the ship's agents, and was not acquainted with them; but the jury have found that the plaintiff might have easily ascertained who were the agents for the *Aracana*. The defendant is sued upon an alleged contract entered into by the master for the repayment of money advanced and for the price of goods supplied. It has been urged as one of the points in favour of the plaintiff that the defendant must be taken to have ratified the captain's contract, because in effect he received part of the money advanced by the plaintiff: but it was incumbent upon the plaintiff to shew that the defendant at the time of receiving the money knew that it came from the plaintiff; and it was not identified as cash obtained from him, and knowledge of the circumstances under which it was advanced was not brought home to the defendant. There was no evidence that the defendant ratified the contract of the master. The circumstances proved in this case are of an ordinary character. The captain had no express authority to enter upon a contract with the plaintiff, but it has been alleged that he had an implied authority. Now the master of a ship has implied authority to bind the owners to pay money only when necessity compels him to pl their credit. If he borrows money in name, the ship must be lying in a where he cannot get funds from owners or from an agent recognise them; if he buys goods they must be sonably necessary for the ship; but mere circumstance of stores being quired for her use does not in itself w rant him in ordering them upon credit; must be shewn to have been reasona requisite to buy them by pledging t owners' credit. If the master is in a reign port, where he is destitute of fun and where there is neither an owner an agent, reasonable necessity may ex to obtain what is requisite upon the c dit of the owners: but if the vessel is i home port, where the owners can be ea communicated with, or if she is in foreign port, where they are persona with means and funds enabling them furnish her with what is wanted, the m ter has no power to bind the owners' c dit, and upon such facts a jury ought to directed that it cannot be requisite for master to contract debts in the own name. A similar rule is to be observ when the vessel lies in a port for wh an agent has been appointed. After he accepted the duty of supplying the ves he stands in the place of the owne it is no longer necessary for the mas to contract debts on account of the sl and his discretion is taken away by presence of the agent. This seems to sound law, and is supported by the E lish decisions. *Arthur* v. *Barton* (5) the leading case upon this subject, it always quoted with approbation, and never been questioned; it is adopted the text books. Before a creditor supplies to a vessel in a foreign port recover from the owners, he must sh first, that the things obtained by the m ter for the ship's use were such as a p dent owner would order if he were prese secondly, that neither the owners nor agent appointed by them were presen the port; if the plaintiff fails in prov either of the foregoing conditions, he f to establish a contract binding upon owners. I agree with the passages fi *Maclachlan on Merchant Shipping*, wl

n the course of the argument. len of proof lies upon the credi- nust shew that in the port where was lying no agent had been nomi- th authority to supply the ship; s not make this out, he does not the authority of the captain to ots for the ship's use, and he is tled to hold the owners liable. which I have mentioned is in ce with the law administered in t of Admiralty as to hypotheca- holder of a bottomry bond must hority in the master to execute liability of the shipowner under nstrument is extensive, and it is re to establish, not only that the as indispensable for the prosecu- e voyage, and that neither the or an agent appointed by him he port where the ship was lying, that by no other means than a bond could the requisite funds . A similar limitation exists as ower of the master to sell a pe- cargo; in order to justify the sale in must be unable to communi- the owner of it—*The Gratitu-* . It has been argued that the ge of the creditor whether the an agent in the port where she g is material, but the weight of authorities is to the effect knowledge is immaterial. I have est respect for the high attain- Dr. Lushington as to all matters l with maritime law, but I cannot t the opinion which he expressed *Faithful* (14) is sustainable. He have thought that if a person g money or furnishing supplies el's use, be in a state of "invin- norance as to the existence of an her in the port where she is may by a bottomry bond reco- can and the value of the goods owner; that is certainly a novel t of the law. However that may admitted by the plaintiff in the case that he had abundant means g out that Ross & Co. were the ship's agents at Quebec, and therefore it is unnecessary to consider whether the opinion expressed by Dr. Lushington in *The Faithful* (14) be correct. I think that the decision in *McCready* v. *Thorn* (12) does not derogate from the authority of *Arthur* v. *Barton* (5). So soon as it was established that Ross & Co. had been appointed agents for the *Aracana*, and that they had undertaken that duty, and were willing and able to fulfil it, the late Lord Chief Justice of this Court ought to have held that there was no case to go to the jury. Therefore this rule must be made absolute to enter a verdict for the defendant.

DENMAN, J.—I am of the same opinion. The only doubt arising in my mind was occasioned by the fact that the opinion expressed by Lord Abinger in *Arthur* v. *Barton* (5), and relied upon by the present defendant was not in point for the decision in that case; but it has been adopted as a correct statement of the law in the text-books. In *Maude and Pollock on Merchant Shipping*, p. 112 (3rd ed.), in treating of the power of the master to bind the owners, the following doctrine is laid down: "This implied authority does not, however, usually exist in cases in which the owner can himself personally interfere, as, for instance, when the ship is in a port where the owner resides, or at which he has beforehand appointed an agent." It appears to have been taken as settled law that the owner is not liable on a contract made by the master for the ship's use if an agent was present at the port; and the question which has usually arisen is, whether there was any other person who in point of fact was better qualified than the master to contract for what the vessel needed. If an agent for the ship has been appointed, clearly he is the proper person to supply what is wanted to enable the ship to proceed upon her voyage, and the master is not warranted in contracting debts upon her account. This view is consistent with the cases cited before us, and it follows that the defendant is not liable in the present action. It is unnecessary to discuss any other point. In my opinion no evi-

. Robinson 259.

Law J. Rep. (N.S.) Prob. M. & A. 81.

dence existed of ratification by the defendant. Whether the opinion of Dr. Lushington expressed in *The Faithful* (14) be or be not correct we need not now consider, for the plaintiff had ample means of finding out that Ross & Co. were agents to the *Aracana*, and were willing and able to furnish what was needed. In any point of view the defendant is entitled to have the verdict entered for him.

Rule absolute.

Attorneys—Stevens, Wilkinson & Harrics, for plaintiff; Field & Roscoe, agents for Bateson & Co., Liverpool, for defendant.

1874. May 8. } JAMES *v.* HENDERSON.

Parliamentary Election—Petition against Return of Candidate—Scrutiny—Inspection of Marked Register.

Leave to inspect the marked register of voters will be granted under the Ballot Act, 1872 (35 *&* 36 *Vict. c.* 33), *schedule* 1, *part* 1, *rule* 42, *whether the petition against the return of a candidate at a parliamentary election does or does not pray for a scrutiny.*

This was a petition under the Parliamentary Elections Act, 1868, against the return of the respondent for the city of Durham. The petition charged bribery and treating, but did not pray for a scrutiny.

A rule was obtained calling upon the respondent to shew cause why the clerk of the Crown in Chancery should not be at liberty to open a certain sealed packet alleged to contain the marked register of voters for the city of Durham, and permit the petitioner and respondent respectively, or their agents, to inspect such marked register, and take copies of the same (if required), upon paying for the same, the clerk of the Crown in C taking care that no other papers t said marked register be inspected

McKellar now shewed cause.—T plication ought not to be grant scrutiny is prayed for in the petiti therefore it is useless for the pe to inspect the marked register. I v. *Jolliffe* (No. 1) (1) a scrutiny wa for, and therefore the decision in t is distinguishable.

A. L. Smith, in support of the r not called upon to argue.

LORD COLERIDGE, C.J.—This is clear case. By the Ballot Act, 1 & 36 Vict. c. 33), schedule 1, par 42, all the documents used at a mentary election except the ballot and the counterfoils are to be public inspection; and therefore ties to an election petition ougl allowed to see the marked and that whether a scrutiny is claimed.

BRETT, J., concurred.

DENMAN, J.—In *Stowe* v. *Jolliffe* (1) the Court were of opinion marked register being by law open lic inspection, the fact of its havi included in the same package v counterfoils and the ballot paper not to prevent it from being p to any person wishing to see it decision is in point here. I wa of opinion in that case that lea spect the marked register ougl given, and my view of the law matter, as expressed in that case, unaltered.

Rule ab

Attorneys—J. Crowdy, agent for Trott Bishop Auckland, for petitioners; & Ford, agents for W. Marshall & Son, for respondents.

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(1) *Ante*, p. 173.

1874. May 8. } SEWELL v. CHEETHAM.

Evidence — Plea to Jurisdiction in Mayor's Court, London—Dishonour of Bill of Exchange—Proof of Cause of Action within the City of London.

In an action in the Mayor's Court, London, upon a bill of exchange for less than 50l. by indorsee against acceptor, the defendant pleaded to the jurisdiction of the Court; at the trial the bill was produced and was found to be payable at Smith, Payne & Smiths; a witness proved that Smith, Payne & Smiths carried on business in the city. There was no evidence where the bill was drawn, accepted or indorsed:— **Held**, *that the plea to the jurisdiction admitted merely the dishonour of the bill somewhere, that the above circumstances constituted no proof of dishonour within the City of London, and that there was no evidence that part of a cause of action accrued to the plaintiff within the jurisdiction of the Mayor's Court, pursuant to the Mayor's Court of London Procedure Act,* 1857 (20 & 21 *Vict. c. clvii.*), *s.* 12.

This was an action in the Mayor's Court, London. The plaintiff declared upon a *concessit solvere*, and the particulars stated the claim to be for the amount of principal, noting, and interest due upon the defendant's acceptance, dated the 9th of December, 1873, in favour of J. Nield, and endorsed by him to the plaintiff. The sum claimed in the particulars was 15*l.* 14*s.*

The following is a copy of the plea—

"And the defendant in his own proper person comes and says that this Court ought not to have or take further cognisance of this action, because he says that the supposed causes of action, and each and every of them, accrued to the plaintiff out of the jurisdiction of this Court and not in the parish of St. Helen, London, or elsewhere within the jurisdiction of this Court, and that the defendant did not dwell, nor did he carry on business within the City of London or the liberties thereof at the time when this action was brought, nor did he dwell nor did he carry on his business there at any time within six calendar months next before the time when this action was brought, nor did the cause of action either wholly or in part arise within the said city or the liberties thereof, and this the defendant is ready to verify, wherefore he prays judgment whether this Court can or will take further cognisance of this action."

The defendant resided at Stockport, in Cheshire.

At the trial in the Mayor's Court the bill was produced and was found to be payable at Smith, Payne & Smiths. The only witness called gave the following evidence—"I know the city. Smith, Payne & Smiths carry on business in the city." It was contended for the plaintiff that as the only plea went to the jurisdiction, the drawing, accepting, and dishonour of the bill were admitted, that the dishonour was a sufficient cause of action, and that it was proved to have taken place within the city by the production of the bill payable at Smith, Payne & Smiths, and by the evidence that this firm carried on business in the city. A verdict was thereupon entered for the plaintiff in the Mayor's Court.

A rule was obtained in this Court to shew cause why the verdict found in the Mayor's Court, for the plaintiff, should not be set aside, and instead thereof a nonsuit be entered in the cause pursuant to leave reserved, on the ground, first, that there was no evidence adduced at the trial in support of the plaintiff's claim; secondly, that there was no evidence on the part of the plaintiff that the cause of action arose within the jurisdiction of the Mayor's Court of London.

Kemp shewed cause.—It is admitted that in point of fact the bill sued upon was drawn and accepted at Stockport in Cheshire. But as this is an objection to the jurisdiction of the Mayor's Court taken by a defendant, the plaintiff need only prove that a part of the cause of action arose in the city of London—the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 12. It is therefore immaterial where the bill was drawn, accepted, or indorsed, for it was proved, as the plaintiff submits, that it

was dishonoured within the city: in fact the drawing, acceptance, indorsement, and dishonour were admitted upon the record, for the plea to the jurisdiction does not deny that the cause of action alleged in the declaration happened *somewhere*, but merely avers that it did not occur within the jurisdiction of the Mayor's Court. The bill speaks for itself: it shews that it was payable at Smith, Payne & Smiths, and the witness called at the trial deposed that this firm carried on business in the city; these facts, taken in conjunction with the admissions contained in the plea to the jurisdiction, establish that the bill was dishonoured within the city. This is all that under the before-mentioned statute the plaintiff is bound to shew, and nothing more need be proved to enable him to succeed.

Lewis Glyn, who was instructed to support the rule, was not called upon to argue.

LORD COLERIDGE, C.J.—I am of opinion that this rule must be made absolute. It may be assumed that the plea to the jurisdiction admits that the circumstances forming the plaintiff's claim took place *somewhere*, and merely denies that they happened within the city of London. It was, however, necessary for the plaintiff to prove that part of the cause of action arose within the jurisdiction of the Mayor's Court, and no attempt has been made to establish that the drawing, acceptance, or indorsement took place in the city; in fact it is not denied that the bill was drawn and accepted at Stockport. Presentment for payment and dishonour of a bill may be a material part of the cause of action, so as to give jurisdiction to the Mayor's Court if they occur in London; but the question here is, whether at the trial sufficient evidence was adduced that payment of the bill was refused in the city. Granted that the plea to the jurisdiction admits presentment for payment and dishonour in some place, the plaintiff gave no proof that the bill was presented at Smith, Payne & Smiths', as against the defendant the dishonour may have taken place anywhere. Upon this ground the rule to enter a nonsuit ought to be made absolute. Probably the defendant is entitled to ou on the ground that formal ought to have been given, t Payne & Smiths mentioned were the identical firm pr carrying on business in the city. at the trial could hardly assum of law, that the partners in th the persons mentioned in th my opinion some evidence them ought to have been laic jury.

BRETT, J.—I also am that the rule must be mad The plaintiff was bound to pr material part of the cause of a within the city. Now th drawn and accepted in Stock sibly it may be assumed th Payne & Smiths mentioned were the firm proved at the carrying on business in the c don; but it was necessary for to give direct evidence that th tion and dishonour took place jurisdiction of the Mayor's C quite consistent with the admi inferred from the plea to the j and with the bill, and with t at the trial, that the bill ma presented for payment to the d Stockport. No proof was anything which could be deem cause of action occurred i The proposition contended fo of the plaintiff really amour namely, that the mere produc bill being on its face payabl Payne & Smiths was evide honour within the jurisdict Mayor's Court.

DENMAN, J.—I express whether Smith, Payne & Sı tioned on the bill may be ass matter of law, to be identic firm proved at the trial to b on business in the city of Lond the other question I agree wit Chief Justice and my brother

Rule

Attorneys—De Jersey & Micklem, Pritchard, Englefield & Co., for

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874. }
ay 8. } MANN v. NUNN.

vidence—Verbal Promise contemporaus with but collateral to Written Agreet—Contract concerning Land—Statute Frauds (29 *Car.* 2. *c.* 3), *s.* 4.

The defendant demised to the plaintiff a essuage in an unfinished state, by a writn agreement. Before and at the time of the laintiff's signing the agreement the defendant verbally promised the plaintiff to put the messuage into a condition fit for habitation. Amongst the things which the defendant undertook to do upon the messuage was the construction of a water-closet. In an action for the breach of the defendant's promise to put the messuage into a condition fit for habitation,—Held, *that the defendant's verbal promise to finish the messuage was collateral to the written lease; that evidence of the promise was admissible at the trial; and that the defendant's undertaking to build a water-closet in the messuage was not a contract for an interest in land within the fourth section of the Statute of Frauds, and therefore need not be in writing.*

The declaration stated, that in consideration the plaintiff would become tenant t a certain rent to the defendant of a ertain house, and would erect certain rtures and other things therein, the id house being then within the jurisction of the Metropolitan Board of orks, and to which said house divers tutes for promoting and securing the blic health of the metropolis then and ays thereafter applied, and whereof defendant was then owner within the ning of the statutes aforesaid, to the nt and purpose that the plaintiff as nt to the defendant of the said house ld dwell therein with his family, ser- s and lodgers, and that the plaintiff ld carry on in the said house the or business of a provision dealer, efendant promised the plaintiff that uld do all things required to be by the owner of any house erected the jurisdiction aforesaid after the of the statutes aforesaid for pro- and securing the public health as d; and further that he, the defendant, would perform and do all things necessary to make the said house wind and water-tight, and reasonably fit for habitation as aforesaid, and (trade fixtures excepted) for the carrying on of business as aforesaid. And the plaintiff, relying on the said promise and promises of the defendant, became and was tenant to the defendant of the said house, with the intent and for the purposes aforesaid, and so continued for a long time; and all conditions were fulfilled, and all things happened and were done, and all times elapsed on the part of the plaintiff necessary to entitle the plaintiff to have the said promises performed by the defendant, and nothing happened or was done to disentitle the plaintiff therefrom: Yet the defendant would not do all or any things by the statutes aforesaid required as aforesaid, and did not nor would perform and do all things necessary to make the said house wind and water-tight and reasonably fit for habitation, and for the carrying on of business as aforesaid, but therein wholly made default; and by reason of such default the said house became fetid, unwholesome, damp and dangerous to the health of the plaintiff and other persons dwelling therein and resorting thereto as customers of the plaintiff in the business aforesaid, and by reason of the said house being and becoming and continuing fetid, unwholesome, damp and dangerous to health as aforesaid, the plaintiff was greatly hindered and damnified in the carrying on of his said business, and divers persons, customers of the plaintiff in the said business, ceased to deal with him, or to resort to the said premises, and divers other persons refused and ceased to be lodgers of the plaintiff, and divers members of the plaintiff's family became and were sick and disordered, and the plaintiff incurred medical and other expenses in and about endeavouring to cure them of the said sickness and disorders, and the plaintiff lost divers sums of money spent by him in preparing and fitting the said house for the said purposes of the business aforesaid, and in moving his goods, stock-in-trade and other things into and out of the said premises, and divers other sums paid by him, under

rotest, for the rent of the said premises, and was and is otherwise injured.

Pleas.—1. Denial of the defendant's promise.

2. Denial of the breaches.

Joinder of issue.

The cause came on for trial before Keating, J., at the sittings during Easter Term, 1874, and the following were the material facts—

By a memorandum of agreement, dated the 17th of September, 1873, the defendant let to the plaintiff a messuage for the term of three years from that day, at the yearly rent of 65*l*. The agreement, which was signed by both parties, contained the following stipulation: "The said Samuel Mann, his executors or administrators, shall and will, from time to time during the period that he or they shall continue to occupy the said shop, messuage or tenement under this agreement, keep repaired at his or their own expense all the windows, window-shutters, doors, locks, fastenings, bells and all other fixtures in, upon and belonging to the said premises, and all the internal and external wood, iron and stone work, and so leave same at the end of the said term."

At the time of the negotiations for letting the messuage it was in an unfinished condition, and before and at the time of signing the agreement the defendant verbally promised the plaintiff that if the latter would become his tenant, proper drains should be put in, the water laid on, a water-closet built and the messuage altogether finished fit for habitation; but this stipulation by the defendant was not inserted in the written agreement.

The plaintiff accordingly entered into possession, but the defendant failed to fulfil his verbal promise above mentioned. The roof leaked, the water was not laid on for about three weeks after the plaintiff's entry, the bad drainage caused offensive smells, and the water-closet was not completed. The plaintiff suffered damage of the kind mentioned in the declaration. Keating, J., asked the jury whether the defendant had undertaken to complete the messuage in the way and to the extent the law required as to sanitary matters. The jury found a verdict for the plaintiff, with 25*l*. damages, leave being reserved to the defendant to move to enter the verdict for him.

H. T. Cole now moved, pursuant to th leave reserved, on the ground that th verbal promise was inadmissible in ev dence, it being contemporaneous with a contradictory of the written agreement demise. He also moved for a new tri on the ground that the defendant's p mise as to building the water-closet w a contract as to an interest in land, a ought therefore to have been in writi pursuant to the fourth section of the S tute of Frauds.—The Judge ought have rejected the evidence as to the fendant's alleged verbal promise, for allowing it to be laid before the jur enabled the plaintiff to add by par term to the written demise.

[Lord Coleridge, C.J.—How can it b unreasonable in point of law that th er should be an additional contemporane ous promise by the defendant at the tim e of signing the lease? Denman, J.—The written lease is conclusive as to all the stipulations contained therein, but the parties were at liberty to add verbally a term consistent with the written demi The proposition relied upon for the de fendant is new to me.]

When the evidence of the verbal pr mise was admitted, it disclosed an unde taking to do things required to be don by a building owner within the metr lis — The Metropolis Management Ac 1855 (18 & 19 Vict. c. 120, ss. 75, 81 The Metropolitan Building Act, 1855 (1 & 19 Vict. c. 122, s. 19). Apart fro these Acts the law will not imply such contract by a landlord as that alleged the declaration; thus in *Chappell* v. *Gregory* (1), it was held that in the absen of any agreement on the subject a pers who agrees to take a house must tak as it stands, and cannot call on the le to put it into a condition which make fit for his living in. In *Hart* v. *Wi* (2) it was decided that there was n plied warranty on a lease of a ho of land, that it is or shall be reas

(1) 34 Beav. 250.

(2) 12 Mee. & W. 68; s. c. 13 Law (N.S.) Exch. 129.

fit for habitation, occupation or cultivation; and that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. In accordance with this principle of law it was determined in *Sutton* v. *Temple* (3), that on a demise of land or the vesture of land (as the eatage of a field) for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken. These authorities conclusively establish that no duty was cast by the common law upon the defendant as landlord to make the messuage fit for the habitation of the plaintiff and his family.

[DENMAN, J.—Granted that a duty is not imposed upon a lessor by the common law to put a house into a habitable condition, surely an express promise by him to finish a messuage is valid. What is the objection in point of law to an undertaking of that kind?]

Wallis v. *Littell* (4) may be relied upon by the plaintiff, but it is distinguishable; for in that case the inference of fact was that the oral arrangement was intended to suspend the written agreement, and not as a defeasance. But in the present action all the obligations of the defendant as landlord were ascertained by the lease in writing, and the alleged promise was an attempt to impose by parol evidence a heavier burden upon him than that contained in the written agreement. Moreover, the promise to build a water-closet related to land, and ought to have been in writing.

LORD COLERIDGE, C.J.—I am of opinion that we ought to refuse the rule asked for. The defendant was possessed of a messuage, and being the owner, was bound by the provisions of certain Acts of Parliament relating to the management of the metropolis to do certain things before the messuage could be deemed to be fit for habitation. He let the house to the plaintiff by a written agreement, and in the present action has been sued upon a verbal promise made to the plaintiff that the requirements of the beforementioned statutes should be complied with. At the trial the defendant relied upon the written agreement as being the sole evidence of the terms upon which the plaintiff was to hold the house, and it has been contended that proof of the verbal promise ought not to have been allowed. It has been further urged that the undertaking to build the water-closet was a promise concerning land, and therefore ought to have been in writing, pursuant to the fourth section of the Statute of Frauds. The facts established at the trial have been read to us, and the substance of the evidence is, that the defendant as landlord verbally promised to do certain things to bring the house into a condition fit for habitation. This seems a distinct agreement, quite collateral to the written demise. No satisfactory answer was given to my brother Denman's pertinent question as to the legality of the promise, when it has been made in express terms; and if an agreement like that verbally entered into by the defendant can be lawfully concluded, the evidence of the defendant's undertaking was properly received at the trial, although it was omitted from the written lease. Therefore, upon the first point, there will be no rule. The further question which has been raised in the course of the argument before us must also be decided against the defendant. An agreement to build a water-closet cannot in any light be an agreement concerning land. Upon both the points relied upon by the defendant's counsel the rule must be refused.

BRETT, J.—The result of the evidence seems to be that the plaintiff declined to become tenant to the defendant unless the latter would put the messuage into a condition fit for habitation, and would comply with the requirements of the statutes relating to the management of the metropolis. This agreement was verbally arrived at before the execution of the lease in writing, and before the entry of the plaintiff pursuant to the demise. It did not relate to

(3) 12 Mee. & W. 52; s. c. 13 Law J. Rep. (N.S.) Exch. 17.
(4) 11 Com. B. Rep. N.S. 369; s. c. 31 Law J. Rep. (N.S.) C.P. 100.

things to be done from time to time during the term, but it was an independent verbal undertaking, and evidence of it was properly laid before the jury. I am clearly of opinion that the contract to build the water-closet did not relate to an interest in land within the fourth section of the Statute of Frauds. Upon both grounds the rule must be refused.

DENMAN, J.—I am of the same opinion. I think that the evidence of the verbal promise did not vary the written agreement. The defendant's undertaking was collateral to the lease, and when once the evidence was admitted, it was for the jury to consider whether the contract alleged in the declaration had been proved. There was some evidence, and we ought not to interfere with the verdict upon either ground suggested by the defendant's counsel.

Rule refused (5).

Attorneys—W. F. Stokes, for plaintiff; Bennett & Co., for defendant.

1874. May 8. } ROBINSON *v.* EMANUEL.

Prohibition—Cause of Action—Mayor's Court, London—Costs.

The defendant, for valuable consideration, endorsed to the plaintiff a cheque for 10*l.*, *payable at a bank in the city of London; the cheque was dishonoured upon presentation; the indorsement was at S., in Yorkshire. The plaintiff having sued in the Mayor's Court, London, to recover the amount of the cheque, the defendant's attorney applied to this Court for a prohibition:*—Held, *that the dishonour of the cheque within the city of London did not give the Mayor's Court jurisdiction, that a prohibition ought to issue, and that the applicant for the same was entitled to costs.*

This was a rule obtained on behalf of Joel Emanuel, to shew cause why a writ of prohibition should not issue to the Mayor's Court, London, against further proceedings in the above-mentioned action, on the ground that the cause of action did not arise within the jurisdiction, nor the parties reside within the jurisdiction of that Court, and why the plaintiff should not pay to Joel Emanuel his costs of the application.

The plaintiff, who was an innkeeper at Scarborough, Yorkshire, sought to recover the sum of 10*l.*, being the amount of a dishonoured cheque, drawn by J. Lazarus & Co. upon the London and South Western Bank, Limited, of 7, Fenchurch Street, in the city of London.

The defendant, Michael Isaac Emanuel, had been lodging at the plaintiff's house at Scarborough, and had received the cheque from J. Lazarus & Co., of Houndsditch. He requested the plaintiff to cash the cheque. The plaintiff complied with this request; and, after deducting a small sum due for board and lodging, handed the balance to the defendant, who thereupon indorsed the cheque to the plaintiff. The defendant resided at Bayswater, in Middlesex, out of the jurisdiction of the Mayor's Court. The person applying for the prohibition was the defendant's attorney.

Willis shewed cause.—The cheque was dishonoured at the London and South Western Bank, which carries on business in the city of London; and it is sufficient if part of the cause of action arose within the jurisdiction of the Mayor's Court, the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 1, has given that Court a similar jurisdiction to that enjoyed by County Courts under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 1; for, under that section, where the debt claimed does not exceed 50*l.*, it is sufficient that the cause of action in part arises within the city of London. Here the dishonour of the cheque, a material part of the cause of action, occurred within the city.

(5) See *Morgan* v. *Griffiths*, 40 Law J. Rep. (N.S.) Exch. 46; and as to adding by parol a term to a written agreement, see *Malpas* v. *The London and South Western Railway Company*, 35 Law J. Rep. (N.S.) C.P. 166.

e Court make the rule absolute, it is bmitted that the person applying for e prohibition ought not to get costs— is the attorney for the defendant, who the real party to this application.

Kemp, in support of the rule, was not lled upon to argue.

LORD COLERIDGE, C.J.—This is an atmpt to bring the defendant before a ibunal, which has not lawful authority compel payment of the sum owing by im. The suit has been improperly instituted in the Mayor's Court by the plaintiff's attorney, who ought to know the law. We make the rule absolute with costs, and the attorney who commenced the suit must take the risk of an action at the suit of the plaintiff.

BRETT, J.—The plaintiff's attorney has attempted to force the defendant before an incompetent tribunal, after repeated decisions in this Court that the whole cause of action must arise within the city of London. Attorneys must be aware what the law is, and yet, for their own advantage, they persist in an illegal course. This Court will defeat these attempts to break the law. The applicant for the prohibition has done nothing wrong in coming before us, and if he were not to get his costs, he would inform this Court of the wrongful procedure at his own expense. Before attorneys commence suits in the Mayor's Court without jurisdiction, it will be well for them to consider whether, upon a prohibition, they may not be personally subject to the payment of costs.

DENMAN, J.—I agree with the other embers of this Court, that no reason ists why this rule should not be made solute. If we were to discharge it, we ould overrule *Quartly* v. *Timmins* (1).

Rule absolute, with costs.

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orney—Sadgrove & Son, for plaintiff; Joel Emanuel, for defendant.

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(1) 22 W. R. 488.

1874. May 8. } *Re* ISABELLA HOWARD. *Re* JULIA ASHCROFT.

Husband and Wife—Acknowledgment of Deed by Married Woman taken by Commissioners abroad—Affidavit.

The omission of the description of a special commissioner to take the acknowledgment of a married woman is an irregularity, when it occurs in the affidavit of verification; but it may be cured by a statement of identity.

An unsigned affidavit of verification sworn in a foreign possession of the British Crown may be sufficient, if the jurat contains a statement that the oath was administered before a Court, Judge, magistrate, commissioner, or notary public, pursuant to the General Rule of this Court, Hilary Term, 1863.

In Isabella Howard's case, Bovill, C.J., had appointed William Chaine, George Marriner, "George J. D. Hay, Esq., Major in Her Majesty's army, and the Rev. M. S. Laing, a Chaplain in Her Majesty's army, all now residing at or near to Rauril Pindee, in the East Indies, or any two of them, special commissioners to take the acknowledgment of Isabella, the wife of Frederick Howard, of Rauril Pindee aforesaid," of any deed by which it was intended to convey certain lands of Isabella Howard as a married woman, pursuant to 3 & 4 Will. 4, c. 74.

The certificate of acknowledgment stated that on the 12th of December, 1873, "before us, Malcolm S. Laing and G. J. Dalrymple Hay, two of the commissioners specially appointed pursuant to an Act passed in the 4th year of the reign of his late Majesty King William the 4th, intituled 'An Act for the Abolition of Fines and Recoveries and for the substitution of more simple Modes of Assurance' for taking the acknowledgment of any deed by Isabella, the wife of Frederick Howard, appeared personally the said Isabella Howard, the wife of Frederick Howard, and produced a certain indenture" therein described, "and acknowledged the same to be her act and deed."

The certificate was signed "Malcolm

fidavits should be filed.—The omission to state the places of abode of the special commissioners was a mere irregularity, which is cured by the other evidence of identification—*Seymour* v. *Maddox* (1).

[LORD COLERIDGE, C.J. — The order ought to be granted as to this point, unless there be authority to the contrary. BRETT, J.—The commission in Isabella Howard's case is directed to a major in Her Majesty's army, and the certificate is signed by a lieutenant-colonel, "B.S.C.;" but the identity is in effect asserted by the oath of the other commissioner.]

The other alleged informality, to which exception has been taken, is that the deponents have not signed the affidavits. They are however in conformity with the general rule of this Court, dated H. T., 13th of January, 1863—"With respect to acknowledgments of deeds by married women taken in any colony or foreign possession, being part of the dominions of Her Majesty, it is ordered that affidavits verifying the same made before any Court or Judge, magistrate, commissioner, notary-public or other person authorised to administer an oath, and containing in the jurat a statement by such Court or Judge, magistrate, commissioner, notary-public or other person, of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of the 3 & 4 Will. 4. c. 74. s. 85, relating to affidavits of verification."

LORD COLERIDGE, C.J.—I think that the provisions of the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4. c. 74) have been sufficiently complied with. [His Lordship stated the facts, and then proceeded.] The affidavits are not signed by the deponents. That is at first sight an irregularity; but the rule of the 13th of January, 1863, seems to apply, and the statements in the jurats as to the authority and office of the persons before whom the affidavits of verification were sworn seem sufficient. We have evidence before us that the certificate was duly signed. *In re Eady* (2) is an authority somewhat in point. We are now going a step beyond the decision in that case; but I think that the rule of the 13th of January, 1863, enables us to grant the order asked for. Our decision will apply to both *In re Howard* and *In re Ashcroft.*

BRETT, J.—The law requires an acknowledgment to be made before two special commissioners, when a married woman residing beyond the seas wishes to convey her real estate, and in taking her acknowledgment certain formalities are to be observed. Affidavits of verification have been brought before us, and the question arises, whether they comply sufficiently with the 3 & 4 Will. 4. c. 74. It has been suggested that they do not fairly identify the persons taking the acknowledgments with the special commissioners; I think, however, that the identification is sufficient. A further objection has been made that the affidavits are informal, because they have not been signed by the deponents. Without doubt, according to English practice, they ought to have been signed; but we have only to consider whether they have been sworn. And, as the Lord Chief Justice has pointed out, the rule of this Court as to the acknowledgments of deeds taken in a colony or foreign possession of Her Majesty cures what might otherwise have been an irregularity, and the affidavits appear to me sufficient. I cannot help saying that this Court ought to look with great strictness at matters relating to the acknowledgment of deeds executed by married women in England before persons conversant with the law; but a limit must be placed to strictness, and I think that we ought not to ask too much of unprofessional persons acting abroad. We are going a step farther than previous decisions, but we are justified in so doing.

DENMAN, J.—I concur with the opinions of the Lord Chief Justice and my brother Brett. I think the officer quite right in refusing to file the certificates and affida-

(1) 1 L. M. & P. (Prac. Cas.) 543; s. c. 19 Law J. Rep. (N.S.) Q.B. 525.

(2) 6 Dowl. 615 (P.C.).

vits without the sanction of the Court; but we have only to consider whether the 3 & 4 Will. 4. c. 74, has been sufficiently complied with. I think that the informality in not signing the affidavit is got over by *In re Eady* (2) and the rule of the 13th of January, 1863.

Order granted.

Attorneys—Doyle & Edwards, agents for T. T. De Lasaux, Canterbury, for applicants.

1874. May 8. } DOWDESWELL *v.* FRANCIS.

Appeal—County Court—Time for giving Security—13 & 14 *Vict.* c. 61. *s.* 14—*County Court Rules*, 181—19 & 20 *Vict.* c. 108. *s.* 70.

Notice of appeal from the decision of a County Court was duly given, and the Registrar fixed a day for the execution of the bond by the appellants and the sureties. Upon the appointed day two of the three appellants attended before the Registrar, but the sureties were not present, nor had the bond been prepared. The bond was subsequently prepared, and was executed by all the necessary parties but one, six days after the day originally fixed, and by that one seven days after that day. The respondent never waived the delay in the execution of the bond:—Held, *that the requisite security had not been given by the appellants in due time, and that the appeal could not be heard by this Court.*

This was a rule calling upon the appellants to shew cause why this case stated upon appeal against the judgment of the Judge of the County Court of Bedfordshire, holden at Ampthill, should not be struck out of the list.

The action came on for hearing on the 13th of June, 1873, and was adjourned by the learned Judge to the Court holden on the 11th of July, when judgment was delivered for the respondent. Notice of appeal, and of the names of the proposed sureties, was given by post to the respondent and the Registrar of the Court, and on the 21st of July the Registrar sent notic to the parties, fixing the 24th of July fo the execution of the bond by the suretie Neither the respondent nor his attorn attended upon that day, for they we satisfied as to the solvency of the p posed sureties. Two of the three app lants were present, but their sureties not attend; and, by some mistake, it been forgotten to prepare the bond t executed by the sureties. The bond afterwards prepared, and was exec by all the necessary parties but one the 30th of July, and by that party the 31st of July. The respondent ne waived the informality in the executi of the bond.

C. G. Merewether shewed cause.—T bond was executed in due time. T question to be decided upon the presen rule depends upon the true constructio of the statutes and rules, under whic appeals are allowed from County Cour to the Superior Courts of Common La at Westminster. The 13 & 14 Vict. 61. s. 14, enacts that a party to a cau in a County Court, dissatisfied wi the determination or direction there in point of law, may appeal to any the Superior Courts of Common La "provided that such party shall, wit ten days after such determination or dir tion, give notice of such appeal to other party, or his attorney, and also g security, to be approved by the clerk of Court, for the costs of the appeal, w ever be the event of the appeal." 19 & 20 Vict. c. 108. s. 70, provides t "Where by this Act, or any Act rela to the County Courts, a party is requi to give security, such security shall b the cost of the party giving it, and in t form of a bond, with sureties, to the o th party or intended party in the actio n o proceeding." The County Court R les, January, 1868, provide (No. 181) t hat, "in all cases where a party propose s to give a bond by way of security, he s hall serve, by post or otherwise, on the o ppo site party, and the Registrar at his o ffice, notice of the proposed sureties, in t he form set forth in the schedule, and t he Registrar shall forthwith give notice to both parties of the day and hour on whic h

he proposes that the bond shall be executed, and shall state in the notice to the obligee, that should he have any valid objection to make to the sureties, or either of them, it must then be made." All the proceedings of the appellant were taken in due time, except the preparation and the execution of the bond; and this was ultimately signed, with the consent of the Registrar, who has power to determine on what day the bond shall be executed. It is only necessary to comply substantially with the requirements of the statutes and rules as to appeals—*Griffin* v. *Colman* (1), *Walters* v. *Coghlan* (2).

W. Graham in support of the rule.—The enactments and rules giving the right to appeal must be strictly complied with. It is not disputed for the respondent that he cannot take advantage of a delay caused by an act of the County Court, but the appellants' contention is in effect that they need not attend upon the day fixed by the Registrar for giving the security, but that they may appear before him upon a day convenient to themselves.

[BRETT, J.—Surely the Registrar may postpone the time for giving the security at the request of the appellant.]

That is not the present case.

LORD COLERIDGE, C.J.—I am of opinion that this rule ought to be made absolute. [His Lordship stated the facts, and proceeded as follows.] I assume that the 24th of July was in time for the execution of the bond, but all the proceedings subsequent to that date were behind the respondent's back. The first of the former decisions, which I shall mention, is *Stone* v. *Dean* (3). That was a decision of the Court of Queen's Bench at the time when Lord Campbell presided; the Court was of opinion that the appellant must not only give notice of appeal, but also be ready to give security within ten days from the date of the decision in the County Court, and the Judges considered that the provisions of the 13 & 14 Vict. c. 61. s. 14 had not been complied with, and that an appeal could not be allowed. This decision was, ten years after, followed by *Waterton* v. *Baker* (4), where the Court of Queen's Bench refused to strike the appeal out of the paper. The reason for the decision in that case seems to have been that the delay which had arisen did not happen through the default of the appellant; he did all that he could do, and in my judgment the steps requisite to an appeal were in effect taken. *The Park Gate Iron Company* v. *Coates* (5) goes further in one sense than *Waterton* v. *Baker* (4); that is to say, no attempt appears to have been made by the appellants to give notice of appeal and security for costs within the prescribed period of ten days, but the respondent had distinctly waived the performance of the formalities imposed upon the appellants. None of these cases assist the present appellants. I will assume that the 24th of July was properly fixed for giving the security; but on that day the appellants were not ready to do what the law required of them, and they were clearly in default. The respondent did not waive the informality of the appellants' proceedings, for every proceeding subsequent to that date took place behind his back; and when he was informed of the irregularity, there was no assent to the steps which had been taken. In holding that the rule must be made absolute, we decide according to previous authorities.

BRETT, J.—This is a rule to strike the appeal out of the paper on the ground that the formalities imposed by the statutes and rules relating to the County Courts have not been complied with. In *The Park Gate Iron Company* v. *Coates* (5), it was in effect urged, that there could be no waiver by a respondent of the fulfilment of those formalities. The authorities, however, shew that they are

(1) 4 Hurl. & N. 265; s. c. 28 Law J. Rep. (N.S.) Exch. 134.

(2) 42 Law J. Rep. (N.S.) Q.B. 20; s. c. Law Rep. 8 Q.B. 61.

(3) E. B. & E. 504; s. c. 27 Law J. Rep. (N.S.) Q.B. 319.

(4) 9 B. & S. 23; s. c. 37 Law J. Rep. (N.S.) Q.B. 65.

(5) 39 Law J. Rep. (N.S.) C.P. 317; s. c. Law Rep. 5 C.P. 634.

[illegible] incapable of [illegible] and I adhere to what I said [illegible] the privilege of appeal- [illegible] a certain procedure [illegible] must be strictly followed, and the [illegible] must be completed within the [illegible] The rights of a success- [illegible] the County Court ought to [illegible] Two circumstances may ex- [illegible] appellant who has not perfected [illegible] in proper time.—First, he will [illegible] debarred from taking the opinion [illegible] Court, when the delay has [illegible] occasioned by his default, and [illegible] he has done all that could be rea- [illegible] expected of him; for instance, [illegible] Judge of a County Court may decide [illegible] without assigning the grounds [illegible] which he has proceeded, and the de- [illegible] party may not learn the reasons [illegible] the judgment until more than ten days after it has been given; for the purposes of an appeal, perhaps, the day of giving reasons may be considered the day of giving judgment. Again, an appellant may give due notice of appeal, yet the perfecting of the security may be postponed by the neglect of the registrar or of the respondent, as appears to have been the case in *Waterton* v. *Baker* (4). Moreover, the appellant may be misled by the respondent, and thereby may be prevented from doing what is requisite to an appeal. In each of these instances the unsuccessful party may be exempted from a literal fulfilment of the proper forms, and may be allowed to appeal.

A second circumstance, which will excuse an appellant from a strict compliance with the statute, is a waiver by the respondent of the appellant's default. But if there be delay by the appellant's neglect and without waiver by the respondent, the latter may apply to the Court of Appeal in the exercise of its judicial discretion to strike the case out of the list.

In the present appeal notice appears to have been given in due time, and it may be taken that until the 24th of July the statutory provisions had not been infringed; but on that day the appellants were in default, for they were not ready to complete the security at the time fixed by the Registrar, and the irregularity has not been waived by the respondent. The rule to strike out the appeal must be ma[illegible] absolute.

DENMAN, J.—I am of the same opini[illegible] In *Stone* v. *Dean* (3) it was held t[illegible] security for costs as well as notice of [illegible] peal must be given within ten days, a[illegible] that case does not appear to me to con[illegible] with *Waterton* v. *Baker* (4). *The P[illegible] Gate Iron Company* v. *Coates* (5) mer[illegible] shews that the formalities preliminary [illegible] an appeal may be waived by a respond[illegible] If the appellants had been ready to perf[illegible] the security upon the 24th of July, [illegible] might consistently with previous decisi[illegible] have allowed the present appeal to stan[illegible]; for although the statutory provisions m[illegible] be stringent, yet a rigid compliance wi[illegible] them may sometimes be dispensed wi[illegible] But we ought not to keep this case stan[illegible] ing in the paper. There was no wai[illegible] by, and there was no default in, the [illegible] respondent, and the delay did not arise fr[illegible] the act of the Court. The appellants [illegible] not complete the security in proper ti[illegible] and the delay was due to their laches.

LORD COLERIDGE, C.J.—I wish to [illegible] that the view of my brother Brett as [illegible] the day of the Judge's giving reasons [illegible] his decision being the day of giv[illegible] judgment for the purposes of appe[illegible] entirely consistent with *Waterton* v. *Baker* (4).

Rule absolut[illegible].

Attorneys—Lewis, Munns & Longden, agents for J. G. Shepherd, Luton, for appellants; [illegible]. Stimson, Bedford and London, for respondent.

1874. May 8. } TAPP *v.* JONES; PARSON AND LEE, *Garnishees.*

Prohibition—Mayor's Court, London—Court of Queen's Bench at Westminster—Master's Office in City of London—Judgment.

All the proceedings in an action at lau in one of the superior Courts are deemed t be taken before the Court itself; and al though the Master's Office of the Queen Bench is situate in the city of London, a judgment signed thereat is in contempl

tion of law a step in a suit taken before the Court itself sitting at Westminster; therefore a judgment of that Court does not create a cause of action within the city of London, upon which a suit in the Mayor's Court can be founded.

Rule to shew cause why a writ of prohibition should not issue to the Mayor's Court, London, against further proceedings in that Court against the garnishees upon the foreign attachment issued out of that Court in the said cause.

On the 21st of November, 1872, Tapp recovered a judgment by default against Jones in an action in Her Majesty's Court of Queen's Bench, wherein Tapp was plaintiff and Jones defendant, for the sum of 645*l.* 8*s.* 8*d.*, and the sum of 615*l.* 8*s.* 8*d.* or thereabouts still remained due in respect thereof. The cause of action in respect of which the said action was brought was a judgment recovered by Tapp against Jones in the Supreme Court of China and Japan for money lent and advanced by Tapp to Jones, whilst they both were resident at Shanghai within the jurisdiction of that Court; and the cause of action did not nor did any part thereof accrue in the city of London or the liberties thereof, or within the limits of the Mayor's Court, London. Tapp had by the process of foreign attachment of the Mayor's Court, London, attached all moneys of Jones in the hands of the garnishees, and the plaint in the Mayor's Court (to which the garnishees had duly appeared) was still pending. The garnishees carried on business in the city of London.

C. H. Anderson shewed cause.—The office of the Court of Queen's Bench is situate in the Temple within the limits of the city of London, and therefore within the jurisdiction of the Mayor's Court. It must be admitted that the Court of Queen's Bench ordinarily sits at Westminster, in the county of Middlesex; but nothing compels the Judges of that Court to sit at Westminster (1). In contemplation of law it ought to attend the person of the Sovereign for the time being. The law is different as to the Common Pleas, which must be held in some fixed place—Magna Charta, c. 11—which has long been determined to be Westminster (2).

[LORD COLERIDGE, C.J.—Such an argument as is now brought before us must lead to the conclusion that every judgment signed in the Queen's Bench gives a cause of action in the city of London.]

The judgment in the Queen's Bench is in itself a complete cause of action, and the plaintiff in the present suit may rely upon it alone without giving evidence of the original debt. The judgment is complete in contemplation of law when it is entered up at the master's office—*Fisher* v. *Dudding* (3).

[LORD COLERIDGE, C.J.—A writ issuing out of the Queen's Bench is tested at Westminster. DENMAN, J.—We are bound to take notice of the practice in the other superior Courts of Common Law.]

The proceedings at the Queen's Bench office are no doubt matters of detail, but they are acts done within the city of London.

[BRETT, J.—In order to give validity to the acts done at the office in the Temple, the authority of the Queen's Bench is necessary, and the Judges of that Court sit at Westminster.]

It may be suggested in support of the rule that an obstacle arises in the plaintiff's way, because in an action upon a judgment the venue must be Middlesex—2 *Tidd*, 1122, 9th ed.; 1 *Chitty on Pleading*, 281, 7th ed.; *Bullen and Leake's Precedents of Pleading*, 193, 3rd ed.—but that is because the record is in Middlesex.

Kemp, in support of the rule, was not called upon to argue.

LORD COLERIDGE, C.J.—In this case the original cause of action arose at Shanghai in China, and the plaintiff recovered judgment in respect of it in the Court of Queen's Bench. The master's office of that Court is situate in the Temple within the city of London. The plaintiff has sued upon this judgment by the process of foreign attachment, and he must prove a

(1) See Smith's Action at Law, pp. 6, 7 (11th ed.).

(2) See 4 Ins. p. 99, citing Britton.

(3) 9 Dowl. 872.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords,

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

TRINITY TERM, 37 VICTORIÆ.

1874. June 1. { MELHADO *v.* THE PORTO ALEGRE AND NEW HAMBURG AND BRAZILIAN RAILWAY COMPANY.

Company—Articles of Association—Contract before Incorporation—Privity of Contract—Preliminary Expenses.

A provision in the articles of association of a company incorporated under the Companies Acts, 1862 *and* 1867, *that preliminary expenses shall be defrayed by the company, does not enable the promoters to the company after its formation in respect of expenditure necessary for its establishment; for no privity of contract exists between it and the promoters.*

Declaration—That the defendants, before and after the time of the breaches of contract hereinafter mentioned, were a joint-stock company, limited, within the meaning of the Joint-Stock Companies Acts, 1862 and 1867; and it was provided by the articles of association of the said company that all accounts, charges and expenses incurred or sustained in and about the establishment of the company, not exceeding in the whole the sum of 2,000*l.*, which the board of directors of the said company should consider might be deemed and treated as preliminary expenses, should be defrayed by the company; and the plaintiffs say that they were the promoters of the said company, and incurred and sustained charges and expenses in and about the establishment of the company to an amount greatly exceeding the sum of 2,000*l.*; and all conditions had been fulfilled, and all times had elapsed, and all things had happened necessary to entitle the plaintiffs to receive payment from the defendants of the sum of 2,000*l.* in the said articles mentioned, and to maintain this action for the breach hereinafter mentioned, and nothing had happened to disentitle the plaintiffs to receive payment from the defendants of the said sum of 2,000*l.*, or to prevent the plaintiffs from maintaining this action for the said breach: Yet the defendants had not paid to the plaintiffs the said sum of 2,000*l.*, nor any part thereof, nor any portion of the charges and expenses incurred and sustained by the plaintiffs as aforesaid.

Demurrer and joinder.

Horne Payne, in support of the demurrer. — The declaration discloses no cause of action. First, it does not allege

either a contract or even a privity of contract between the plaintiffs and the defendants; it merely states that by the defendants' articles of association a sum of 2,000*l.* was to be devoted to the liquidation of preliminary expenses. The articles of association may be binding upon the shareholders—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 16; but they do not constitute a contract between a joint-stock company and persons who are not members thereof. At the time when the plaintiffs incurred and sustained the charges and expenses as to the establishment of the company, the defendants did not exist as a corporation, and no one then represented them; therefore no privity of contract can exist. Secondly, the declaration does not even allege a contract made by an agent on behalf of the company before it was constituted, and a ratification thereof by the company after it was incorporated; but the authorities shew that in order to ratify a contract made on his behalf the principal must be in existence at the time when it is entered into—*Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2). The defendants, therefore, are incapable of ratifying a contract made on their behalf before they came into existence.

Warton, in support of the declaration.—The plaintiffs did certain work the benefit of which was taken by the defendants; the former, therefore, in effect made an offer which the latter accepted. It is a well-established rule of law that although a person may not be bound to accept an offer, yet if he does accept it he enters into a contract which binds him as to all its terms. Here the defendants derived the full benefit of the plaintiffs' expenditure, and are bound to compensate them. Further, the payment of the preliminary expenses was a condition upon which the company came into existence.

Horne Payne was not called on to reply.

(1) 36 Law J. Rep. (N.S.) C.P. 94; s. c. Law Rep. 2 C.P. 174.

(2) 36 Law J. Rep. (N.S.) C.P. 161; s. c. Law Rep. 2 C P. 255.

LORD COLERIDGE, C.J.—With luctance I have come to the co that the defendants are entitle judgment; for if a company de vantage from expenditure incurr its behalf before its incorporati desirable that it should be held repay those who have aided in it tion; but, upon reflection, I car any ground upon which the plai succeed at law. The question i whether an action can be ma The plaintiffs rely upon the ar association, and a preliminary b probably formed, which may h mised that the plaintiffs' expens be liquidated by the company formation; but, even if we assur promise was made by persons i in the company before its incor the opinions of the Judges in *Baxter* (1) seem to shew that the could not be ratified by the comp its formation, and that the direct not lawfully reimburse the plai the money expended by them. that the declaration cannot be s upon the doctrine of ratificatio ther, no contract seems to hav between the plaintiffs and the de capable of being enforced at law referring to 1 *Lindley on Partner* (3rd edit.), it will be found to b that "if a company's deed of settle articles of association, provide for ment of a debt incurred before th tion of a company, the company sued for such debt, if the creditor trustee for him, is a party to the d a member of the company." In this passage, *Touche* v. *The Met Railway Warehousing Company* (3 and reference is made to *Parsons* v (4). I confess that I feel great in distinguishing the facts in th of these cases from the allegati tained in the declaration, which now considering; but perhaps the may be explained upon the equita ciple, which appears to have

(3) Law Rep. 6 Chanc. 671.

(4) 5 Hare, 102; s. c. 15 Law J. Chanc. 155.

the judgment in *Parsons* v. *Spooner* (4), so far as it is material to the present question; that principle seems to be, that the promoters and the company may be regarded as trustees and *cestui que trustent*, and that trustees are entitled to be indemnified by their *cestui que trustent* in respect of costs and expenses properly incurred. This may be a most excellent principle of equity; but, unfortunately, we cannot recognise it in a Court of Common Law; we are therefore bound to give judgment for the defendants.

MELLOR, J. (5).—I am of the same opinion. The declaration charges that preliminary expenses were incurred by the plaintiffs, and that they were the promoters of the defendants' company; and further, that what the directors should consider preliminary expenses should be defrayed by the company, for a provision to this effect was contained in the articles of association; the usual allegation as to conditions precedent is also inserted; these averments, however, do not disclose a cause of action. We should be greatly extending the law if we were to hold the company liable, because the directors have not carried out a discretion given to them by the articles of association; and there is no privity of contract between the parties to this action.

BRETT, J.—It may possibly be assumed that a contract existed between the plaintiffs and other persons not parties to this record, whereby expenditure necessary to bring the company into existence was to be repaid by the company after its formation; but no enactment can be found which will enable the plaintiffs to maintain this action, for the contract was not made with the defendants but before their existence; and the reasons given by the Judges in *Kelner* v. *Baxter* (1) establish, that in order to be capable of ratification a contract must be made on behalf of a person existing at the time when it was made. If it is suggested that the plaintiffs can sue because they expended money, without which the company could not have existed, the answer is that by force of that argument every promoter would be enabled to sue a company. Then it was contended, that one of the conditions of the company's existence was the payment of preliminary expenses; if this is a valid cause of action, it does not seem to me to be alleged in the declaration.

Judgment for the defendants.

(5) Mellor, J., was sitting in the Common Pleas under the Judges Jurisdiction Act, 1870.

Attorneys—H. Philipps, for plaintiffs; Walter Webb, for defendants.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Common Pleas.*)

1874. Feb. 6. June 16. } RODOCANACHI AND OTHERS *v.* ELLIOTT.

Marine Insurance—Policy—Risk during Land Transit—Restraint of Princes—Goods in a besieged Town.

The plaintiffs insured by a policy in the ordinary form of a Lloyd's policy, which was underwritten by the defendant, silks from Shanghai to London, via Marseilles or Southampton, "and whilst remaining there for transit, with leave to call at any ports or places in or out of the way, for all purposes including all risks of craft to and from the steamers." The risk insured included "arrests, restraints and detainments of all kings, princes and people," and there was a memorandum in the margin of the policy that the silks should be shipped by, inter alia, the Messageries Imperiales steamers. It was found as a fact that the company of the Messageries Imperiales always send goods from Shanghai to London overland through France, and that it was well known among underwriters that goods sent from China to London via Marseilles were always sent overland through France. The silks insured were shipped on one of the steamers of the Messageries Imperiales, and reached Paris via Marseilles, on the 13th of September, 1870, but at that time there was war between France and Germany, and the German armies were

BRAMWELL, B.—The first point made by the defendant in the argument before us (very faintly and not at all in the Court below) was that, supposing there was a loss within the policy, there was no right of abandonment, the plaintiffs having sold the goods insured and the vendees having claimed them on their arrival. The answer is, that if the plaintiffs had the right of abandonment and did abandon, the abandonees, the underwriters, thereby acquired all the rights of the assured, including their right to the price of the goods from the vendees. The second point made by the defendant was that the policy was limited to marine risks. What was in the contemplation of the parties does not matter, though we do not doubt that the assured must have had the whole journey in view. We must see what the policy says. It seems to us that it very clearly in words includes the whole transit by land as well as by sea. The words are "at and from Shanghai to Marseilles and London, *via* Marseilles." The slovenly mode of saying "and or," if the words were critically examined, might make a difficulty, though not on this question, but bearing in mind the course of carriage and transit found in the case, there can be no doubt the voyage or journey described includes a land passage through France. No doubt many of the perils are sea-perils exclusively; "perils of the seas" are named, but many are common to land and to sea, as "fire" and "thieves." With respect to the argument that as all risks of craft are mentioned it follows that while on land there is no insurance, the answer is that these words are necessary to cover the risk of the original embarcation and final landing which would not be included in the words "at and from" and "shall be arrived at." We see nothing to make us limit the plain words of the policy to the sea part of the transit.

There remains the question of whether there has been a loss from a peril within the policy, for if so, it seems to us there was a right to abandon, there being a loss of the goods, the assured having lost all control over them for an indefinite time, which might extend to such a period as to cause at least a loss or failure of the particular adventure, and possibly a total loss of the goods or more or less damage to them. In such a case the assured has a right to throw the risk on the underwriter (*Philips on Insurance*, par. 1624). Now the facts found are that the goods safely arrived at Paris, that on the 10th of September, carriage by railway from Paris to Boulogne became, and till after the commencement of this suit continued, impossible, in consequence of the German armies having taken possession of parts of the railway, and intercepted all communication thereby between Paris and Boulogne. This was the usual way in which such goods were sent from Marseilles *en route* to London. It was not said that they could not have been sent to Havre or other ports, but we think this immaterial. For supposing they could and ought to have been but were not, and supposing that in this the carriers were guilty of a breach of duty, that would not make the loss the less a loss to the assured. It is afterwards found that while the silks remained at Paris, on September 19th "the German armies completely invested Paris, and that from that day until the commencement of the action they completely surrounded and besieged Paris, and held military possession of all roads leading out of Paris, and prevented communication between Paris and all other places by reason whereof it was impossible to remove the silks from Paris." The result of this state of things undoubtedly was that the goods were prevented from leaving Paris and the whole adventure was broken up and so continued at the time when the notice of abandonment was given, and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods by restraint of kings and princes within the terms of the policy. This is not a mere temporary retardation of the voyage, but a breaking up of the whole adventure. It is well established that there may be a loss of the goods by a loss of the voyage on which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, "to a destruction of the contemplated adventure." *Anderson* v. *Wallis* (2) and *Barker*

(2) 2 M. & S. 240.

v. *Blakes* (3). But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city. But the city in which the goods were, was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army. What we have to look at is whether by the immediate and direct pressure of the German army the goods were prevented from reaching their destination. A siege like the present, which was intended to reduce the besieged place by famine, is a prohibition of all commerce and intercourse with the besieged place. Neutrals would have no right to cross the German lines in order to bring out their goods or for any other purpose that would or might in the least interfere with the military operations. In the case of a maritime blockade, neither the ships nor the goods on board of them within the port, and which are prevented from coming out, are seized or arrested, or in the actual possession of the blockading force; there is no specific action on the ships or goods beyond the prohibition from leaving the port. But surely they are "restrained" from coming out, and the prosecution of the adventure is thereby effectually impeded.

We quite agree with the opinion expressed on this subject by the supreme Court of the United States in *Olivera* v. *The Union Insurance Company* (4), and which was quoted before us,—that the inhabitants of a besieged town or the ships in a blockaded port may be properly said to be "restrained" from coming out by the action of the besieging army or the blockading force. A siege where the place is completely surrounded and invested is a stronger case than a mere maritime blockade.

In the latter case the land communications are unaffected, and the commerce by sea only is interdicted.

But we are unable to draw any materia[illegible] or substantial distinction between the two so far as they operate to prevent or r[illegible]strain all intercourse or commerce or t[illegible] entry into or exit of any goods from t[illegible] besieged or blockaded places. Groti[illegible] book 3, 1-5, places "*oppidum obsess*[illegible] *vel portus clausus*," exactly on the sa[illegible] footing as regards the right of neutrals [illegible]hold commerce with the belligerents; a[illegible] Lord Stowell's definition of a blockad[illegible] still more applicable to a siege like t[illegible] siege of Paris than to a blockade mer[illegible]ly maritime—"A blockade," he says, "i[illegible] a sort of circumvallation round a place [illegible]y which all foreign connection and corre[illegible]s-pondence is, as far as human force c[illegible]n effect it, to be entirely cut off. It is i[illegible]n-tended to suspend the entire commerce [illegible] that place, and a neutral is no more a[illegible] liberty to assist the traffic of exportatio[illegible] than importation."

If therefore the effect of the siege of Paris was to cut off entirely all foreign connection and correspondence, we think that the goods in this case were restrained or prevented from leaving Paris by the operation of that siege.

It appears to us that the words "restraints and detainments of all kings, princes and people, of what nation, condition or quality soever," are wider and more comprehensive words than those which precede them, and that they include and cover the case now under consideration. And, as a verbal matter, we may observe that restraint is a word more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods. We cannot help thinking that the doubt arises through the speedy arrival of these goods uninjured. Had they been perishable goods destroyed by the delay it would then be difficult to say that the loss was not caused by the restraint of princes.

For these reasons we are of opinion that the goods insured by the present policy were either restrained from leaving Paris or were detained within Paris by the immediate and direct action of the German army, and were therefore so lost

(3) 9 East 283.
(4) 3 Wheaton 183.

by one of the perils insured against as to entitle the assured to abandon them to the underwriters and claim for a total loss.

We think, therefore, the judgment of the Court below ought to be affirmed.

Judgment affirmed.

Attorneys—Markby, Tarry & Stewart, for appellant; Waltons, Bubb & Walton, for respondents.

1874. June 6, 8. } OGDEN *v.* BENAS AND ANOTHER.

*Banker—Cheque payable to Order—Forged Endorsement—*16 & 17 *Vict. c.* 59. *s.* 19—*Money had and received.*

Though the banker on whom a cheque is drawn which is payable to order, is protected by 16 & 17 *Vict. c.* 59. *s.* 19, *from proving it to be endorsed by the person to whose order it is made payable, if it purports to be so endorsed, yet a third person who cashes such cheque is not so protected, and if the endorsement of the name of the payee to whose order it was made payable be a forgery, such third person will be liable to refund to the drawer the money he received on the cheque when it was honoured by the banker on whom it was drawn.*

This was an action brought in the Mayor's Court of London to recover the sum of 12*l.* 12*s.* as money received for the use of the plaintiff under the following circumstances.

In February, 1873, the plaintiff, who was in London, wished to remit a sum of 12*l.* 12*s.* to a Mr. Vincent Willis at Liverpool. He accordingly drew a cheque for that amount on his bankers, the Holborn branch of the London and County Bank, and made it payable to "Mr. Vincent Willis or order." The cheque was dated the 15th of February, 1873, and was on that day sent by the post in a letter addressed to Mr. Willis according to his address at Liverpool. It never reached him, but was stolen in the course of its transit. The defendants are money changers and bankers at Liverpool, and on the 18th of February, 1873, a person who was a stranger to them came into their office with the cheque the plaintiff had so posted, and asked the defendants to cash it for him. The cheque at the time had the words "Vincent Willis" on the back of it. One of the defendants asked such person if he was the Vincent Willis to whose order the cheque was made payable. The person replied that he was, and upon such defendant asking how he could be sure that he was, he struck out the words "Vincent Willis," which were on the back of the cheque, and wrote them there again in the presence of such defendant as if he were writing his own name. The defendants then took the cheque and told the person to call again on the 21st of February for his money, which he would have if the cheque should be duly honoured. The cheque was then sent by the defendants to their London correspondents, who, presenting it to the bank on which it was drawn, received the amount thereof, and afterwards transmitted the same to the defendants. On the 21st the defendants paid over the 12*l.* 12*s.*, less 1*s.* their commission, to the person who had brought it to them, and who had so represented himself to be Vincent Willis, the payee. The endorsement of "Vincent Willis" was in fact a forgery, and the plaintiff, who had for the first time discovered on the 20th of February, 1873, that the cheque had been stolen, sought by this action to recover the amount of it from the defendants.

At the trial a verdict was entered for the plaintiff for 12*l.* 12*s.*, with leave to the defendants to move to set the same aside, and to enter a verdict for themselves.

That rule was argued before the Common Sergeant, who made the same absolute, but gave leave to the plaintiff to move in one of the Superior Courts to set the same aside, and to enter the verdict for the plaintiff for the amount claimed. Accordingly a rule *nisi* to that effect was obtained in the beginning of this term, against which—

M'Intyre and *M'Connell* now shewed cause.—The plaintiff has been guilty of negligence, and therefore ought not to

recover the amount of this cheque. The cheque was posted on the 15th, and ought to have reached its destination on the 16th of February, and the plaintiff ought on the 17th to have expected to have received an acknowledgement of its receipt by Willis. It was not presented to the defendants until the 18th of February, and there had therefore been time before then to have telegraphed to Willis as to whether he had received the cheque.

[LORD COLERIDGE, C.J.—How does the question as to negligence arise? This is a case as to money received for the use of the plaintiff.]

At all events the plaintiff might have stopped payment of the cheque, or if too late for that, he might on the 20th when he was aware that the cheque was stolen, have telegraphed to the defendants what had occurred, for the defendants did not pay the money to the forger until the 21st of February.

[LORD COLERIDGE, C.J.—The omission to telegraph is not negligence; moreover, the question does not arise.]

Then there was no privity of contract between the plaintiff and the defendants to found an action for money received for the plaintiff's use—*The Société Generale* v. *The Metropolitan Bank* (1). This action can only be supported upon the assumption that the defendants actually received the proceeds of the forgery for their own benefit; but they were merely agents; they did not get the benefit of the money, for they paid it to the person who had presented it, and they never received the money for themselves. The defendants had taken all reasonable precaution to ascertain the genuineness of the name, Vincent Willis, which was endorsed on the cheque, and had not paid over the money until the cheque had been paid in London. Moreover the defendants did no more than was ordinarily done by bankers, and they ought to be protected by 16 & 17 Vict. c. 59. s. 19, which makes a cheque on a banker payable to order when it purports to be endorsed by the person to whose order it shall be drawn payable, a sufficient authority to such banker to pay the amount to the bearer, and declares that "it shall not be incumbent on such banke[illegible] to prove that such endorsement or any sub[illegible]sequent endorsement was made by [illegible] under the direction or authority of th[illegible] person" to whom the said cheque w[illegible] made payable.

Wetherfield, in support of the rule. The case of *The Société Generale* v. *The M[illegible]tropolitan Bank* (1) was one of contract [illegible] does not apply to this case where the [illegible]fendants are sued for having been gu[illegible] of a wrongful act, and where no pri[illegible] of contract is required. The actio[illegible] not founded on contract but on [illegible] failure of consideration. Money had [illegible] received will lie against one who [illegible] wrongfully converted the property [illegible] another. The defendants have got [illegible] plaintiff's money by means of a for[illegible] endorsement, and it is well establish[illegible] that no property in a bill or cheque c[illegible] pass to another by a forged endorseme[illegible] The defendants, therefore, can have [illegible] right to keep the plaintiff's money th[illegible] have so received.

KEATING, J.—At the request of [illegible] Lord, who is indisposed and sufferi[illegible] from cold, I deliver judgment for him [illegible] well as myself.

We are of opinion that this rule ong[illegible] to be made absolute. The sum at sta[illegible] in this case is small, but the princi[illegible] involved is one of considerable importan[illegible] The facts are few and simple. Ogd[illegible] (the plaintiff) posted a cheque for twe[illegible] guineas to a Mr. Vincent Willis. T[illegible] cheque was drawn on the Holb[illegible] branch of the London and County B[illegible] in this form. [The learned Judge r[illegible] the cheque.] The words "Vincent Will[illegible]" endorsed on the cheque appeared at [illegible] trial, but when the cheque was sent [illegible] the post it had no endorsement. The [illegible]fendants are money-changers and bank[illegible] at Liverpool, and on the 18th of Febru[illegible] 1873, a person unknown to them preser[illegible] the cheque which was then endorsed [illegible] the words "Vincent Willis," and aske[illegible] have it cashed. One of the defend[illegible] said to such person, "How do I know [illegible] are the party to whose order the cheque [illegible] payable?" Upon which the person w[illegible] brought the cheque replied by erasi[illegible] the name "Vincent Wilson" indorse[illegible]

(1) 27 Law Times N.S. 849.

funds of the plaintiff to meet it. Plea, that the plaintiff was a married woman. Replication, that the causes of action arose exclusively from earnings, money, chattels and property within the meaning of the Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *and that the defendants knew when they accepted the plaintiff's banking account that she was a married woman carrying on her business separately from her husband:*—Held, *on demurrer, that the replication was good as shewing that the plaintiff was seeking a remedy for the protection of her earnings and property within the meaning of the* 11*th section of the Married Women's Property Act,* 1870.

First count.—For that in consideration that the plaintiff, who heretofore exercised and carried on, and still exercises and carries on, the business of a restaurant-keeper at Crown Court, Old Broad Street, in the city of London, as a sole trader, according to the custom of the said city of London, would become a customer of and keep an account with the defendants' bank for reward and commission to the defendants, the defendants contracted and agreed with the plaintiff that they would in the course of their dealings with her, as her bankers aforesaid, collect the moneys due on any bills of exchange which she might deposit with them, when and as they respectively became due and payable, and place the moneys so collected to her account at their said bank, and in pursuance of such contract and agreement, the plaintiff paid into the said bank for collection and the defendants received from the plaintiff for the purpose aforesaid a certain bill of exchange, accepted and payable by Otto Rocks at 3, Crown Court aforesaid, for the sum of 25*l.*, of which bill the plaintiff was the holder; and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said bill of exchange presented for payment, and the amount placed to her account by the defendants, in accordance with their promise aforesaid. Yet the defendants did not present the said bill of exchange to the said Otto Rocks at 3, Crown Court aforesaid, for payment when it became due, accord-

ing to the said contract and agr
and according to the custom and
of merchants and bankers, and
place the proceeds of the said bil
change to the plaintiff's account,
by the plaintiff has been deprived
remedies on the said bill of ex
and of the benefit of the amount
and has had cheques drawn by
the defendants dishonoured, and h
greatly injured in her credit, and
to injurious suspicions as to her s
and honesty, and otherwise damni

Second count.—For that the
employed the defendants as her b
for reward to the defendants, as
first count mentioned, and in co
tion thereof the defendants promi
plaintiff to collect all bills of ex
deposited with them by the plair
that purpose, and to give immed
tice to the plaintiff of the disho
any of the bills so deposited by th
tiff with the defendants for col
And the plaintiff deposited with
ants a certain bill of exchange for
tion as aforesaid for 25*l.*, accepted
Rocks, and the defendants duly pr
the bill, which was dishonoured;
conditions were fulfilled, and all
happened, and all times elapsed ne
to entitle the plaintiff to a fulfilr
the defendants of their said promi
to immediate notice from the def
of the said dishonour. Yet the
ants did not give to the plaintiff n
the said dishonour according to
tom and usage of merchants and b
by reason whereof the plaintif
cheques upon the defendants to
them paid out of the proceeds
said bill, which said cheques were
noured by the defendants, where
plaintiff was injured in her cred
compelled to pay cash for goods s
to her by divers persons, and l
benefit of the usual terms of deali
was otherwise injured and damnif

Third count.—For that plaintif
a sole trader according to t
tom of the city of London, and the
dants being bankers, as in the firs
mentioned, the plaintiff retained a
ployed the defendants as her bank
the defendants accepted the said

and employment upon the terms amongst other things that the defendants would from time to time out of moneys in their hands applicable for that purpose, pay on presentment any cheque which might be drawn by the plaintiff upon the defendants, and duly presented at their banking-house for payment by any person lawfully entitled to receive the amount of such cheque, not exceeding the amount of the moneys in the hands of the defendants applicable to the payment thereof at the time of the presentment thereof. That afterwards the plaintiff drew four cheques directed to the defendants, and thereby required the defendants to pay to Mr. Pitski, Mr. Lambert, Mr. Vinall John Robertson Reep, and Messrs. Simonds, respectively, the sums of 10*l.*, 2*l.*, 3*l.* 13*s.*, and 9*l.* 0*s.* 6*d.*, respectively, and delivered the said cheques to the said Mr. Pitski, Mr. Lambert, Mr. Vinall John Robertson Reep, and Messrs. Simonds, in payment of debts due to the said Mr. Pitski, Mr. Lambert, Mr. Vinall John Robertson Reep, and Messrs. Simonds from the said plaintiff, and the said Mr. Pitski, Mr. Lambert, Mr. Vinall John Robertson Reep, and Messrs. Simonds, being the lawful holders of the said cheques, and entitled to receive respectively the amounts thereof, duly presented the said cheques at the banking-house of the said defendants for payment; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said cheques paid by the defendants when so presented as aforesaid. Yet the defendants did not pay the said cheques when so presented as aforesaid, whereby the plaintiff was injured in her credit and reputation, and the said Mr. Pitski, Mr. Lambert, Mr. Vinall John Robertson Reep, and Messrs. Simonds and others, refused to deal with plaintiff in the usual way of her trade and business, as they otherwise would have done, and thereby the plaintiff has been deprived of the benefit of the usual terms of dealing, and has lost and been deprived of large gains and profits which she would otherwise have gained and acquired.

To the three counts the defendants pleaded (*inter alia*) eighthly, the coverture of the plaintiff.

Replication to such eighth plea, that the cause of action in the said counts arose exclusively from earnings, moneys, chattels and property of the plaintiff as and being a married woman, acquired and gained by the plaintiff as such married woman after the passing of the Married Women's Property Act, 1870, in a certain occupation and trade, to wit, that of a restaurant-keeper, in which the plaintiff was engaged, and which she carried on separately and apart from her said husband, and the defendants well knew when they accepted her banking account that she was such married woman so carrying on her business as aforesaid.

Demurrer to this replication, and joinder therein.

Sir H. James (*Murphy* with him), in support of the demurrer.—Though the plaintiff alleges herself to be a sole trader according to the custom of London, yet as she is a married woman she could not, prior to the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), have sued in the superior Courts without joining her husband—*Caudell* v. *Shaw* (1). The question in this case turns, therefore, on the meaning and effect of that statute. By the 1st section it is enacted that the wages and earnings of a married woman, acquired by her after that Act, in any employment, occupation or trade which she may be engaged in or carry on separately from her husband, and all investments of such wages or earnings shall be deemed property settled to her separate use. Then the 11th section declares that she may maintain an action in her own name for the recovery of such wages, &c., and that she may "have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings," &c., "as if such wages," &c., "belonged to her as an unmarried woman." The action in this case is not within that 11th section. It is not an action for the recovery of any of her wages, earnings or property, but for a breach of contract.

(1) 4 Term Rep. 361.

[BRETT, J.—When money is placed by a customer with a banker he undertakes to pay it according to the written authority of such customer. Is not the action for the breach of that a mode of protecting the customer's money?]

This action is not for the recovery of the plaintiff's money, nor can it be said to be for the protection of her money or property. It is for damages the plaintiff has sustained by her credit in business having been injured by the defendants' not honouring her cheques. It would be a straining of the enactment to say that "credit" is "property." "Property," within the meaning of this section, must be something which is *ejusdem generis* with what is there before described, viz., "wages, earnings and money."

[BRETT, J.—"Credit," as used in this declaration, means business credit. Is not such credit part of the business? LORD COLERIDGE, C.J.—May not money be invested in a business? If so it is property.]

If a married woman can sue in her own name on any contract made with relation to her business she might go on the Stock Exchange and speculate, and though she could not be sued thereon yet she would have all the benefit which might ensue from the same. It has been held that if she has no separate estate she cannot be made a bankrupt—*Ex parte Holland* (2). If the Legislature meant that a married woman might sue in her own name for the breach of any contract entered into with relation to her property it ought and would no doubt have said so in plain terms as it has done in the Divorce Act, 20 & 21 Vict. c. 85. s. 26, in the case of a judicial separation.

Day (*Currie* with him), *contra.*—This is an action to protect the property of a married woman, and is within the 11th section of the Married Women's Property Act, 1870. Credit goes to constitute goodwill and to the making of a business. The action is for damage done to the business, and is for the protection of her property. The investment of what a woman has earned is equally within the Act as the earnings themselves.

(2) 43 Law J. Rep. (N.S.) Bankr. 85.

[LORD COLERIDGE, C.J.—Must y shew that if the action is for the tion of the plaintiff's business, tha business arose from her earnings?

The replication does so. It alleg the cause of action arose exclusivel earnings of the plaintiff acquired in her trade.

Sir H. James in reply.—The ac founded on the contract—*Mar Williams* (3), and *Rollin* v. *Stewar*

Cur. adv.

The following judgment of the (5) was (on July 8) delivered by

LORD COLERIDGE, C.J.—This wa murrer, raising an important quest determination on the 11th section 33 & 34 Vict. c. 93, the Married W Property Act, 1870. The section, as it is material for this case, is as —"A married woman may main action in her own name for the re of any wages, earnings, money a perty by this Act declared to separate property, or of any p belonging to her before marriag which her husband shall by writing his hand have agreed with her shall to her after her marriage as her s property, and she shall have in h name the same remedies both ci criminal against all persons whom for the protection and security c wages, earnings, money and proper of any chattels or other propert chased or obtained by means ther her own use as if such wages, ea money, chattels and property belon her as an unmarried woman."

The question raised in this c whether a married woman can unc words of this section maintain an for breach of contract against her b The declaration against the defe contained three counts,—the first presenting for payment a bill of ex deposited with them for that pu

(3) 1 B. & Ad. 415.

(4) 14 Com. B. Rep. 595; s. c. 23 Law (N.S.) C.P. 148.

(5) Lord Coleridge, C.J.; Brett, J.; a man, J.

ond for not giving notice to the
f of the dishonour of a bill of
ge entrusted to them; and the
or dishonouring cheques drawn by
aintiff upon the defendants, the
ants having at the time funds of
intiff to meet them.
defendants pleaded that the plain-
s a married woman. The plaintiff
that the causes of action arose
vely from earnings, money, chattels
operty within the meaning of the
d Women's Property Act, 1870,
at the defendants knew when they
d her banking account that she
married woman carrying on her
s separately from her husband.
s replication the defendants de-
l.
are of opinion that the replication
. The words of the section are very
nd provide for two states of things.
first portion of this section a mar-
man may "maintain an action" for
overy of wages, earnings, &c., and
second portion of the section she
ave the same remedies both civil
minal against all persons whosoever
protection and security of such
earnings, &c., as if such wages,
gs, &c., belonged to her as an un-
d woman. The question is perhaps
ecisely the same on all the three
, but to take the third count first,
ain that the section will become
useless if a married woman other-
ithin its provisions cannot maintain
tion against her banker for dis-
ring her cheque. It does not neces-
follow, because a married woman
e her banker for dishonouring her
, that the general proposition is
vithout qualification that she can
ain an action for damages for breach
tract. The relation of banker and
er is a peculiar one. It is that of
and creditor with a custom super-
to pay the creditor's cheques—
bley v. *Hill* (6), and the judgments
l Cottenham and Lord Campbell)—
becomes perfectly clear that so far
count for dishonouring the cheque is
ned the plaintiff is seeking a remedy
for the protection of her earnings within the meaning of the 11th section.

The first and second counts undoubtedly raise a somewhat broader question, as they are founded upon a contract of agency. But we think that the words of the 11th section, to which we have referred, are sufficient to cover this state of circumstances also. To hold otherwise would be in effect to say that a married woman could not safely have any of her earnings paid to her by bills of exchange, for that she has no protection against the negligence of the bankers to whom she intrusts them. Our decision in favour of the plaintiff under these circumstances must not be taken to affirm, nor will it affirm, the general proposition that under this Act, and without reference to particular circumstances, a married woman can contract. This remark incidentally disposes of the argument very properly drawn by Sir Henry James from the 25th section of 20 & 21 Vict. c. 85, the Divorce Act. On the whole we are of opinion that the replication is good.

Judgment for plaintiff.

Attorneys—Reep, Lane & Co., for plaintiff; R. & S. Mullens, for defendants.

1874. June 10, 11, 12, 23. } STOWE *v.* JOLLIFFE (No. 2).

Parliament—Register of Voters, how far conclusive—6 Vict. c. 18. s. 79—35 & 36 Vict. c. 33. s. 7.

The Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 7, *enacts that "at any election for a county or borough, a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote: Provided that nothing in this section shall entitle any person to vote who is prohibited from voting by any statute, or by the common law of Parliament, or relieve such person from any*

(6) 2 H.L. Cas. 28.

penalties to which he may be liable for voting:"—Held, *that the register of parliamentary voters is, by force of the Ballot Act,* 1872, *conclusive not only on the returning officer, but also on any tribunal which has to inquire into elections, except in the case of persons ascertained by the proviso in the above enactment.*

The persons "prohibited" from voting by the proviso are not those who, from failure in the incidents or elements of the franchise, could be successfully objected to on the revision of the register on the ground of the receipt of alms, the receipt of parochial relief, non-residence within the proper distance of a borough, non-occupation, or insufficient qualification; but the persons "prohibited" from voting are those who, from some inherent or for the time irremovable quality in themselves, have not the status of parliamentary electors, for instance, peers, women, persons holding certain offices or employments, and persons convicted of crimes, which disqualify them from voting.

CASE stated by Mellor, J.

This was a petition under "The Parliamentary Elections Act, 1868," against the return of the above-named respondent as a member of Parliament for the borough of Petersfield, Hampshire, and which came on to be tried at the said borough in April, 1874. The petition prayed that it might be determined that the respondent was not duly elected or returned by a majority of legal votes, and that William Nicholson, the other candidate at the said election, had a majority of legal votes, and ought to have been returned instead of the respondent. On the trial the following facts were admitted or proved, and Mellor, J., thought it right to reserve, for the opinion of this Court, certain questions arising therefrom.

At the last election for the said borough the respondent and William Nicholson were respectively candidates. The nomination took place on the 30th of January, 1874, and the poll was taken on the 3rd of February, and the returning officer returned the respondent as being duly elected. The number of votes recorded for the candidates was as follows—for the respondent 372, and fo Nicholson 361, making a major respondent of eleven votes. Twe who voted for the responden voters who voted for Mr. Nich proved to have received paroc within the meaning of 2 Will. 36, between the 31st of July, 18 day of the election. There wa under the management of the the will of John Goodger, d about the 22nd of April, 166 funds were applied, in confor the directions of his will, for t of the poor inhabitants and children of the tithing of West teen voters who voted for the r and one who was also objected petitioner, but who voted for M son, received clothing or good 31st of July, 1873. The son voter for the respondent was, said date and still was, apprent charity, and the son of anc voter was, before and since the educated by the charity. Fif voters, who voted for the res the last election, were prove received parochial relief, also meaning of 2 Will. 4. c. 45. s. twelve months previously to t July, 1873. One other voter, for the respondent at the las was proved not to have resided borough, or within seven ste thereof, or of any part there year preceding the 31st of Jul between that time and the d election. One other voter, for the respondent at the las was proved not to have resi the borough, or within seven n of, or of any part thereof, a between the middle of July, the beginning of November, 18 teen other voters, the nature qualification appeared upon t to be the occupation of premi borough, and who, save as afo no other qualification, and wh the respondent, were proved cupied the premises, but not t cupied them as owners or ten time between the 31st of July, the day of the election. Twe

voters, alluded to already under some previous head other than the thirteen last-mentioned and being voters who voted for the respondent, were proved to have had no sufficient qualification entitling them to be upon the register, on the ground of non-occupation, non-rating or change of occupation.

The question for the opinion of this Court was, whether any of the above votes ought to be struck out and disallowed, and if so, which of them; and such as ought to be struck out and disallowed must be taken off the number polled, and the majority determined accordingly. The case stated that Mellor, J., had reserved his determination whether the respondent was duly returned, or whether he was not, and the said William Nicholson was duly elected, and ought to have been returned, until this Court had determined the above questions, and that he should certify to the Speaker of the House of Commons according to the decision of this Court.

Hardinge Giffard (*C. S. C. Bowen* with him), for the appellant.—The questions which arise in this case will depend chiefly upon the true construction of the Ballot Act, 1872; the 7th section of that Act is directed merely to the procedure during an election; every person whose name is on the register is entitled to vote at an election, although his vote may afterwards be struck off upon a scrutiny.

[LORD COLERIDGE, C.J.—That construction seems to render the proviso inconsistent with the rest of the section.]

In order to construe the Ballot Act, 1872, it will be necessary to pass in review the former procedure at parliamentary elections. The returning officer, with or without assessors, decided who was the successful candidate; his decision was subject to the supervision of the House of Commons; but under the Reform Act, 2 Will. 4. c. 45, a register of voters was introduced; and by 6 Vict. c. 18, further provisions as to registration were enacted. The construction of the Ballot Act, 1872, requires that the register of voters shall be deemed conclusive at the time of polling, but that upon a scrutiny it shall be open, for that statute clearly contemplates a scrutiny in section 25, and in schedule 1, part 1, rule 41. It was no doubt intended that the confusion, which would be occasioned by investigating claims to vote, should be avoided at the time of polling. The persons mentioned in the special case are all disqualified; it is only necessary to mention specially those who have received relief from the charity; poor and indigent persons are disqualified from voting by the common law of Parliament; this is plain from the proceedings on the election petition for the borough of Reading, as reported in the journals of the House of Commons, 7 Anne, 2nd and 4th of December, 1708, and from the judgments in *Smith* v. *Hall* (1).

A. Thesiger (*W. G. Harrison* and *R. E. Couch* with him), for the respondent.—The repeal of the provisoes in 6 Vict. c. 18. s. 79, and the Ballot Act, 1872, s. 7, have rendered the register conclusive as to the right to vote after it has been settled by the revising barrister; the only persons who, being upon the register, can be objected to at the time of polling, are those mentioned in the proviso to the latter enactment. The history of election law may be divided into five periods—first, the time before the Reform Act, 1832; secondly, the period between the Reform Act, 1832, and 6 Vict. c. 18; thirdly, the period between 6 Vict. c. 18 and the Representation of the People Act, 1867; fourthly, the period between the Representation of the People Act, 1867, and the Ballot Act, 1872; fifthly, since the Ballot Act, 1872. As to the first period, it is said in *Rogers on Elections*, ch. 2, p. 48 (10th ed.), that "the rights of voting for cities and boroughs were not, as in counties, regulated by any statute or fixed rule uniformly pervading the whole kingdom. They were established by special Acts of Parliament, by charters, by local usage, or by last determinations of the House of Commons applicable to the particular place. Where none such existed to abridge or limit the common law right, it was said to belong to the inhabitant householders." In particular boroughs, customs existed disqualifying the reci-

(1) 15 Com. B. Rep. N.S. 485; s. c. 33 Law J. Rep. (N.S.) C.P. 59.

pient of alms from voting; originally no usage prevailed through England which prevented the objects of charitable donations from taking part in elections, but a practice of holding them disentitled to the franchise sprang up amongst parliamentary committees—*Rogers on Elections*, ch. 4. p. 181 (10th ed.); *Orme on Election Laws*, p. 104; *Elliott on Parliamentary Electors*, p. 250. A "charity" has been defined to be "sums arising from the revenue of certain specific funds which have been established or bequeathed for the purpose of assisting the poor;" but alms have been interpreted to mean "parochial collection or parish relief"—1 *Douglas's History of Controverted Elections*, 870. The receipt of alms is only evidence of inability, which may be rebutted by circumstances—*Rogers on Elections*, ch. 4. p. 179 (10th ed.). It was a matter of evidence upon the trial of the petition whether a usage existed in the borough excluding the recipients of charitable donations from voting; and the special case contains no statement as to what usage existed in Petersfield before 1832, so as to enable this Court to ascertain whether the objects of the charity were then prevented from voting by the common law of Parliament.

As to the second period, the Reform Act, 1832, introduced a register (2 & 3 Will. 4. c. 45. ss. 37, 54); but the voter might be questioned as to whether he retained his qualification at the time of tendering his vote, section 58, and the register itself could be impeached before a select committee of the House of Commons, section 60. In *Rogers on Elections*, ch. 19, p. 547 (10th ed.), it is said that "most committees held the register under the Reform Act (see section 60) to be final, and refused to inquire into objections which might have, but had not, been raised before the revising barrister." The extent to which the register could be questioned is illustrated by the following cases—*David Hermitage's Case* (2), *George Wilkinson's Case* (3), *Stephen Cruttenden's Case* (4), *Richard Gates's Case* (5), *William Collins's Case* (6), *John Lock's Case* (7 *Peter Davis's Case* (8), *Thomas Coo Case* (9), *William Winwood Goodma Case* (10), *Charles Aldridge's Case* (1 *William Hall's Case* (12).

As to the third period, in *Rogers Election Committees*, p. 211, after ci 6 Vict. c. 18. s. 98, which rendered register conclusive, it is said that "mittees have acted strictly up to the visions of this section, and except w the barrister has come to an express sion upon the point, have refused open the register, or enter upon any qualification existing at the time of revision." And upon an appeal to Court, the decision of the revising rister was considered so far conclu that it was requisite to argue the case the appellant, if he appeared, though one represented the respondent—*Co* v. *Harris* (13), *Pownall* v. *Hood* (14).

As to the fourth period, the Ju acting under the Parliamentary Elect Act, 1868, have to some extent dee the register open—*The Coventry* (15), *The Oldham Case* (16).

As to the fifth period, apart from Ballot Act, 1872, it may be supposed the Legislature would be inclined to th it reasonable and convenient that a whose name was registered should no prevented from voting, because he subject to some disqualification rende him liable to be struck off the elect list by the revising barrister; it is tended that by that statute the regis has been made conclusive as to the ri to vote, except in those instances me tioned in the proviso to section 7. Th section contains a general declaration the law; the titles of the divisions in statute are parts of the statute itself, a

(2) Knapp & O. 83.
(3) Ibid. 104.
(4) Ibid. 109.
(5) Ibid. 112.
(6) Knapp & O. 121.
(7) Ibid. 121.
(8) Ibid. 160.
(9) Ibid. 240.
(10) Ibid. 257.
(11) Ibid. 271.
(12) Ibid. 415.
(13) 7 Man. & G. 97; s. c. 14 Law J. Re (N.S.) C.P. 72.
(14) 11 Com. B. Rep. 1; s. c. 21 Law J. Re (N.S.) C.P. 12.
(15) 1 O'M. & H. E.P. 107.
(16) Ibid. 155, 157, 159.

ion 7 comes under "Amendment of ," and not under "Procedure at tions." The words, "entitled to vote," ht to bear the same meaning through- the section; but according to the r on behalf of the petitioner they r, in the body of the section, to the of polling, and in the proviso, to the l of a petition. The object of the lot Act was to maintain secresy as to ch was the candidate for whom an tor voted; this is plain from section which allows a vote to be struck off n a voter has been tampered with, it is unnecessary to ascertain how he d (17); but if the contention for the itioner be correct, the whole register l be open at the trial of the petition, the Judge will have to investigate stions which ought to be settled by revising barrister. The power of as- taining how an elector has voted, en in schedule 1, part 1, rule 41, nly to be used when persons have ed in spite of the proviso in section 7. meaning of the words, "prohi- d from voting," is very important. y do not include those who, from e failure in the incidents of the fran- se, are not entitled to be registered. instance, the proviso does not extend persons in receipt of parochial relief, o may be objected to before the revis- barrister, pursuant to 2 & 3 Will. 4. 5. s. 36. These words refer to per- s who suffer under a disability to vote, ated either by statute or by the com- n law of Parliament. The following may ited as instances of persons who are ohibited from voting" by statute—Re- ue officers before the repeal of 22 Geo. 41 (18)—1 *May's Constitutional His- of England*, ch. 6. p. 288; metropoli- policemen (10 Geo. 4. c. 44. s. 18); bo- gh constables (19 & 20 Vict. c. 69. s. 9); tors employed for reward at elections & 31 Vict. c. 102. s. 11); persons d guilty of bribery (31 & 32 Vict. 5. s. 45). Amongst those who are ohibited from voting" by the common of Parliament may be mentioned peers—*Elliott on Parliamentary Electors*, 261. Probably aliens (19) are subject to the same incapacity, although in the *Oldham Election Case* (20) Blackburn, J., "held that infants and aliens, being men subject to a legal incapacity, could not be struck off, unless an objection to them had been first taken before the revising barrister; but that women, not being men at all, were in a different position; their votes, therefore, might be struck off; but that if it came to a question of one vote, he would reserve this point for the Court of Common Pleas." None of the voters referred to in the special case were prohibited from voting within the meaning of the proviso to the Ballot Act, 1872, s. 7.

Hardinge Giffard, in reply.—It is a mistake to argue that by the Ballot Act, 1872, it was intended to get rid of a scrutiny, and to make the register conclusive. The object of registration is to diminish expense, as may be gathered from the preamble to 2 & 3 Will. 4. c. 45. 6 Vict. c. 18. s. 79, remains in part unrepealed. If the contention for the respondent is to prevail, the portion still in force will have much greater effect than it had before the Ballot Act, 1872. It will be a strange result if the Legislature has created so great an alteration in the law by a mere matter of inference. The persons mentioned in the special case were clearly disqualified from taking part in an election, and were "prohited from voting" within section 7. The recipients of the charity belonged to that class of indigent persons to whom the law of Parliament has ever refused to entrust the franchise.

Cur. adv. vult.

LORD COLERIDGE, C.J. (on June 23).—This is a case stated for the opinion of this Court by my brother Mellor, who tried the Petersfield Election Petition. The petitioner was to be entitled to the seat, first, if the register is not conclusive as to the right to vote on the part of all or some of the voters who voted for the sitting member; or secondly, if some

(7) See *Malcolm* v. *Ingram*, Boston Election ion, *post*.
(8) 31 & 32 Vict. c. 73; 37 & 38 Vict. c. 22.

(19) See the Naturalization Act, 1870 (33 & 34 Vict. c. 14) s. 2.
(20) 1 O'M. & H. E.P. 159.

of those voters come within the proviso of section 7 of 35 & 36 Vict. c. 33.

The case was argued before us with remarkable learning and clearness by Mr. Giffard and Mr. Thesiger, and I may, I hope, be permitted to thank them for the great help they have afforded the Court in arriving at a conclusion. A very natural result of an argument so complete and exhaustive was to narrow materially the disputable ground, and to reduce the matters for decision to very few. We come at last to the true construction of the 7th section of the Ballot Act, and to the question whether, upon the right to vote of all, or if not upon the right of all, upon the right of which of the voters whose votes are impugned by this petition, the register of electors is or is not conclusive.

The history of legislation upon the subject of the register seems to me, when accurately stated, to be practically decisive of this case. There was no register before the first Reform Act in 1832, and after the various provisions for revising and completing the register, both in counties and boroughs, the 2 Will. 4. c. 45, enacts in terms sufficient to imply its conclusiveness, in section 54, that it "shall be deemed the register of electors to vote" for members of either counties or boroughs. By the 58th section of that Act three questions, and three only, were allowed to be put at the time of polling as to the right of any person to vote: first, as to the identity of the voter; secondly, as to his having already voted; thirdly, as to his still retaining the qualification for which his name stood on the register. The 60th section provided for the election committees retaining some part of their control over questions as to the qualification of voters, and allowed the correctness of the register to be impeached in any case in which the revising barrister had, in the opinion of the committee, improperly decided. There were, indeed, no direct and affirmative words making the register conclusive, but the practical effect of the provisions of the Reform Act was, with slight exceptions, to make it so.

But the Registration Act, 6 & 7 Vict. c. 18, went much further. It enacted in section 79, that "At every future el[illegible] tion for a member or members to se[illegible] in Parliament for any county, city [illegible] borough, the register of voters so m[illegible] as aforesaid shall be deemed and take[illegible] be conclusive evidence that the pers[illegible] therein named continue to have the [illegible] lifications which are annexed to t[illegible] names respectively in the register in f[illegible] at such election. Provided always, t[illegible] it shall not be lawful for any perso[illegible] vote at any election for a member [illegible] members for any county where the [illegible] lification annexed to the name of s[illegible] person shall have appeared annexed [illegible] his name in the preceding regist[illegible] and such person, on the last day of J[illegible] in the year in which such register so [illegible] force was formed, shall have ceased [illegible] have such qualification, or shall not h[illegible] retained so much thereof as would h[illegible] entitled him to have had his name inser[illegible] in such register. Provided also, that [illegible] person shall be entitled to vote at a[illegible] future election for a member or memb[illegible] to serve in Parliament for any city [illegible] borough, unless he shall, ever since t[illegible] 31st day of July in the year in which [illegible] name was inserted in the register of vot[illegible] then in force, have resided and at [illegible] time of voting shall continue to res[illegible] within the city or borough, or pl[illegible] sharing in the election for the city [illegible] borough, in the election for which [illegible] shall claim to be entitled to vote, or w[illegible] in the distance thereof required by [illegible] said recited Act" (2 Will. 4. c. 45. s. [illegible]3), "to entitle such person to be regist[illegible] in any year." And the 81st section [illegible] acts that "in all elections whatever [illegible] member or members to serve in Pa[illegible] ment for any county, &c., or for [illegible] city or borough in England or W[illegible] or the town of Berwick-upon-Tweed, [illegible] enquiry shall be permitted at the ti[illegible] of polling as to the right of any per[illegible] to vote, except only as follows, th[illegible] is to say, that the returning officer [illegible] his respective deputy shall, if requir[illegible] on behalf of any candidate, put to a[illegible] voter at the time of his tendering his vot[illegible] and not afterwards, the following que[illegible] tions, or either of them—'1. Are you th[illegible] same person whose name appears as A. B[illegible] on the register of voters now in force for [illegible]

cedure at elections, and affected only the returning officer, so such was its only effect now; and the 7th section of the Ballot Act is to be read in the same manner as applying only to procedure at elections, and by its proviso practically leaves open the enquiry into any vote which, although the voter may be on the register, is capable of being impeached on any legal ground.

The argument is ingenious, but, I think, untenable. From the Reform Act to the Ballot Act the tendency of legislation has been to make, with certain exceptions, the register conclusive. There is nothing in the words "at" or "in any election" (for both prepositions are used), to limit the enactments to the time of polling only; and although it is true that the 58th and 60th sections of the Reform Act and the 98th section of the Registration Act have been repealed, the enacting part of the 79th section of the Registration Act has been carefully kept in force, which is the more remarkable, because the provisoes to that section, which insist on the retention of certain incidents of the qualification up to the time of voting, are expressly repealed.

No answer has been given to the question, and probably no answer could be given to it, what effect is to be ascribed to this 79th section of the Registration Act beyond and other than the 7th section of the Ballot Act, if both these sections have to do with procedure only. The retention of the earlier section would be useless if the 7th section of the Ballot Act makes the register certainly conclusive on the returning officer.

I think the true construction of these sections, which alone remain, is to make the register conclusive not only on the returning officer, but also on any tribunal which has to enquire into elections, except in the case of persons ascertained by the proviso. These are "persons prohibited from voting by any statute, or by the common law of Parliament." I do not think that these words are pointed at any of the cases which my brother Mellor has referred to us. The receipt of alms (supposing the alms in this case to be such as to disqualify); the receipt of parochial relief; non-residence within the proper distance of the borou occupation; insufficient qualific none of these things appear to s words of this proviso. It does persons, who from failure in the or elements of the franchise successfully objected to on the of the register. It means pers from some inherent, or for the t moveable quality in themselv not, either by prohibition of sta at common law, the status of pa tary electors. Such, for exa peers, whether of the United —*Earl Beauchamp* v. *The Overse Parish of Madresfield* (21), or land or of Ireland—*Lord Rendl Haward* (22); women—*Chorlton* (23); *Wilson* v. *The Town Clerk ford* (24); persons holding certa or employments the subjects of prohibitions; and persons conv crimes (25) which disqualify th voting. I do not say this list i tive. It is enough to give exa the cases in which I think the would be still open. In all the ferred to us by my brother Mello it is not open, and I answer the put by him by saying that I thi of the votes referred to ought to out and disallowed.

KEATING, J.—Having had an nity of reading and considering ment just pronounced by my remains for me only to say that concur in it.

GROVE, J.—I also have read sidered my Lord's judgment, an in the conclusion which he ha at, and in the reasons which he h

Judgment for the resp

Attorneys—F. L. Soames, agent for Petersfield, for petitioner; W. Ford, Albery & Lucas, Midhurst, for resp

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(21) 42 Law J. Rep. (N.S.) C.P. 32.
(22) *Ante*, 33.
(23) 38 Law J. Rep. (N.S.) C.P. 25 Rep. 4 C.P. 374.
(24) 38 Law J. Rep. (N.S.) C.P. 35 Rep. 4 C.P. 398.
(25) See 33 & 34 Vict. c. 23. s. 2.

HUDSON AND OTHERS *v.* HILL AND OTHERS.

- Charter-party — Voyage to ing—Exemption from Liabi- ils of the Seas—Damages— yptain—" Forthwith."

*ter-party dated the 28th of plaintiffs' ship was to "forth- d from England to B., an West Indies, and having a cargo of sugar for the de- turn to England. The vessel wed to take an outward cargo cified places, and the charter- d a clause excusing the per- of if it could not be complied perils of the seas. At the ing upon the charter-party, ndergoing repairs, but she came pon the 6th of January, and n board a cargo of coals for R., cified places, she sailed on the ry. Delay on her voyage out- occasioned by unfavourable e was injured by a collision er, which rendered necessary s. She finally sailed for R. March, and reached R. on the having there discharged the ls she started on the 1st of ched B. on the 28th of July. for exporting sugar from B. he month of April and ends every year, and the agents of s declined to provide a cargo the plaintiffs' vessel on the she had arrived at B. too late . They offered to provide a ar if the plaintiffs' vessel der protest to V., an island ff. The captain refused this ained at B., insisting upon the of the charter-party by the gent. The captain at last her parties for a charter, and 14th of October. The plain- ed for a breach of the charter- sing to load a cargo at B., he trial directed the jury that sailed without unreasonable roceeded "forthwith" within f the charter-party; that the g performance thereof, on the ground of perils of the seas, applied to the preliminary voyage to R., and that the captain might reasonably think that if he shipped a cargo elsewhere than at B., he might put an end to the original charter-party:—*Held, *a right direction.*

The first count of the declaration stated that the plaintiffs and the defendants agreed by charter-party dated the 28th of December, 1870, that the plaintiffs' ship called the *Winlow* should forthwith proceed to Carlisle Bay, Barbadoes, the said vessel being allowed to take a cargo of coals to a port outwards for owners' benefit or to the Brazils, and as ordered load afloat a full and complete cargo of sugar or other lawful merchandise, to be shipped according to the custom of the ports of loading which the said charterers bound themselves to ship, and that the said ship, being so loaded, should therewith proceed to London, and deliver the same on payment of freight 40*s.* per ton; and that the defendants should be allowed thirty running days, Sundays excepted, for loading the said ship, and ten days on demurrage, at 8*l.* per day; the said charterers' agents at ports of loading abroad to advance cash for vessel's ordinary disbursements free of interest and commission, subject to costs of insurance; and the said lay days were not to commence before the 1st of April, 1871, and the penalty for non-performance of the said agreement was to be the estimated amount of freight; and upon other terms therein agreed upon between them. And the plaintiffs say that they did all things necessary on their part to entitle them to have the said cargo loaded on board the said ship at Barbadoes aforesaid, and that all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiffs to have the said ship loaded according to the said charter-party; yet the defendants made default in loading the said ship, and refused and wholly neglected to do so, whereby the plaintiffs were deprived of the gains and profits which would have accrued to them, and were put to great costs and expenses in and about the procuring of another cargo and the maintenance of the said ship, and otherwise.

The second count was for money found to be due from the defendants to the plaintiffs for the hire of a ship of the plaintiffs by the defendants, for money paid, for money received, for the demurrage of a ship of the plaintiffs, for interest and for money due on accounts stated.

Pleas.—As to first count:

1. That it was not agreed as alleged.

2. That the said ship did not forthwith proceed to Carlisle Bay within the meaning of the said charter, and by reason thereof the object of the said charter and of the voyage therein mentioned was wholly frustrated, and the defendants were prevented from deriving any benefit therefrom.

3. That the master of the said ship was not ready and willing to accept and load the agreed cargo.

4. That the defendants had not reasonable notice of the said ship having proceeded or arrived at Carlisle Bay within the meaning of the charter, or of being ready to receive cargo there, wherefore the defendants did not nor could they load as in the first count is complained of.

5. That the defendants did not make default in loading, or refuse and neglect to load.

6. That after the making of the said charter, and before any breach of it by the defendants, the plaintiffs exonerated and discharged the defendants from any further performance of it.

7. That the charter in the declaration mentioned was and is in the words and figures following, that is to say:

"London, 28th December, 1870.

"Jamaica, charter-party. Ship or vessel, *Winlow*. Flag, British. Master, . Class, A. 1. Tonnage, 457.

"Where lying, in Sunderland.

"It is this day mutually agreed between G. W. Hudson, Esq., owner of the above-named ship or vessel, and Messrs. Thomas Daniel & Co., of London, charterers, that the said ship or vessel of which the above general description is warranted to be correct, being tight, staunch and strong, and every way fitted for the voyage, classed as above, and guaranteed to be maintained so during present service, shall forthwith proceed to Carlisle Bay, Barbadoes, vessel being al take in cargo of coals to a port for owners' benefit, or to the Bra as ordered load afloat a full and cargo of sugar or other lawful dise, to be shipped according to tom of the ports of loading (c to pay any lighterage or drogh any produce shipped from out harbour where the ship lays), w said charterers bind themselves not exceeding what she can re stow and carry over and above he apparel, provisions and furnit being so loaded shall therew ceed to London to discharge, or thereunto as she may safely deliver the same in the usual in such dock as charterers ma on being paid freight as follows:

40*s.* for sugar, 150 barrels, or equal thereto in barrels and tierces for stowage	per ton not de at the bes

Other goods in fair and custom portion to sugar, all in full. In f port charges and pilotages as c (the act of God, the Queen's restraints of princes and rulers, all and every other dangers and s of the seas, rivers and navigation, ever nature and kind soever, han ing, frost, floods or other unavoida dent, which may prevent the lo delivery of the cargoes during voyage, always mutually excepte sel to be consigned to charterers' Barbadoes, paying 2½ per cent port only for doing ship's busines running days (Sundays excepted be allowed the said charterers fo the said ship at Barbadoes, to beg the vessel is clear and ready to cargo, the master giving charterer written notice to that effect; an charge with all customary despat said charterers to have the option ing the said ship ten days on de over and above the said laying 8*l.* per day. The master to sig lading at any rate of freight req charterers' agents, without prej this agreement. Charterers' ag ports of loading abroad to adva for vessel's ordinary disburseme

the appropriation of which by the captain the charterers are not to be held responsible, free of interest and commission, subject to cost of insurance, the same to be also on account, and the balance on unloading and right delivery of the homeward cargo in cash at two months, or under discount at 5 per cent. per annum, at charterers' option. Lay days not to commence before the 1st of April, 1871. Penalty for non-performance of the agreement, estimated amount of freight.

"For G. W. Hudson.
pp. R. W. Cousens & Co.
A. R. Poste.
Thos. Daniel & Co.

"Witness to the signature of
both parties,
G. R. Jackson.

"28th December, 1870.

"Five per cent. commission is due on the execution of this charter to James Thompson & Co., by whom the ship is to be reported at the custom-house if she returns to London, or by their agents if to an outport."

And the defendants say that time was an essential and material part of the said contract, as the plaintiffs and defendants well knew. And the defendants say that the said ship was not at the time of making the charter tight, staunch or strong, or every way fitted for the said voyage, within the meaning of the said charter, but on the contrary, was in a bad state of repair, of which the defendants had no knowledge, and by reason of her said condition it would have been impossible for her, and the plaintiffs could not have reasonably expected her, to be able to proceed to Carlisle Bay forthwith, within the meaning of the said charter.

8. As to the residue of the declaration, never indebted. Joinder of issue.

The cause came on for trial before Coleridge, C.J., at the sittings in London after Michaelmas Term, 1873, when the following facts were proved:

The plaintiffs were the owners of the ship *Winlow*, and the defendants were merchants in London, carrying on business under the name of Thomas Daniels & Co., and having a large trade with the West Indies. The object of the defendants in chartering the *Winlow* was to load her with sugar. The season for exporting sugar from Barbadoes lasts from April to July in each year. On the 1st of August the hurricane season commences; after that time double insurance has to be paid upon every vessel which leaves Barbadoes, and ships seldom sail from Barbadoes when August has begun.

At the time when the charter sued upon was entered into, the *Winlow* was in dry dock, undergoing repairs. She left the dry dock on the 6th of January, and on the 10th a charter to carry coals to Rio in Brazil as an outward cargo was concluded. The vessel finished taking in her cargo of coal on the 27th of January. She was detained by bad weather and by neap tides until the 8th of February; she then put to sea, but met with adverse winds, and did not reach the Downs until the 19th of February; she was by unfavourable weather prevented from sailing until the 25th, when she was run into by a steamer and seriously damaged; she was towed to Portsmouth, and was there repaired; she sailed from Portsmouth on the 9th of March, and after a very lengthy voyage she arrived at Rio on the 26th of May; she commenced to discharge her cargo of coals about the 1st of June, and finished upon the 23rd; after taking in ballast she sailed from Rio upon the 1st of July for Barbadoes, where she arrived on the 28th; on the 31st of July she was reported to Messrs. Louis, Son & Co., the defendants' agents, as being ready to receive her cargo under the charter-party sued upon. At this time the sugar crop of the year had been shipped; a cargo of molasses might have been obtained, but that kind of merchandise is very seldom sent to England, and at the end of July it could have been sent to England only at a considerable loss. The agents for the defendants refused to load the *Winlow*, on the ground that they had no sugar to put on board, and repudiated all liability under the charter-party; but they offered, if the captain would go to St. Vincent, about ninety miles off, to load a cargo of sugar at that island; they added that he might take their offer "under protest," and they made other offers of providing a cargo

either at St. Vincent or St. Thomas. The captain, however, refused to depart from the terms of the charter-party without an indemnity, and not obtaining this, he remained at Barbadoes, insisting upon having a cargo put on board there. On the 20th of September he agreed for a fresh charter with other persons than the defendants, and on the 14th of October the *Winlow* sailed from Barbadoes.

In summing up to the jury, Coleridge, C.J., told the jury that when, pursuant to a charter-party, a vessel is to proceed "forthwith" on a voyage, she need not be ready to start at the moment when the charter is signed; it is sufficient if she be able to sail without unreasonable delay; and that it is for a jury to decide what is unreasonable delay. He further directed the jury that the charter was subject to the clause as to the perils of the seas, and that that clause applied to the whole adventure, including the outward voyage to Barbadoes by way of Rio. His Lordship further stated that the captain might reasonably think that if under protest he shipped a cargo elsewhere than at Barbadoes, he might discharge the defendants from liability under the charter-party. His Lordship left seven questions to the jury, who answered them as follows:

1. Was the *Winlow* so tight, staunch and strong as to be able to proceed forthwith to Barbadoes and Brazil?—*A*. Yes.

2. Did she in fact forthwith proceed to Barbadoes and Brazil?—*A*. Yes.

3. Was there any unreasonable delay on the part of the shipowners in arriving at Barbadoes, or was the delay occasioned by perils of the seas or other excepted accidents?—*A*. No delay but what was occasioned by the excepted accidents.

4. Was there want of reasonable notice on the part of the shipowners to the charterers of the circumstances of the delay?—*A*. No.

5. Did such want of notice, supposing it to exist, prevent in any way the loading of the *Winlow* by the charterers when she arrived at Barbadoes?—*A*. No.

6. Was the date of the arrival of the vessel at Barbadoes such as to put an end, in a commercial sense, to the commercial speculations entered upon by the shipowners and the charterers?—*A*. No.

7. Was the date of arrival of t at Barbadoes a date which co been at the time of making the in the reasonable contemplation the charterers or the shipowners way applicable to the commercia lations of either party?—*A*. W think that either party could templated such delay.

The verdict was thereupon en the plaintiffs for 450*l*., but leave served to move to enter the verdi defendants.

In Hilary Term (Jan. 15),

H. Matthews moved accordin also for a new trial, on the g misdirection, and of the verdi against the weight of evidenc words in the charter-party, "sh with proceed to Carlisle Bay," an undertaking that the ship made seaworthy in a convenie with reference to the adventure f she had been chartered. In *R* v. *Stanton* (1) it was held that tered vessel must be seaworthy tion to the cargo which she is t and if a vessel which is chartere "forthwith" need be ready for "without unreasonable delay," long time may be spent in ex repairing her without a breach charter. In *Staunton* v. *Wood* (pears to have been held that "fo must mean less than fourteen da

He also contended that the to perils of the seas did not app outward voyage, and that the c the *Winlow* ought to have accept protest one of the cargoes offere defendants' agents, and thereby the damages, and also that the a the jury to the 6th and 7th were against the weight of evide cited *Bruce* v. *Nicolopulo* (3); *Usborne* (4); *Maude and Pollock chant Shipping*, 263 (3rd ed.)

(1) 41 Law J. Rep. (N.S.) C.P. 180; Rep. 7 C.P. 421, affirmed in Ex. Ch. *an* s. c. Law Rep. 9 C.P. 390.

(2) 16 Q.B. Rep. 638.

(3) 11 Exch. Rep. 129; s. c. 24 L (N.S.) Exch. 321.

(4) 18 Com. B. Rep. 144; s. c. 25 L (N.S.) C.P. 209.

therefore, for the defendants' advantage that the ship should not be despatched from England empty.]

Barker v. *M'Andrew* (6) is not really in conflict with *Crow* v. *Falk* (10), which seems to be approved of by Cockburn, C.J., in *Valente* v. *Gibbs* (11). It was agreed by the charter-party that the vessel should proceed "forthwith" to Barbadoes, but in no sense was that stipulation fulfilled. It is submitted that a compliance with this term of the contract was a condition precedent to the liability of the defendants for not loading, and that it was a misdirection to tell the jury that the plaintiffs were excused by perils of the seas upon the outward voyage—*Crookewit* v. *Fletcher* (12). In *Duncan* v. *Topham* (13), it was held that "directly" did not mean "within a reasonable time." In *M'Andrew* v. *Chapple* (14), Willes, J., appears to have been of opinion that delay depriving the charterer of all benefit under the contract of affreightment would entitle him to annul it.

[GROVE, J.—That is merely a statement in a different form of the proposition that a delay frustrating the objects of the adventure puts an end to the contract.]

If the Court are of opinion that the contract was broken by the defendants, a further misdirection consisted in this, that the Lord Chief Justice told the jury that if the captain had accepted the offers of the defendants' agents, he would have discharged the defendants from liability upon the charter-party; but it is plain, from *Bradford* v. *Williams* (15), that the captain would have been justified in seeking other employment for the *Winlow*, as the agents refused to load her. "When a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence find another employment," per Erle, in *Beekham* v. *Drake* (16), and t doctrine was approved of by Crompt J., in *Emmens* v. *Elderton* (17). T principle there laid down applies tween a charterer and a shipowner well as between a master and a serv As the captain did not accept the re ciation of the contract by the defenda agents, he might have accepted offered cargoes under protest wit discharging the defendants from liabi under the charter—*Avery* v. *Bowden* (1 *Reid* v. *Hoskins* (19); and although action would have lain against the pla tiffs, they might have sued the defenda —*The Danube and Black Sea Railw and Kustendjie Harbour Company* v. *Xen* (20). The captain's conduct was unre sonable, and ought to have been left the jury as a ground for lessening t damages—*Wilson* v. *Hicks* (21).

BRETT, J.—This rule has been obtain on the ground of misdirection, and al on the ground that at the trial the verdi was given against the weight of eviden

As to the latter ground, I need o remark that the verdict was not contra to the evidence, although it may, in point of view, be said to have been son what unreasonable.

As to the ground of misdirection, I of opinion that the counsel for the fendants have misconstrued *Jackson* *The Union Marine Insurance Comp* (9); that was a case of delay in arrival of the vessel at the port of load and the question arose whether charterers had power to annul the cont It was contended that the shipo might insist upon fulfilment of the ch after any length of time; but on other hand, in a mercantile point of v

(10) 8 Q.B. Rep. 467; s. c. 15 Law J. Rep. (N.S.) Q.B. 183.

(11) 6 Com. B. Rep. N.S. 270; s. c. 28 Law J. Rep. (N.S.) C.P. 229.

(12) 1 Hurl. & N. 892; s. c. 26 Law J. Rep. (N.S.) Exch. 153.

(13) 8 Com. B. Rep. 225; s. c. 18 Law J. Rep. (N.S.) C.P. 310.

(14) 35 Law J. Rep. (N.S.) C.P. 281; s. c. Law Rep. 1 C.P. 643.

(15) 41 Law J. Rep. (N.S.) Exch. 164; s. c. Law Rep. 7 Exch. 259.

(16) 2 H.L. Cas. 606.

(17) 4 H.L. Cas. 645; s. c. 13 Com. B. Re 508.

(18) 6 E. & B. 953; s. c. 26 Law J. Rep. (N.S. Q.B. 3.

(19) 6 E. & B. 953; s. c. 26 Law J. Rep. (N.S. Q.B. 5.

(20) 13 Com. B. Rep. N.S. 825; s. c. 31 La Rep. (N.S.) C.P. 284.

(21) 26 Law J. Rep. (N.S.) Exch. 242.

ıow sued upon; but in my opinion if the :aptain had shipped any cargo suggested by Messrs. Louis, he must have been deemed to accept it upon the terms proposed by them. I consider that there was no misdirection, and that the rule ought to be discharged.

GROVE, J.—I am of the same opinion. I think that the findings may be justified, and I cannot say that the verdict was wrong. Sitting as a member of this Court, in which *Jackson* v. *The Union Marine Insurance Company* (9) was decided, I am of course bound to take the judgment of the majority upon the bench in that case as correct; but the question which, according to that decision, is proper to be determined as a matter of fact, was left by the Lord Chief Justice to the jury and answered by them against the defendants: therefore the circumstances proved at the trial do not raise the same question as was argued in that case. The answers to the sixth and seventh questions are apparently contradictory, but they may be reconciled; probably the jury meant that neither party expected the ship to be so long in reaching Barbadoes, but nevertheless that the adventure mentioned in the contract of affreightment might have been carried out. By reading their answers in this point of view, they are consistent with each other.

The first of the alleged misdirections relates to the question how soon the exception of perils of the seas is to attach. *Barker* v. *M'Andrew* (6) seems to me to decide this question. The word "cargo" is here used in the plural in the clause exempting the parties from liability, if the charter is not fulfilled owing to certain perils and accidents; and this tends to shew that the voyage outwards as well as the voyage homewards was to be subject to the operation of that clause. The provisions are substantially the same as in *Barker* v. *M'Andrew* (6), where it was determined that to go a short distance in an English port might be deemed part of a voyage to Egypt. In my judgment the present case falls within the rule in *Barker* v. *M'Andrew* (6). The cases relied upon by the defendants' counsel proceeded upon different facts; they do not apply to the circu[illegible] stances proved in the present action.

It was further contended on behal[illegible] the defendants that the vessel hav[illegible] been delayed by perils of the seas u[illegible] her outward voyage, she did not "for[illegible] with proceed" to Barbadoes within [illegible] meaning of the charter-party. If t[illegible] contention were to be upheld, it wo[illegible] strike the clause as to perils of the se[illegible] out of the charter-party. "Forthwith[illegible] means without unreasonable delay. T[illegible] difference between undertaking to [illegible] something "forthwith" and within [illegible] specified time is familiar to everyo[illegible] conversant with law. To do a thi[illegible] "forthwith" is to do it as soon as [illegible] reasonably convenient.

It has been further argued that wh[illegible] the defendants' agents declined to ser[illegible] on board a cargo of sugar at Barbado[illegible] the captain ought to have treated [illegible] charter-party as broken by the defe[illegible] ants, and ought to have shipped suc[illegible] cargo as was proposed to him. If [illegible] captain had adopted this course, he mi[illegible] have reduced the loss to be sustained [illegible] the defendants, but he might have [illegible] his owners in great peril. The true v[illegible] of the captain's conduct was stated [illegible] my Lord to the jury. It has been u[illegible] that if a substituted cargo had [illegible] loaded, the defendants would still [illegible] been liable to compensate the plai[illegible] for the loss sustained by them; this, [illegible] ever, seems doubtful. If the captain [illegible] accepted the offer of a substituted ca[illegible] under protest, he might neverthe[illegible] have been deemed to ship it upon [illegible] terms of the defendants' agents. I [illegible] not think that very great effect can [illegible] attributed to the words "under prote[illegible] and in my opinion the plaintiffs wo[illegible] not have been able both to sue for t[illegible] breach of the charter-party and to ea[illegible] freight under a fresh contract. I agr[illegible] with my brother Brett's view; but ho[illegible] ever that may be, the question was le[illegible] open for the consideration of the jury. [illegible] was merely pointed out to them that t[illegible] captain might have put the shipowne[illegible] in jeopardy, and there was in fact n[illegible] direction in point of law. The Lor[illegible] Chief Justice was merely commentin[illegible] upon the reasonableness of the captain

ct, and my Lord did not say that ster was bound to refuse the offers, at he was justified in declining This ruling is quite consistent the reasoning of the Judges in rd v. *Williams* (15). I think that was no misdirection, and that this ught to be discharged as to all the ls upon which it has been obtained.

D COLERIDGE, C.J.—The facts as l at the trial were quite in the ffs' favour, and the jury could not properly arrived at a conclusion e to them. I quite believe that the jury intended to find by the r to the seventh question, was that e expected the ship to arrive at does so late as the end of July, at they did not intend to interfere heir answer to the sixth question. reference to the authorities, I find y the clause relating to perils of s, the shipowners were excused as delay on the voyage to Barbadoes, at my ruling at the trial was cor- As to the question whether the v proceeded forthwith to Barbadoes, y have, as it seems to me, decided ur of the plaintiffs the point that en raised. The rule has been ob- also on the ground that the es ought to have been smaller, e the captain might have accepted the cargoes proposed to him. I d up at the trial with reference to r as laid down in *Avery* v. *Bowden Reid* v. *Hoskins* (19), and *The s and Black Sea Railway and djie Harbour Company* v. *Xenos* nd the result of these cases appears hat a declaration of an intention perform a contract need not be d, and the contract will remain in t the option of the party against the breach is intended to be com- ; but that if the declaration be d, the original contract is gone, e performance of it in its original an no longer be claimed. In the case it was no doubt anticipated e *Winlow* would reach Barbadoes il or perhaps May, and she did not until the end of July; but it is to strue the charter-party to say that ained a warranty requiring her to reach the island before any particular time. I asked the jury to consider what was the reasonable view to be taken by the captain, when the defendants' agents refused to load. They maintained that they were committing no breach; and if the captain had shipped any one of the proposed cargoes, the question would have been raised, whether he had not accepted it in exoneration of the defendants' liability as principals upon the charter-party. It is said that the captain might have put the substituted cargo on board under protest, but the agents on behalf of the defendants repudiated any liability upon the contract; and the general rule is that when an offer is made upon a condition, it can only be accepted subject to the condition; it must be taken with all its incidents or rejected. Without laying down a general proposition, it seems to me that in the present case, if the captain had availed himself of the offer made by the defendants' agents, it would be difficult to say that the original contract was still in force. The captain's conduct was therefore reasonable, and no complaint can be made of it.

Rule discharged.

Attorneys—W. A. Crump, for plaintiffs; Druce, Sons & Jackson, for defendants.

1874. May 29. } MARSHALL *v.* JAMES.

Parliament — Election Petition — Costs —Dissolution, Effect of—The Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 11. *sub-sect.* 13 — *Division of a Day as to the Performance of Judicial Acts.*

The delivery of judgment upon an election petition, upholding the return of the respondent thereto, and awarding him costs, began at 10 *a.m. and finished at* 10.35. *a.m. The report of the Judge and his certificate were sent by the post at noon to the Speaker of the House of Commons. Upon the same day upon which the judgment was delivered Parliament was*

dissolved by royal proclamation, but the exact time when the proclamation was issued by the Queen was not ascertained. The Judge's report and certificate did not reach the Speaker before the dissolution: —Held, *that the delivery of the judgment and the order for the payment of the costs being judicial acts, must be taken to have happened before the dissolution, and that by force thereof the respondent was entitled to his costs after the Parliament had ceased to exist.*

This was a petition under the Parliamentary Elections Act, 1868, against the return of the respondent as member for the borough of Taunton, in the county of Somerset. The petition charged bribery, treating, undue influence, personation.

The following facts were stated in affidavits:

The petition was appointed to be heard on the 12th of January, 1874, and on such other subsequent days as might be needful, at Taunton, before Grove, J. The petition accordingly came on for hearing on the 12th of January, and on the 26th of January judgment was delivered by Grove, J., determining that the respondent was duly elected and returned for the borough of Taunton, and that the petitioners should pay the respondent's costs of the petition. The order for the payment of costs was endorsed upon the petition, and signed by the registrar on the same day. On the 26th of January, being the day on which the said judgment was delivered, a proclamation was published by Her Majesty the Queen, dissolving the then present Parliament, which stood prorogued to the 5th of February then next, and declaring the calling of another for the 5th of March. The following was a true extract from the journals of the House of Commons, of the date of the 19th of March, 1874:

"Mr. Speaker informed the House that he had received from Mr. Justice Grove, one of the Judges selected for the trial of election petitions pursuant to the Parliamentary Elections Act, 1868, a certificate and report relating to the election for the borough of Taunton. Mr. Speaker also informed the House that the said certificate having been given and the report made before the dissolution of the la[illegible] Parliament, were not received by h[illegible] until after such dissolution; but that [illegible] thought it right that the same sho[illegible] be laid before the House. And the sa[illegible] was read as followeth:

"'To the Right Honourable [illegible] Speaker of the House of Commons.

"'I, Sir William Robert Grove, Knig[illegible] one of the Justices of our Lady the Qu[illegible] of the Court of Common Pleas at W[illegible] minster, and one of the Judges for [illegible] time being for the trial of election pe[illegible] tions in England, do hereby in pursua[illegible] of the said Act certify that upon [illegible] 12th day of January, 1874, and seve[illegible] days following, I duly held a Court at the Shire Hall in the borough of Ta[illegible] ton, in the county of Somerset, for the trial of, and did try, the election petiti[illegible] for the borough of Taunton between Jo[illegible] Marshall and Walter Chorley Bran[illegible], petitioners, and Henry James, resp[illegible] dent.

"'And in further pursuance of the said Act, I certify that at the conclusi[illegible] of the said trial I determined that the said Henry James, being the mem[illegible] whose election and return were complai[illegible] of in the said petition, was duly elec[illegible] and returned, and I do hereby certify [illegible] writing such my determination to you.

"'And whereas charges were made [illegible] corrupt practices having been commit[illegible] at the said election, I, in further pur[illegible] ance of the said Act, report as follows:

"'That no corrupt practice was prov[illegible] to have been committed by or with t[illegible] knowledge or consent of any candidate [illegible] such election.

"'That there is no reason to belie[illegible] that corrupt practices extensively p[illegible] vailed at the election for the borough [illegible] Taunton, to which the said petition relat[illegible]

"'Dated this 26th day of January, 187[illegible]

(Signed) "W. R. Grove.

"'To the Right Honourable the Speaker of the House of Commons.

Upon the 30th of March, 1874, Grove, [illegible] ordered that the taxation of costs sho[illegible] proceed, the respondent undertaking, [illegible] case the Court should decide that the pe[illegible] tioners were not liable for the costs, [illegible] bear the costs of the taxation, and pay t[illegible] costs of the solicitor coming up from Ta[illegible]

to take proceedings to enforce
r costs till the petitioners
had an opportunity to take
of the Court on the question

ly, in Easter Term, a rule
l calling upon the respondent
se why the taxation of costs
eedings incident to such tax-
not be stayed, and why the
n (if any) should not be set

foregoing rule was granted
ing upon the bench, stated
he 26th of January he com-
deliver judgment upon the
10 A.M., and finished it at
He then signed the certifi-
port to the Speaker of the
mmons above set forth, and
to the post in time for the
noon upon the same day to

on the 26th of January at
proclamation dissolving the
ent was issued by the Queen
ar.

S. Giffard and *R. S. Wright*
e.—The respondent is enti-
paid his costs of the petition
the Parliamentary Elections
1 & 32 Vict. c. 125). By
ection this Court is to "have
wers, jurisdiction and autho-
erence to an election petition
eedings thereon, as it would
petition were an ordinary
their jurisdiction." By sec-
section 13, the Judge who
ition is to certify in writing
ation to the Speaker, "and
rtificate being given, such de-
shall be final to all intents
s." It is contended for the
hat a certificate is "given"
ned and issued by the Judge,
immaterial that the certifi-
ot reach the hands of the
ore a dissolution. This view
y the power conferred upon
o postpone the granting of
te under section 12. The
ard costs is created by sec-

First, the dissolution did not affect the authority of the Judge, who constituted an independent tribunal. The petition remained in force as to the payment of the costs. An election petition may drop when a dissolution takes place—*Carter* v. *Mills* (1), but it does not abate. Section 37 shews what an abatement is.

[LORD COLERIDGE, C.J.—The 19th section enacts that "the trial of an election petition under this Act shall be proceeded with, notwithstanding the prorogation of Parliament." This seems to shew that in the opinion of the legislature a petition would otherwise come to an end even upon a prorogation.]

The key to that enactment will be found by reference to 28 Geo. 3. c. 52. s. 33, which enacted that select committees for the trial of election petitions should not be dissolved upon prorogation. The power of awarding costs is independent of granting the certificate.

Secondly, the delivery of the judgment and the order to pay costs were judicial acts, which therefore must be deemed to have taken place at the earliest hour of the day on the 26th of January—*Shelley's Case* (2); therefore in contemplation of law the Parliament was still in existence when the judgment was pronounced and the order made, for by parliamentary law the House of Commons can sit and transact legislative business, such as amending and passing bills, upon the very day of its dissolution; see journals of the House of Commons, December 29, 1660, when the Parliament was dissolved by the Sovereign in person; and also July 17, 1837, July 23, 1847, March 21, 1857, on which latter days the Parliament was prorogued and then dissolved by proclamations of the same respective dates. The Speaker therefore was holding office when the order for costs was made.

Thirdly, although the Speaker is elected at the commencement of Parliament, yet the office is permanent and every Speaker may be considered as the representative of his predecessors—*Strachey* v. *Turley* (3); therefore the Speaker of the new

(1) *Ante*, 111; s. c. Law Rep. 9 C.P. 117.
(2) 1 Rep. 93 b.
(3) 11 East 194.

House of Commons may be considered to be the Speaker to whom the Judge trying the petition was to certify his determination under section 11, sub-section 13.

Fourthly, the duties of Speaker may always be discharged by a deputy duly appointed—*Ex parte Stocksbridge Railway Bill* (4); and by the Parliamentary Elections Act, 1868, s. 4, when the office of Speaker is vacant, the clerk of the House of Commons is to be substituted for him. The clerk of the House of Commons is a permanent official, being "appointed by the Crown, for life, by letters patent"—*May's Parliamentary Practice*, 236 (7th ed.); his receipt therefore of the Judge's certificate instead of the Speaker was sufficient.

A petition may perhaps be tried after a dissolution, but probably it is unnecessary to go so far as that.

Charles Russell and *W. G. Harrison*, in support of the rule.—*Carter* v. *Mills* (1) is an authority in the petitioner's favour. The procedure under the Parliamentary Elections Act, 1868, must be strictly complied with, and the mere delivery to a representative of the Speaker is insufficient—*Hurdle* v. *Waring* (5). The Court cannot discharge this rule without impeaching the authority of that case. The words of section 11, sub-section 13, clearly imply that a Speaker must exist to receive the certificate; the word "given" implies a donor and a donee; and owing to the dissolution there was no donee.

Lord Coleridge, C.J.—In this case application has been made to stay the proceedings as to the taxation of costs and to prevent the payment of them from being enforced by the respondent. The following facts are material, and I desire to base my judgment upon them; for it seems to me unnecessary to decide all the interesting and important points discussed before us. On the 26th of January, between 10.0 a.m. and 10.35 a.m. judgment upon the petition was delivered at Taunton upholding the return of the respondent, and ordering the petitioners to pay costs. My brother Grove forthwith certified in writing his determination who was duly elected, and made a
the Speaker. His report was de
at noon from Taunton, and af
reached London. In the journ
House of Commons it is stated
authority of the Speaker, that t
ficate was given and the repo
before the dissolution, but that t
not received by him until after t
lution. With the materials befor
impossible to ascertain the pre
ment on the 26th of January, w
proclamation dissolving the Pa
was issued.

Now it is not disputed that
proceeding must be assumed f
purposes to have taken place at
liest possible moment of the d
which it did in fact take place;
principle *Wright* v. *Mills* (6) was
It follows that the certificate
brother Grove was in one sense
during the life of the late Pa
which must be assumed to h
dissolved after judgment upon th
was pronounced; upon the same
January, and in contemplation o
fore the dissolution, by word o
and by endorsement upon the
costs were ordered to be paid b
titioners; everything was done
Judge that could be done to n
certificate valid whilst the Pa
was in existence; and therefor
"given," so far as he was co
But it has been argued that in
constitute a perfect gift there
two parties, the one to transfer,
to receive, and consequently t
much as no Speaker existed
certificate arrived in London, it
"given" within the meaning of
liamentary Elections Act, 1868.
fore becomes necessary to cons
provisions of the statute, and in t
of the discussion before us our
has been drawn to many of its
I will begin by referring to se
sub-section 13, which appears to
fully framed: it enacts that "at
clusion of the trial the Judge w
the petition shall determine wh
member whose return or electio

(4) Law Rep. 2 Eq. 364.
(5) *Ante*, 209; s. c. Law Rep. 9 C.P. 435.
(6) 4 Hurl. & N. 488; s. c. 28 Law J. Exch. 223.

or any and what other person eturned or elected, or whether ı was void, and shall forthwith writing such determination to ır, and upon such certificate ı such determination shall be ll intents and purposes." If had stopped at the word ' there might have been a plau- ıd for urging that the certifi- not final until it reached the ıands; but the words, "upon ficate being given," seem to ne time other than the moment certificate is delivered to the ınd without entering upon the hat would be our decision if ; of the petition had begun or ; certificate had been signed lge on a day after the dissolu- ık myself bound to hold that of the enactment have been in ; case complied with. The pro- t the Judge's determination final to all intents and pur- mply means, I believe, that certificate has been signed and the Judge, he cannot recall it. ı said that the view taken by ıse will be in conflict with the . *Hurdle* v. *Waring* (5). It was that the delivery of the cer- to the return of a member to was not a delivery thereof to of the Crown, and that the ; days within which a petition eturn must be filed, ought to from the time when the return ed by the clerk of the Crown by one of his recognised clerks. ough to point out in reply to ıtion, that that was a decision ion 6, sub-sect. 2, and that its ; different from those of the which we are considering. ıse, pursuant to the section, a ime was to be calculated from r event, and if a certain thing, ıe presentation of a petition, ıppen within that time, a very result would follow, and the returned was to take his seat. ; present case time is not to be rom a given event, and for the eady given, the determination of the Judge was ascertained by the signing and issuing of the certificate. The matter now in dispute does not raise the question whether the certificate was in proper form, and the discussion before us is unconnected with the due publication of the certificate. If the Judge had authority to sign and issue the certificate, subsequent events cannot take away his power to order the payment of costs. The true view seems to be that if he had jurisdiction to determine who was elected, he had likewise power to award costs; a vested right to them thereupon accrued to the respondent, and the petitioners cannot now turn round and argue that by reason of the dissolution they are not liable. If it were necessary to decide whether a Judge who in delivering judgment had reserved the question of costs, could lawfully at a subsequent time and after a dissolution of Parliament order them to be paid, I should have a strong inclination to hold that under these circumstances he would have power to award costs. In my opinion a very large jurisdiction has been conferred upon a Judge who tries an election petition, and, moreover, costs seem merely ancillary to the judgment. This matter, however, it is unnecessary to determine. In the present case all that remained to be done, after signing and posting the certificate, was to ascertain by taxation the amount of the costs. The judgment was given in sufficient time to be valid; the right to the costs having accrued to the respondent, he cannot be deprived of it by what has subsequently happened. *Carter* v. *Mills* (1) has been pressed upon us, but the decision in that case was simply that when a petition drops by a dissolution before its determination, nothing further can happen to the parties to it. I think that decision right, and I adhere to it. Section 26 of the Parliamentary Elections Act, 1868, required this Court to observe the practice of committees of the House of Commons, and therefore we were enabled to make the order prayed for. It does not conflict with our present decision. It was for the Judge who tried the petition to decide whether the respondent was entitled to his costs, and it could not have been intended that a

dissolution should interfere with his decision.

BRETT, J. — I am of opinion that the rule should be discharged. In order to deprive the respondent of the costs ordered to be paid to him it is necessary to shew that some acts were done which in a judicial view ought not to have been done, and in order to find out whether anything irregular has occurred, it will be proper to consider the provisions of the Parliamentary Elections Act, 1868. When a petition has once been launched, various steps may be taken with respect to it, and interlocutory proceedings may go on, provided a dissolution, which may happen at any moment, does not occur during the progress of the petition. It has been contended that the trial may be held after a dissolution, but I have a clear opinion that this argument cannot be maintained. Upon a dissolution the petition will drop, and can have no effect upon the position of the parties to it. To my mind this is undoubtedly the result of the provisions in the statute, and of *Carter* v. *Mills* (1). Section 11, subsection 13, enacts that upon the certificate being given, the determination of the Judge becomes final, and he has no power to alter it. It is possible that if the Judge gives his determination before a dissolution, but signs and issues the certificate after it, the certificate may be valid, but this is a very doubtful matter. In the present case it has been argued that the order for the payment of costs is invalid, because at the time the certificate reached London there was no donee to whom it could be delivered, and because the statute requires that there should be a person capable in law of receiving it. It has been urged that the decision in *Hurdle* v. *Waring* (5) is against the respondent; but that case related to the mode of computing time, and proceeded upon the well-established rule that if a limited period is fixed for doing an act, every moment of the specified time must be allowed for performing that act. By section 11, sub-sect. 13, the finality of the Judge's determination depends upon his giving the certificate, that is, upon his publishing and issuing it, not merely upon his writing it out. The certificate is then final to all intents and purposes. It is unnecessary to consider the effect of publishing a certificate after a dissolution, for my brother Grove signed it, and sent it out to the post, whilst Parliament was in existence. The petition then had arrived at the same point at which an ordinary action stands when it reaches final judgment. It was admitted that a final judgment carrying costs confers a vested right in the costs upon the successful party; he has acquired a title to certain property which he can enforce by legal process, and a vested right cannot be destroyed without the consent of the person to whom it belongs. Another question will remain undecided, namely, what is the effect of a dissolution where a Judge trying a petition has announced his determination as to the prayer of the petition, but has reserved the decision as to the costs? I feel doubt as to this point, and it remains untouched by our judgment.

GROVE, J.—I have little to add to what has fallen from the Lord Chief Justice and my brother Brett. I am glad that they have been able to take a view in favour of the respondent, and as far as I can form an independent judgment, I agree with them. As election Judge I had to do two things, namely, to try the petition and to certify to the Speaker. My judicial duties were fulfilled when my determination was pronounced. My strong opinion is, that at the time of declaring my decision, I had power to award costs quite independently of the certificate to be forwarded to the Speaker. I think that section 41 conferred upon me that jurisdiction. The order for the payment of costs was an adjudication upon a matter as to which I was bound to exercise a judicial discretion, for I had to determine by whom and in what proportions they should be paid. This discretionary power of granting costs has analogies in other branches of law, but I do not think that they have any bearing upon the present question. The right of the successful party to costs in an ordinary action was not given by the common law, but by numerous statutes, of which the first was the Statute of Gloucester. But if it be requisite that before costs can be law-

fully given final judgment upon the petition must be pronounced, in my opinion when I parted with the certificate, and when I had discharged all my duties connected with the trial, final judgment was pronounced, and the respondent was entitled to the costs. By the terms of the statute the Judge is to determine whether the candidate returned has been duly elected. Now determination in itself signifies finality as to the decision of the Judge, although his judgment is not final as to the action of the House of Commons. I had expressed my determination at Taunton, and it only remained to certify to the Speaker. I did draw up a certificate in writing. If the document which I caused to be prepared had remained in the registrar's hands, it might perhaps have been deemed an escrow, and not a certificate; but when it had been parted with in order to be sent to the Speaker, my duty was at an end, and my whole jurisdiction had gone. The discretionary power of awarding costs had been exercised by me, as far as I could, whilst Parliament was in existence. Can subsequent events destroy the vested right to costs? I think that they cannot. All my duties having been fulfilled before the dissolution of Parliament, the certificate to the Speaker was final and conclusive as to the right of the respondent to his costs.

Rule discharged.

Attorneys—C. C. Ellis, Taunton, for petitioners; T. J. Holmes, for respondent.

1874. June 25. { LORD BOLINGBROKE *v.* THE LOCAL BOARD OF HEALTH OF SWINDON NEW TOWN.

Master and Servant—Liability of Principal for Acts of Agent—Scope of Servant's Employment.

The defendants were proprietors of a sewage-farm, of which B. was manager. The farm was separated from the plaintiff's land by a brook. In order to improve the drainage from the farm, and to benefit the neighbourhood, B. scoured the brook, pared down the bank of the plaintiff's land, and cut down the bushes there growing. These acts were trespasses, and B. had no express authority from the defendants to commit them:—Held, *that the defendants were not liable to be sued by the plaintiff in respect of the acts above mentioned, as they were not done upon the sewage-farm.*

The declaration stated that before and at the time of the committing of the grievances by the defendants hereinafter mentioned a certain close, situate in the county aforesaid (Wiltshire), forming part of the bed and banks of a brook or stream flowing between certain lands of plaintiff on the one side, and certain lands in the occupation of the defendants on the other side, was in the possession of one William Plummer as tenant thereof to the plaintiff, the reversion thereof then belonging to the plaintiff; and the defendants injured the plaintiff's said reversion in the said close by wrongfully and improperly paring and cutting away the banks of the said brook or stream, and lowering and deepening the bed thereof, and also by wrongfully and improperly cutting down and destroying divers bushes and underwood of great value then growing in the bed and upon the banks of the said brook or stream, and also by wrongfully and improperly digging and carrying away divers large quantities of earth and stones from the bed and banks of the said brook or stream, and converting and disposing thereof to their own use; by means of which several premises the plaintiff has been and is greatly injured in his reversionary estate and interest of and in the said close and premises so in the possession of his said tenant.

Plea—Not guilty (by statute 11 & 12 Vict. c. 63. s. 139, Public Act).

Joinder of issue.

The cause came on for trial at the Spring Assizes, 1874, for Wiltshire, before Quain, J., and the following appear to be the material facts of the case.

The defendants were possessed of a sewage-farm, the drains whereof ran into a brook; this brook formed the boundary of the sewage-farm, and divided it from

The cases run very close, and it is difficult to draw the line of demarkation. When the principle of the authorities I have mentioned is applied, the present case falls clearly within the line of non-liability. My brother Quain was right in directing a verdict for the defendants, and the rule to enter the verdict for the plaintiff will be discharged.

GROVE, J.—I am of the same opinion. My brother Keating has said that it is difficult to draw the line of demarkation, and I quite agree with him. In one sense a wrongful act done by a servant is very seldom within the scope of his authority; for an employer rarely can be shewn to have directed a trespass to be committed; it is therefore necessary to determine what acts shall in law be deemed to be within the scope of a servant's authority; and a tangible distinction seems to exist between acts done negligently or recklessly, but appertaining to the duty to be fulfilled, and acts such as those complained of in this declaration; the gap between proceedings within the powers of Buchan and this trespass is quite sufficient. I express no opinion as to what our judgment ought to have been if Buchan had undermined the plaintiff's land by digging upon the sewage-farm; that might have been a different case. But the trespass complained of was entirely beyond the scope of Buchan's powers; he shaved down the plaintiff's bank; he must have known that he was committing a trespass; it was a wrong done independently of the powers conferred upon him. In answer to my brother Quain, he in effect admitted that he knew himself to be working upon land not belonging to the defendants, and assigned as a reason that in his opinion to cleanse the brook would confer a benefit upon the neighbourhood. Buchan had no power to benefit the neighbourhood by doing an act off the sewage-farm. Buchan was aware that he was a trespasser and was doing what he was not employed to do; he must have known that, although the farm might be benefited, he could not lawfully interfere with the freehold of an adjoining owner. Buchan had no right to work upon another person's land without his consent, even for that other person's benefit. Buchan was, no doubt, an adverse to the plaintiff; but this circu does not allow us to supplement dence by an inference that the de were cognisant of his conduct. I see any evidence warranting us in the plaintiff entitled to succeed cases which have been referred t shew that any authority can be in Buchan to go upon the plainti and cut down the bushes there g the authorities do not lay down a ciple pursuant to which we can the defendants are bound to com the plaintiff. They stop short of quisite point. It has been urged defendants received an advanta the trespass by the better drainag sewage-farm; but the benefit is on they cannot help taking. The action is fairly distinguishable fro cases in which a master has been sponsible for the acts of his serv is unnecessary to determine how vious authorities have gone. The in *Mackay* v. *The Commercial Ban Brunswick* (10) has, no doubt, car principle of liability a long way does not apply to the present agree with my brother Keating, defendants are entitled to keep the

Rule disch

Attorneys—Clarke, Woodcock & Rylan for Kinneir & Tombs, Swindon, for William Moon, agent for Townsend & Swindon, for defendants.

[IN THE EXCHEQUER CHAM

(*Error from the Court of Common*

1874. May 12, 13. June 24. } SOWERBY *v.* SM

Manor—Manorial Rights—Re in Inclosure Act of Right of Sporti

In an Inclosure Act passed in 17 *missioners were directed to allot Margaret W., who was recited to b*

(10) 43 Law J. Rep. (N.S.) P.C. 31; Rep. 5 P.C. 394.

the manor of M., a certain part of the lands to be inclosed "in lieu of and as a full compensation for the right and interest of the said Margaret W., her heirs and assigns, in and to the soil of the said common and waste grounds by that Act directed to be divided and inclosed." The residue was to be allotted amongst the other persons entitled to rights of common, and it was enacted that the several allotments should be vested in the allottees respectively, "in full bar of and satisfaction for all rights of common and other rights and interests whatsoever in, over and upon the said lands and grounds directed to be divided and inclosed, except such manorial rights as are hereinafter reserved to the said Margaret W., her heirs and assigns," and that all rights of common, &c., should cease over the said lands except such manorial rights as last aforesaid. The reservation clause enacted that nothing in the Act should prejudice the right of the lords or ladies of the said manor "of, in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them; but that the said Margaret W., and all succeeding lords and ladies of the manor should and might, from time to time, and at all times, hold and enjoy all rents, quit rents, and other rents, reliefs, duties, customs and services, and all courts, perquisites and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing and fowling within the said manor, and all tolls, fairs," . . . . "royalties, jurisdictions, franchises, matters and things whatsoever to the said manor, or to the lord or lady thereof incident . . . . other than and except such common right as could or might be claimed by the said Margaret W. as owner of the soil and inheritance of the said commons or waste grounds:"—Held (*per* COCKBURN, C.J., MELLOR, J., BRAMWELL, B., *and* AMPHLETT, B., *affirming the judgment of the majority in the Court of Common Pleas*, CLEASBY, B., and POLLOCK, B., *dissentientibus*), *that the reservation clause referred only to the seignorial or manorial rights of the lady of the manor, and did not extend to her territorial right, as owner of the soil, of shooting over the allotted lands.*

In this case the defendant had brought error upon a judgment of the Court of Common Pleas in favour of the plaintiff. The judgments delivered in that Court are reported in 42 Law J. Rep. (N.S.) C.P. 233. The facts and the arguments in the Court of Exchequer Chamber are sufficiently stated in the judgments hereinafter set forth.

The case was argued (on May 12th and 13th) by

Field, for the defendant in the Court below; and

John Mellor, for the plaintiff in the Court below.

In addition to the authorities mentioned in the judgments, the following authorities were referred to during the argument —*Arundell* v. *Lord Falmouth* (1), *Askew* v. *Wilkinson* (2), *Lloyd* v. *The Earl of Powis* (3), *Musgrave* v. *The Inclosure Commissioners for England and Wales* (4), *Musgrave* v. *Forster* (5), *Co. Litt.* 122a, and the 4 & 5 Vict. c. 35. s. 82.

Cur. adv. vult.

The following judgments were delivered on the 24th of June.

COCKBURN, C.J.—The question for our decision in this case is, whether the lord or lady of the manor of Messingham, in the county of Lincoln, is entitled to shoot and take the game on the freehold inclosures, allotted under an Inclosure Act in lieu of rights of common enjoyed by the allottees, prior to the passing of the Act, in the commons and waste lands of the manor. The Inclosure Act in question was passed in the 38th of Geo. 3. It provides for the inclosure of the commons and waste lands in the township of Messingham and in that part of the hamlet of East Butterwick which is within the parish of Messingham. After reciting that Margaret Walker is lady of the manor of Messingham, and of that part of East Butterwick which is in the parish of Messingham, and as such is interested in the soil of the waste grounds within the

(1) 2 M. & S. 440.
(2) 3 B. & Ad. 152; s. c. 1 Law J. Rep. (N.S.) K.B. 141.
(3) 4 E. & B. 485; s. c. 24 Law J. Rep. (N.S.) Q.B. 145.
(4) *Ante*, Q.B. 80; s. c. Law Rep. 9 Q.B. 162.
(5) 40 Law J. Rep. (N.S.) Q.B. 207; s. c. Law Rep. 6 Q.B. 590.

manor, it provides that the commissioners appointed under the Act shall "set out and allot unto the said Margaret Walker, her heirs and assigns, as lady of the manor of Messingham aforesaid (exclusive of all other allotments to the said Margaret Walker in respect of her other property), such part and parcel of the residue of the commons and waste grounds hereby directed to be divided and inclosed, as shall (quantity, quality and situation considered) in the judgment of the said commissioners be equal in value to one-twentieth part, and no more, of the said commons and waste grounds, in lieu of and as full compensation for the right and interest of the said Margaret Walker, her heirs or assigns, in and to the soil of the said commons and waste grounds by this Act directed to be divided and inclosed."

By another section it is provided that "the several lands and grounds so to be set out and allotted unto and for the several persons who by virtue of this Act shall be entitled to the same, shall be and are hereby vested in them respectively, in full bar of and satisfaction for all rights of common, and other rights and interests whatsoever in over and upon the said lands and grounds hereby directed to be divided and enclosed (*except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns*), and that from and immediately after the making of the said division and allotments, all rights of common in, over and upon all the lands and grounds intended to be inclosed, shall cease and determine, and for ever be extinguished."

Then follows a clause reserving the rights of the lady of the manor in these terms—"Nothing herein contained shall prejudice, lessen or defeat the right, title or interest of the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively, for the time being, be lady or ladies, lord or lords of any manor or manors, lordship or lordships, or reputed manors or lordships within the jurisdiction or limits whereof the said township of Messingham, or the said part of the said hamlet of East Butterwick, or the said fields, ings, meadows, pastures, moors and other commonable lands and waste grounds, hereby directed to be inclosed or exonerated from
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was given in favour of the plaintiff, from which judgment error has been brought. I am of opinion that that judgment must be affirmed. At and before the time when this action was brought, the right claimed and asserted by the lord of the manor was a much larger right than that contended for before us, being no less than a right of free warren claimed over the whole of the manor, or, at all events, as stated in the plea, a right to sport on the wastes or a profit *a prendre*, otherwise than in respect of being seised of the waste, so as to constitute the right a manorial right in the terms of the reservation. It appears that for many years prior to the passing of the said Act, and down to the time of this contest, the lords and ladies of the manor have regularly appointed gamekeepers for the manor, and the deputations of such gamekeepers have been duly registered at the office of the clerk of the peace of the said county of Lincoln, and the gamekeepers so appointed have shot over the ancient inclosures and freehold lands in the manor as well as over the wastes.

It further appears that about the year 1806 the then lord of the manor was in the habit of shooting over the freehold lands within the manor, as well as over the waste lands, accompanied by the gamekeepers of the manor, and that his right to do so was not contested. Permission was also given by the lord or the steward to persons to shoot over the freeholds within the manor, and the persons to whom permission was thus given were allowed to shoot without any interruption.

It was, however, fully admitted, on the argument before us, that the claim to a right of free warren, or to any right of sporting over the freeholds and ancient inclosures could not be maintained, and that the right of the lord of the manor was confined to the right of sporting over the wastes as incident to the ownership of the soil; and the question became limited to the right of the lord in respect of the wastes allotted under the Act as preserved under the reservation clause. This being so, the question in dispute appears to me to be free from difficulty.

The land having been allotted as freehold, the ownership must carry with it all the incidents which ordinarily attach to a freehold interest, unless by the special provisions of the Act some right has been reserved to the lord which would derogate from the ordinary rights of ownership in the soil; and the question turns therefore entirely on the effect of the reservation clause. Now, by the express terms of the Act, the allotment to the lady of the manor is to be in bar and satisfaction for "all rights of common and other rights and interests whatsoever, in, over and upon the said lands and grounds hereby directed to be divided and inclosed, *except such* manorial rights as are herein after reserved to the said Margaret Walker, her heirs and assigns."

Then the right of sporting reserved is expressly stated to be the "right of fishery and liberty of hawking, hunting, coursing, fishing and fowling within the said manor, and all matters and things whatsoever to the said manor or to the lord or lady thereof, incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors." It appears to me that the effect of this clause, which being in derogation of the right of freehold given by the Act to the allottees of the lands inclosed, must, I think, be construed strictly against the party claiming under it, is simply to preserve to the owner of the manor such rights as were of a manorial character, that is to say, were in the lord *qua* lord of the manor, and not as owner of the soil of the wastes. Had the intention been to reserve to the lord the right of sporting over the waste lands when inclosed under the Act, nothing would have been more easy than to say so in terms, as was done in the inclosure Act under which the case of *Ewart* v. *Graham* (6) arose.

No doubt the reservation clause in the present Act, however general may be its terms, copied probably from some other Act, without considering how far the language might be applicable to the manor in question, was intended to have some effect and to preserve a right of sporting to the lord. But I cannot think

(6) 7 H. L. Cases 331; s. c. 29 Law J. Rep. (N.S.) Exch. 88.

from its terms that it was the right of sporting, as incident to the ownership in the soil of the waste lands, that the framers of the Act had in view. At the time the Act passed it was believed that the lord had as lord the right of sporting over all lands within the manor. There existed at that time of day, quite independently of any right of free warren, a general notion that the lord of a manor had the right of sporting over all lands within the manor, whether freehold or otherwise, a belief which however had no foundation in law. "We all know," says Mr. Justice Bayley in *Pickering* v. *Noyes* (7) "that a very mistaken notion long prevailed that the lord of a manor had a right to go not only over his own lands, but over the lands of others within his manor." "In the West Riding of Yorkshire," says Baron Martin in *Bruce* v. *Hellewell* (8), "an idea prevails that lords of manors have a right and liberty of hawking, hunting, coursing, fishing and fowling, analogous to that of free warren, or free chase. But that notion is erroneous, they have no such right." Mr. Christian in his notes to *Blackstone*, book ii. c. 27, p. 418, says that this notion, which he terms a very erroneous one, has probably sprung from the Acts of Parliament from the 22 & 23 Car. II. c. 25, downwards, which for the protection of game and for preventing unqualified persons from sporting have empowered lords of manors to appoint gamekeepers with power to seize guns, dogs, nets and engines kept by unqualified persons for the destruction of game.

It was believed that the lady of the manor of Messingham possessed such a right, and I cannot doubt that it was with the view of preserving such a right and not with reference to any right as incident to the ownership of the soil in the wastes of the manor, that the reservation clause in the present Act, so far as it relates to the rights of sporting, was framed. And as soon as it is admitted that no such right existed independently of the ownership in the soil, the reservation appears to me altogether inapplicable, a as regards any right arising f ownership as of no effect.

In this respect the present ca to me clearly distinguishable fr *Ewart* v. *Graham* (6), in which an express reservation of "all hunting, shooting, fishing and f the stinted pasture," which wa about to be inclosed. In the pr there is no reservation of the p existing right of sporting over lands about to be inclosed, but general right inherent in the l cident to the manor, which rig the reservation fails to have a and this appears to me to result from the language of the re clause, but from the preceding that the allotment to the lady of t shall operate to extinguish all and interest in the waste except t "of a manorial character" afte be reserved.

If authority were wanting for I take of the case before us, would I think come within the of the decision in *Greathead* v. *M* in which under an inclosure Act a reservation of "free warren, an of hunting, hawking, fishing and &c., matters and things, to the to the lord or to the lords thereo time being, incident, belonging taining, in as full, ample and be manner as if that Act had not bee Tindal, C.J., in giving judgmen "We are of opinion that the hunting or fowling over the allot the moor or common is not re the lord of the manor by the savi of the inclosure Act set out in It is the manifest object of that save to the lord all those manori which he possessed before the inc lord of the manor, other and e right to the soil. The saving cla no new royalty or manorial rig lord which he did not possess b only reserves such as he was b titled to. If he had no market o fore, if he had no right of free wa

(7) 4 B. & C. 648.

(8) 5 Hurl. & N. 620; s. c. *nom. Bruce* v. *Helliwell*, 29 Law J. Rep. (N.S.) Exch. 297.

(9) 3 Man. & G. 139; s. c. 10 Law J. C.P. 246.

it is needless to say, the clause ed to confers none. So if, before et passed, he had no liberty of hunt-awking, fishing and fowling over oor or common 'to the said manor the lord thereof incident, belonging pertaining,' he acquires no such under the clause in question. Now uld be against all legal construction ld that the power of the lord of the r to hunt or shoot over a waste or closed common within his own manor merely a 'license or liberty' incident mas lord, it is a mode of direct en-ent of his own property. The soil e waste or common is his, subject to the right of the commoners to the herbage by the mouths of their e; and the right in the lord to walk le over it in every direction, and at mes, is the same right which he has his other demesne lands, and not a liberty or easement. The statute, if d intended to grant the new lord a liberty or license of this nature after oil had become the property of those hom it was allotted, would have em-ed proper words to create such new ty or easement. The statute if it intended to grant the new lord a ty or license of this nature, after the ad become the property of those to n it was allotted, would have em-d proper words to create such new y."

e reasoning of the learned Chief Jus-ppears to me directly in point to the at case. By the Act the allotment extinguish all right or interest in the with an express reservation of ma-l rights only. The reservation is of liberty" of hunting, &c., within the r, a term inapplicable to a right in-t to the ownership of the soil. And observations of Tindal, C.J., on the ion of any direct reservation of the of sporting over the lands with-n from the ownership of the soil are lly applicable here. It is true that the case of *Ewart* v. *Graham* (6) was e the Court of Exchequer Chamber the Court of Exchequer having in the first instance decided in favour of the defendant on the authority of the fore-going case of *Greathead* v. *Morley* (9) the authority of that case was impugned, and by the majority of the Judges, Erle, J., and Willes, J., dissenting, overruled as applic-able to the case before the Court. But the overruling of the case of *Greathead* v. *Morley* (9) was wholly unnecessary to the decision in favour of the plaintiff in *Ewart* v. *Graham* (6), and when the latter case was before the House of Lords on appeal from the Exchequer Chamber, though the judgment of the Exchequer Chamber was affirmed neither of the learned lords who concurred in affirming that judgment went the length of over-ruling *Greathead* v. *Morley* (9), but on the contrary they distinctly say that the case before them is distinguishable from it, and uphold the judgment of the Court below on the ground of a clear reservation of the right of the plaintiff as if still owner of the soil. Lord Campbell says—"Great stress has been laid on the case of *Great-head* v. *Morley* (9). I do not at all mean to say that that case is not well decided. I give no opinion upon that. I am not called on to give an opinion upon it. I think it is clearly distinguishable from the present. I am bound to express my own opinion that it is clearly distinguishable. According to *Greathead* v. *Morley* (9) the language of the reservation was uniformly, as it seems to me, confined to manorial easements. Here there is an express, ab-solute and unqualified reservation which I think clearly reserves this right to Sir James Graham as if still owner of the soil. For these reasons, my Lords, I must advise your Lordships that this judgment should be affirmed."

Lord Brougham says—"I entirely take the same view as my noble and learned friend. Without being called upon to give any opinion whatsoever upon the case of *Greathead* v. *Morley* (9), I will only say, that I think it may be perfectly well de-cided; I do not say that it is not, but it is clearly distinguishable, upon the ground stated by my noble and learned friend, from the present case. I am, therefore, of opinion with him that your Lordships ought to give judgment for the defendant in Error."

) 1 Hurl. & N. 550; s. c. 26 Law. J. Rep. Exch. 97.

Lord Cranworth says—"My Lords, I take exactly the same view of this case with my noble and learned friends. With respect to the case of *Greathead* v. *Morley* (9) I must make this observation. Either this case is distinguishable from it, or else the decision in that case in my opinion was wrong. We need not say which of these two alternatives we think the right one, and it would be improper for us to say, that we overrule a case which possibly may be distinguishable from the present. But if not distinguishable I have no hesitation in saying that the case was wrongly decided. Here, after what is called the saving clause, there is an express enactment 'that Sir James Graham, his heirs and assigns, shall at all times hereafter enjoy the right of hunting, shooting, fishing and fowling in, and through, and over the said stinted pasture, and every part and allotment thereof.'" Then the noble and learned lord proceeds to point out that the difficulty in the case arises from seignorial rights having been in the same clause reserved to the lord and to this having been stated in the case; but he observes that "it was evidently no seignorial right: I am very glad," he says, "that the form in which the case was put for the opinion of the learned Judges raises what is the real question, namely, that there was no other right than the right which arose from the defendant in error being the owner of the soil."

Lord Wensleydale says—"I entirely agree with my noble and learned friends that the judgment ought to be for the defendant in error. I entirely adhere to the opinion which I gave in the Court of Exchequer, in which all of us concurred, that in this case there is a reservation of the *de facto* right to Sir James Graham. The only part of that judgment as to which I have any doubt is, whether this case can be distinguished from the case of *Greathead* v. *Morley* (9); but I adopt the alternative of my noble and learned friend opposite that either it can be satisfactorily distinguished, or that the decision is wrong."

The result, then, of these judgments is that Lord Campbell and Lord Brougham expressly declined to overrule *Greathead* v. *Morley* (9). Lords Cranworth and Wensleydale only so fa rule it as the *ratio decidendi* may plicable to the case before them, w the four law lords concur in sayi the case before them was plainly guishable from the case in the C Pleas, the reservation in the latter been of seignorial rights, while in t in the House of Lords there was a and express reservation of the ri sporting over the land to be in The House of Lords having decli overrule *Greathead* v. *Morley* (9) plicable to such a case as the p and having clearly held that th ruling of that case in the Exc Chamber in *Ewart* v. *Graham* (6 unnecessary to the decision of tha it must be looked upon as extra-ju and I therefore feel myself perfe liberty, sitting in a Court of Er treat *Greathead* v. *Morley* (9) as no ruled, and to express my concurr the reasoning and conclusion of C.J., and the Court of Common Pl to my mind more cogent and satis than that of Wightman, J., in *Ew Graham* (6).

Independently, however, of autho arrive at the conclusion that n short of a positive reservation to t of the right of sporting over the ir lands, if not in express terms, events in language necessarily l to such a conclusion, will suffice force on land allotted as freel burden of a feudal and onerous ch inconsistent with the ownership in agree with what is said by Baron well in *Lord Leconfield* v. *Dixon* (11 the reservation of such a right to t is contrary to the policy of the in Acts. The policy of the legislat this subject has been to cause the re ing of waste lands and the making available to the purposes to which property is capable of being applie inconveniences of such a reservati there forcibly pointed out. "It sho remembered," says Baron Bra

(11) 36 Law J. Rep. (N.S.) Exch. 10 Law Rep. 2 Exch. 202; in Exch. Law J. Rep. (N.S.) Exch. 33; s. c. Law Exch. 30.

"that the right now claimed by the plaintiff is inconsistent with the useful design of the statute; which was that the lands affected should be held in severalty, with a plenary proprietorship unfettered by the rights of others over them. There is no doubt that this is most for the public interest. If the plaintiff's claim is well founded, there is no use to which the defendant can put his lands without their being subject to that claim. He could not build a house and have a garden or lawn without the privacy of the occupation being liable to invasion by the plaintiff in search of game."

I am therefore prepared to hold that nothing short of a clear recognition of a right of the lord to take the game in what becomes *alienum solum* will suffice to preserve this right, and that the mere reservation of manorial rights, properly so called, will not have this effect. In the present instance we have only a reservation of manorial rights, and it is not because the parties have intended to preserve a right as incident to the manor, which turns out to have had no existence, that we can give effect to this intention by holding the reservation to apply to a right which was not in the contemplation of the parties, and which was not a manorial right at all but simply a right incident to the ownership of the soil, and which therefore was not theretofore in the lord as a manorial right.

I am therefore of opinion that the decision of the Court of Common Pleas was right and should be affirmed.

I am authorised by my brothers Mellor and Amphlett to state that they agree with me in the opinion at which I have arrived.

BRAMWELL, B.—I agree with the reasoning and the conclusions of the Lord Chief Justice. But I have prepared a judgment stating my own view of the case, and will now proceed to deliver it.

If I had to say what was the intention or object of the draftsman in the clauses beginning "Nothing herein contained shall prejudice, &c.," I should say he found certain words had been commonly used, either for preserving some right which otherwise would be lost, or for avoiding a question of whether it was lost, and so put them in to serve the same purpose here, believing they would at least do no harm. And I should say that *most certainly* he never put them in to save or confer the right of sporting claimed by the defendant. That his object was what I suggest, seems manifest from the words used. There is a whole string of words, many of which are, probably, and certainly one is, inapplicable and useless. There is no fishery, probably no fairs, marts, markets or stallage, and probably no right to the goods and chattels of felons and fugitives, felons of themselves and put in exigent, deodands, treasure-trove, waifs, estrays and forfeitures. These words and the general words, "matters and things," satisfy me the object of the draftsman was what I have mentioned. That it was not the object to save or confer the right of sporting claimed, I am satisfied from the inappropriateness of the language used. The claim is of an exclusive right to take and destroy all game and rabbits, and, I suppose, other edible birds, as plovers, quails; and also, I suppose, the exclusive right of hunting foxes, and destroying other vermin. This was definitely put forward, and it is a claim made under a title to a right of sporting, which was territorially possessed before the enclosure. Is it conceivable that a man who wished to save or confer that right would have contented himself with using such words as "liberty of hawking, hunting, coursing and fowling within the manor"? No such word as sporting, shooting, taking game and rabbits; no word of "right;" no word of exclusion; but the old-fashioned words, "hawking and fowling," and the useless ones as a matter of profit of "hunting and coursing." I have no doubt no such idea was in the head of the draftsman as is suggested. Had there been, he would have used such words as appear in *Ewart* v. *Graham* (6).

If, however, it could be proved to me there was some such idea, then I should say it was this: That thinking there was some right in the lord of the manor as such over lands "within the said manor," he meant that it should extend, such as it was, to the new enclosures. I am satisfied, as I have said, that he had no such

idea; but if he had and used those words to carry that into execution, then he only saved or conferred the same right over the new as existed over old inclosures, and that is none. If it was a doubtful right, then the allotments were, on the footing that it was doubtful, more to the tenants than if it was certain there was no right, less than if it was certain there was a right.

But we are not called on to guess and say what the draftsman intended. The question for us to decide is, what intention he has expressed—what is the meaning of the words he has used. In construing these words we may well take into account the general intention of the statute and the probabilities. The intention was to allot the land in severalty free from rights interfering with its use in such way as the owner thought most beneficial. But according to the argument of the defendant, this intention was only partially carried into execution, for a right of sporting was given to the lord over every allotment. The freeholder is not at liberty to sport on his own land, nor to destroy hares or rabbits, however mischievous, or however inconsistent with the most profitable use of it, but is subject to the right, well called odious, of having his freehold invaded by the lord or those whom he may license, with any number of beaters and helpers.

May the allottee build a house or erect a brick wall, or lock a gate to his freehold? It is in vain to say ordinary farming tenants are subject to this right. So they are to pay rent. They take their farms on these terms or leave them alone. They pay rent accordingly, and the feeling is different in the case of a freehold. The right claimed is, in my judgment, injurious and objectionable, and consequently one not likely to have been conferred by the Legislature. Let us see if it has been. The burthen of proof is on the defendant. The right of sporting was territorial, an incident of the property in the soil. When that property was transferred to the allottee, this right went with it, unless the defendant can shew it was saved to, or conferred on, the lord. I might content myself with saying I have heard nothing to shew that has been done. But further, I think I ca negatively that it has not been statute says that the lands allot vested in the allottees in full bar satisfaction for, all rights of comm other rights of and interests ov upon the lands, except such r rights as are hereinafter reserved garet Walker, her heirs, &c. The reserves, and does not pretend to right, and the rights it deals with "manorial." It afterwards procee "Nothing shall prejudice, &c., th of Margaret Walker or any lord manor of, in or to the seignory or ties incident or belonging to such This is the reservation clause, a stopped there, it is clear that noth seignory or royalties would be r But it goes on to explain what it by "manorial rights and seign royalties," introducing the exp with the words, "but that" M Walker and all succeeding lords manor shall enjoy rents and lib fishery, &c., "within the manor." this, which is meant to explain, ou to extend the meaning of the "seignory or royalties." It th merates what it has thus called rial rights and seignory or royaltie claim is merely to preserve whate or was not in the nature of a s or royalties. The words "if any be read in that enumeration, as i tain there was no right of fishing these rights, if any, are certainly manorial, that is to say, some m held where there was no manor other than the lord. But they a a manorial character, or such s belong to the lord of the man a seignory or royalties, and are a territorial character. It is nee enumerate them; moreover, they spoken of as "to the said manor, or lady thereof incident or belon which have been heretofore held garet Walker or any of her anc These words clearly govern the sentence, and not "matters and only." They are, therefore, thin dent to the manors, or belonging as lady thereof. If the matter here, there would scarcely, as I th

Before considering the first question, viz., whether the enactment in question upon the face of it has reference to some particular right distinct from that possessed and enjoyed by the lord of sporting on the wastes, and possibly over old inclosures in the manor, it is requisite to consider what the position of the lords of manors was, and whether they stood in a different position from mere owners of land.

It is quite unnecessary to enter into the question of the original right of the Crown to take all animals *feræ naturæ*, in which there was no right of property, and whether originally no man could do it without some grant from the Crown, such, for instance, as a right of free warren, as to which *Blackstone* may be consulted, vol. 2, p. 38 (ed. by Stewart): because all questions connected with the right must be decided upon the effect of the numerous statutes on the subject. Those statutes had reference to the right to preserve and kill game, and to the qualification which was required. The necessity for a qualification was abolished by 1 & 2 Will. 4. c. 32. But my object in referring to the earlier Acts is to shew that lords of manors were regarded as standing in a different position from other persons as regards the right of sporting over the manor. The difference was not sufficiently adverted to upon the argument. It is only necessary to refer to the statute 5 Ann, c. 14, an Act for the better preservation of game, which empowers lords and ladies of manors to take within their manors game from the possession of unqualified persons, and to take guns, dogs and nets, and also to appoint gamekeepers to kill game for the use of such lord or lady; and the statute 1 & 2 Will. 4. c. 32 (which being passed subsequently to the Act in question, is only of importance historically as being founded, not upon new, but upon old ideas), is to the same effect. The 13th section enables lords and ladies of manors to appoint gamekeepers, and confers upon such gamekeepers the right to seize for the use of the lords, nets, &c., used for taking game, used within the limits of the manors by persons not authorised to take game. The same Act in many sections deals with the right to kill game as something distinct from the ownership of the soil. The words "right of killing game," whether enjoyed by landlord or other persons are frequently used, and that separate right is made the subject of legislation. Without referring further to the statutes it is sufficient to notice the case of *Calcraft* v. *Gibbs* (12) (decided in 1792, the Act in question being passed in 1798). It was an action for a penalty under the game laws for sporting without a qualification. The qualification set up was a deputation as gamekeeper under a person who, it was said, had purchased the right of shooting over the manor. But this was held to be no answer, there being no *bona fide* dispute as to who was lord of the manor. If there had been such a dispute, it could not have been tried in an action for a penalty; but there being no dispute, it was said the lord of the manor was the only person who could grant the deputation as the law then stood. The words of Lord Kenyon are—"Now that decides the question at once; for a man cannot convey to another the power of appointing a gamekeeper without a conveyance of the manor itself: such a power is a mere emanation of the manor and inseparable from it."

The clear effect of the legislation on the subject, and of the authorities was, it is submitted, that the lord had certain rights connected with the preservation and taking of game, which were regarded as inseparable from the manor, and therefore as manorial rights. The extent to which the lord had the exclusive right of sporting has nothing to do with this. It might be over the whole manor, or it might be over the wastes and particular inclosures, or it might be a subject of dispute whether it existed beyond the wastes of the manor, and to what extent.

Mr. Christian in his note to *Blackstone*, vol. 2, p. 418, says, "that the power of lords of manors to appoint gamekeepers had led to the inference (which he considers as erroneous) that lords of manors have a right to take game through the manor superior to that of other qualified owners of land within the manor." Having regard to the

(12) 5 Term Rep. 19.

of the lords of the manor at the time when the Act passed, we may now consider whether it appears that the Act of Parliament in the various clauses is intended to preserve some right to the lord which did not exist. It was suggested that the language of the Act was used upon the supposition that the lady of the manor had some such distinct right as a right of free warren, which it was intended to reserve, and as it was now conceded that there was no such right as that of free warren, that the enactment was inoperative. Upon reading the various clauses of the Act I see no reason whatever to conclude that they have reference to any such particular right independent of the general right of the lord of the manor. By the first clause there is to be an allotment to the lady of a certain portion of the wastes in lieu and in full compensation for her right and interest in the soil of the commons and waste grounds, and in the section which follows we have the effect to be given to the allotment. By that section the allotment to each allottee, including the lady of the manor, is made a satisfaction for all her rights over *all the wastes* with the following exception, "Except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns."

A right of free warren does not come within the description of a manorial right at all. It is a franchise to which title must be made either by grant from the Crown or by prescription, and may be held just as well by a person not lord of a manor as by one who is. It is so separate from the manor that when the lord of a manor has also acquired a right of free warren over the manor and conveys away the manor, with all rights of fishing, fowling, hunting and shooting belonging to it, this would not carry the free warren, because though the words all rights, &c., are large enough to include a free warren yet the warren does not belong to the manor and therefore does not pass.

This was expressly decided in *Morris v. Dimes* (13). In that case Littledale, J., says, "Whether these words be sufficient to include a free warren, I will not enquire; the grant is only of things belonging to the manor, and the warren was distinct from the manor; and therefore it will not pass by the release."

It may no doubt be by prescription or by the terms of the original grant like any other profit *à prendre* or easement appurtenant to the manor so as to pass by a conveyance of the manor with all its appurtenances; but that does not make it any more than any other such profit, or easement, a manorial right. So that this exception of manorial rights could not by any natural conclusion be held to have reference to such a right as has been mentioned.

As regards the reservation and enacting clause which follows, and which is referred to in the second section, it contains general words including all rights of hunting, fishing and fowling, and all franchises and privileges, and every right which could be enjoyed by the lady as lady of the manor, and therefore would no doubt include a free warren if such a franchise had become appurtenant to the manor; but coupling those general words with the more particular words of the exception to the preceding clause, which refers to them, it seems impossible to contend that the whole enactment clearly refers to a supposed right of free warren, which did not exist, to the exclusion of any more limited right which did exist.

Applying, however, the whole of the enactment to the state of things which did exist we must consider what that state of things was. Miss Walker was lady of the manor, with the usual right of appointing gamekeepers and granting deputations for the manor, with the exclusive right of sporting on the wastes of the manor. She might have or might not have the right of sporting over old enclosures, although the inference derivable from the Act is that she had not, or at all events, that it was not admitted by the parties to it that she had any right beyond that over the wastes; because the exception in the second section only refers to the rights over the wastes, and it refers to the subsequent enactment as carrying into effect the previous exception. The effect of the enactments, as applied to what was undisputed, appears to be that the allotment clause

(13) 1 Ad. & E. 654; s. c. 3 Law J. Rep. (N.S.) K.B. 170.

excepts the lady's rights over the wastes, and the enactment clause contains words carrying into effect the exception; and we ought to give it this operation by applying it to what did exist rather than make it inoperative by supposing it to apply exclusively to something which did not exist.

The only real question appears to be, whether in any fair sense of the word the lady of the manor can be said to have any right of sporting over the wastes. There is, perhaps, some want of strict accuracy in speaking without some explanation of the right of the owner of the soil to the exclusive sporting on his own land; although it should be borne in mind that the owner of land has not necessarily the exclusive right of sporting over it: there may be a right of free warren in some other person, or he may himself have granted away the exclusive right of sporting. But even if there is some want of strict accuracy the only question is, whether what is intended is clearly understood; and it has been so common a thing to have the right to the land and to use it for the ordinary purposes of occupation in one person, and the privilege of sporting in another (the latter privilege being one of the most common subjects of bargaining in all parts of England), that even before it has become, properly speaking, a separate right, it is spoken of as such. It may never have existed in the time of the owner for the time being, except as a separate right. It may always have been let either for terms of years or from year to year, and it may be under demise at the time when the lord and the commoners come to the agreement for the enclosure. And as to its coming within the words "manorial right" enough has been said to shew how much the rights of lords of manors, in relation to game, were and are treated as manorial rights. I will only add that supposing the lord of a manor having always enjoyed the exclusive right of sporting over the wastes of the manor, and having made it the subject of profit by letting it from time to time, and the commoners were to meet for the purpose of settling the terms of enclosure, and there was to be an agreement to the effect that the allotment to the lord should be in satisfaction of al his rights over the wastes, would it no be considered that he had given up al his rights, including that of sporting On the other hand, if the agreement wa that the allotment to the lord should b in satisfaction of all his rights over th wastes, except the manorial right afte wards mentioned, and the right afte wards mentioned was that of sportin along with certain other rights, th the right of sporting would be reserv it is only a question of intention, and intention I submit would be obvious.

It was said that there was a diffic upon this construction in giving effe the exception in the third clause, wh excepts out of the reservation " common right as could or migh claimed by the said Margaret as owne the soil and inheritance of the said co mons or waste grounds." The wo "such common rights as might claimed" by the lady are inartificial, cause the common right would be clai by the commoners, and the lady wo have no right as owner of the soil w the commoners. If this had applied her right in respect of tenements in manor, her property, it would be corre but the language applies it to the wast The lord would have no right as a co moner, but he would have a right stock the common as owner of the wa provided enough was left for the co moners, and in that general sense he m be said to claim a common right with others, to which the language might ply; for the lord receives compensa by his allotments not only for his giv up the ownership of the soil, but also his losing his benefit of stocking the c mons. At any rate the words, "com right," cannot by any straining of la guage be held as referring to the lo exclusive right of sporting so as to exe it. As regards the distinction which drawn between territorial and manori rights, I beg to be allowed to say that a manorial and seignorial rights are in every proper sense of the word territorial.

Without regard, therefore, to any authorities I should come to the conclusion that there is nothing to prevent effect being given to the language of this agree-

intend by these words? And although the words might not properly describe such a right, taken by themselves, enough has been said, I hope, to shew that there is nothing so inappropriate in them as to make it impossible for them to be construed as including the only thing to which the intention of the parties could apply them.

It is because I am satisfied that this judgment carries into effect the intention of the parties to this arrangement of rights in 1798, that I venture to differ from the Lord Chief Justice and many of my learned brothers.

I think, for the above reasons, that the judgment of the Common Pleas ought to be reversed.

My brother Pollock concurs in this judgment.

Judgment affirmed.

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torneys—Scott & Co., for plaintiff; Pilgrim & Phillips, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Common Pleas.*)

1874. May 11. June 24. } ELLIS *v.* THE GREAT WESTERN RAILWAY COMPANY.

Negligence — Evidence—Level Crossing upon Railway.

The plaintiff had occasion between nine and ten o'clock on an evening in December to cross the defendants' line, where that line crossed a highway on a level crossing. There were gates on each side of the line, which were closed, as was usual when a train was expected: there was a small gate adjoining, through which foot-passengers could pass, and which was not kept shut. In crossing the line the plaintiff was caught by a train passing along the line, was knocked down and very seriously injured. There was no light at or near the level crossing, by which the plaintiff could see whether the gates, usually closed to prevent carriages from passing when a train was approaching, were open or shut, so as to form a judgment whether a train was likely to pass or not. He saw no light as of an approaching train, and heard no whistle from the train:—Held (*per* BRAMWE MELLOR, J., POLLOCK, B., *and* AM B., *dissentientibus* COCKBURN, C. CLEASBY, B.), *that the foregoing stances disclosed no evidence of ne in the defendants.*

Error upon a bill of exceptions ruling of Grove, J.

The declaration stated that at the the committing of the grievances after alleged the defendants were p of a railway which crossed on t thereof a certain public highway; defendants negligently invited pe cross the railway upon the said h when it was dangerous for them a and improperly and negligently dr managed their trains on the said r and the plaintiff whilst lawfully u said highway, and being invited by fendants so to do was, owing to t negligent conduct of the defendar knocked down by a train of the ants and had one of his legs cut was otherwise hurt and permane jured, and was prevented for a lo from attending to his business, curred great expense for surgi medical attendance.

Plea, not guilty. Joinder of is

The cause came on for trial Grove, J., at the Summer Assize for the county of Stafford, and the ing appear to be the material fact case.

A surveyor deposed that the where the accident happened wa the Bloomfield Crossing; that the two lines of rails and a boarded p across all the rails where persons over; that there were gates on e of the line; that in the daytime a crossing the line could see quite mile along it towards Dudley, and over a quarter of a mile towards W hampton.

The plaintiff deposed that he l the parish of Tipton, on the Blo side of the line; that on Sund 17th of December, he went to Wa to dine, a place on the side of the posite to the Bloomfield side, an home in the evening; that on h home he stopped at "The Swift P

Inn and started therefrom about 9h. 20m. The witness then proceeded to give the following evidence—"My road was across the Bloomfield Crossing; when I got to the crossing I heard a train coming in the direction from Dudley, and I waited till it passed; I came to the watch-box; it was dark, and I could see no light whatever; I went straight to go over the crossing, and was not aware that another train was coming up. I did not see it until it was close to me, and I did not hear it. The night was very dark. There was no lamp or gas to light the crossing. I saw no light on the train which was coming from Wolverhampton and going to Dudley. I heard no whistling from any train. The up and down trains do not generally come together at that crossing to my knowledge. I was going across the crossing and got into the centre when I found an engine close to me. I tried to turn to get out of the way of it when it struck me on my left arm and knocked me over on the six foot way, which is between the two lines of rails. My leg was smashed flat. I saw no railway servant there to give me caution or warning. I cried for help. In about six or seven minutes a woman, Mrs. Gallagher, came. She was the first to come: others came after . . . . I have not known two trains meet there before. I have lived thirty years near there. I crossed once or twice a week. I always crossed carefully, as I knew it was a dangerous place."

The cross-examination of this witness was postponed by consent.

Joyce Gallagher deposed as follows—"I remember the night the plaintiff was hurt at the crossing. I was going across and saw plaintiff had been knocked down. Moore came up afterwards. He watches the goods sheds on Sunday nights. I have to pass the crossing to go home. There is a pointsman there on week-days. I do not know his name: the pointsman stops at the other side of the line from the goods' shed. The pointsman is not there on a Sunday. There are gates for carts to go through. They remain open all day and are closed at night towards six or seven o'clock, when the traffic is done at the brickfield."

Other evidence having been given for the plaintiff, his case was closed; whereupon the counsel for the defendants submitted that the plaintiff ought to be non-suited, or that the Judge ought to direct a verdict for the defendants on the ground that there was no evidence to go to the jury of negligence in the defendants to render them liable to an action, and if there was such evidence of negligence there was also evidence that the plaintiff had been guilty of such negligence as disentitled him to recover against the defendants. The counsel for the plaintiff contended to the contrary. The Judge ruled that in point of law there was evidence to go to the jury of negligence in the defendants to make them liable, and that the question whether the plaintiff had been guilty of such negligence as disentitled him to recover against the defendants was for the jury to determine.

Thereupon the plaintiff was recalled, and upon cross-examination said—"The train from Dudley to Wolverhampton was passing as I got to the turnstile to cross, but I had not got through the turnstile before it passed. I did not hear anybody call out. This train which passed was on the line nearest to me, and when it had gone by I proceeded to cross. I cannot say whether the engine or tender was first in the train which knocked me down. It was either the corner of the engine or the tender that struck me. I was on the centre of the line as nigh as I can tell, and I was backing off trying to get away as it struck me on the elbow. I was on the line of metals where the engine was coming along. My left arm was first touched. The train was going in the direction from Wolverhampton to Dudley. I was sideways to the engine. It caught me as I was turning round."

The plaintiff on re-examination said—"The down train, which passed me first, made a noise running along as trains usually do. The train was still near enough for me to hear the noise of it when the accident happened. The locomotives on this railway usually have lamps alight when it is dark, but I do not know whether the train in question had a light. It was very dark. I did not see anything of the

whether the omission does not amount to negligence.

I am of opinion that that question is one which should be left to a jury, and I am further of opinion that the statement of the plaintiff amounted to *prima facie* evidence of such an omission, and that consequently the learned Judge was right in not withdrawing the case from the jury.

MELLOR, J.—I think that there must be a *venire de novo* in this case, as I cannot see in the bill of exceptions any evidence set forth which was proper and sufficient to submit to the jury to sustain an action against the defendants, on the ground of negligent management of their trains on the night in question.

I do not desire to withdraw or qualify anything which I am reported to have said in the case of *Cliff* v. *The Midland Railway Company* (8). I think that the opinion which I expressed was strictly correct as applicable to the circumstances of that case; the engine which caused the injury was not the engine of any regular train, but was employed in shunting trucks after the regular train had passed. It was, in fact, an unusual train of trucks which came without notice across the footway, and I think that whistling as the train appoached the footway was obviously so reasonable a precaution, that the omission under the circumstances might be evidence of negligence. In the present case there was nothing unusual in the management of the traffic on the night in question. The trains were the usual and accustomed trains passing at the usual and accustomed times, as was admitted by the counsel for the plaintiff.

It is not enough, in order to make out a case to go to the jury, that the party injured did not see a light or hear a whistle. He must give evidence which ought to satisfy a jury that there was something negligent or unusual in the conduct of business on that night. It is, I think, apparent from the evidence that the traffic had been conducted for a long time in the same manner as it was on that night, and I think that it must be taken that the plaintiff, who stated that he had lived near the spot for thirty years, and crossed at the crossing once or twice a week, was aware that trains coming in opposite directions passed that spot about the same time every night, and I think that the true inference from the evidence on the part of the plaintiff, was that the accident was due entirely to his own want of ordinary care.

BRAMWELL, B.—I entirely agree with the opinion of my brother Mellor. But as I have prepared a judgment of my own, I will proceed to deliver it; for a decision arrived at by a train of independent reasoning carries more weight than mere acquiescence in the views of another person, however eminent for judicial knowledge he may be.

I am of opinion there should be a *venire de novo* in this case. I think there was no evidence to go to the jury. In my judgment the road being straight, things on it visible for a quarter of a mile in one, and half a mile in the other direction, nothing to impede the view or make a difficulty for the foot passengers crossing the line, nothing was necessary to be done by the defendants. The sight and sound of the approaching trains were enough warning. If not, I cannot see why it should not be held that where a carriage on a common road crosses a footpath, the driver is bound to blow a horn, or stop or have somebody at the crossing to warn the foot passengers. Further, I think that proper precautions are not negatived here by the evidence. I think it is shewn by the defendants' evidence that they did not whistle. But it is not shewn that warning was not given. The witness who says he gave warning is displaced if the contradiction is believed. But that only proves that there is no evidence that warning was given, not that there is evidence that it was not. The only thing relied on for that purpose, is the statement of the plaintiff that he did not hear it. That is no evidence it was not done. It is consistent with two things, one that it was not given, the other, that though given it was not heard. And where testimony is equally consistent with two things it proves neither. This may seem a subtlety, but it is not. We all know what is done at Nisi Prius

COURT OF COMMON PLEAS:

n said, 'There is two yonder, and s got hurt.' He came across with np, and asked me if two men had out. It was before Ellis was picked

aac Brooks was examined on the part he plaintiff, and said—"I am the ma- er at the Bloomfield Works." Q. id you hear Moore say, 'I shouted out Ellis, but I do not think he heard me.' A. 'Yes, up in the room at the man's ouse.' Q. 'Was that the day after the ccident?'—A. 'In the morning, about ine o'clock.'

The counsel for the defendants and the plaintiff respectively addressed the jury.

The Judge, in his direction to the jury, said that there was some evidence for the consideration of the jury of negligence on the part of the defend- ants in the conduct of their railway and train, which produced the injuries to the plaintiff complained of, but that they were not obliged to find for the plaintiff on that account; and if they fonnd that there was such negligence, the plaintiff would be entitled to the verdict, unless the plaintiff so far contributed to the accident by his own negligence or want of common care that but for such negligence or carelessness the accident would not have happened, in which case the defendants would be entitled to the verdict.

The jury found a verdict for the plain- tiff with 350*l*. damages.

Manisty (*J. O. Griffits* with him) (on May 11), for the defendants (the Great Western Railway Company).—The bill of exceptions does not disclose any evi- dence either of invitation, or of negligence in driving the engine. *Bilbee* v. *The Lon- don, Brighton and South Coast Railway Company* (1) is distinguishable in its facts. There the crossing was constructed in a dangerous manner. Moreover, it is doubtful whether the decision can now be deemed good law; but at all events at the Bloomfield crossing persons could see trains coming a long way off. The car- riage gates were closed at the time of th[redacted]he accident, and this distinguishes the pre[redacted]re- sent case from *Stapley* v. *The Londo*[redacted]on, *Brighton and South Coast Railway Com*[redacted]m- *pany* (2).

Henry Matthews (*G. Browne* with him[redacted]n), for the plaintiff Ellis.—The defendar[redacted]nts were guilty of negligence. The eng[redacted]ine ought to have whistled at the Bloomfi[redacted]eld crossing—*James* v. *The Great Western R*[redacted]il- *way Company* (3). It was not sufficien[redacted] to whistle at the Prince's End stat[redacted]on. *Wanless* v. *The North Eastern Rail*[redacted]ay *Company* (4) is in the plaintiff's fav[redacted]ur. *Stubley* v. *The London and North West*[redacted]ern *Railway Company* (5), *Skelton* v. [redacted] *London and North Western Railway Co*[redacted]m- *pany* (6), *Wyatt* v. *The Great Weste*[redacted]rn *Railway Company* (7) are not precisely in point.

Manisty, in reply.—It is unnecessar[redacted]y for the defendants to rely upon the do[redacted] trine of contributory negligence. T[redacted] plaintiff was the author of his own mi[redacted] fortune.

Cur. adv. vult.

The following judgments were delivere[redacted] on the 24th of June:—

MELLOR, J., read the judgment of COCKBURN, C.J.—I regret in this ca[redacted] to be obliged to differ from the majorit[redacted] of my learned brothers, but I cann[redacted] bring myself to think that there was n[redacted] a case made out on the part of the plai[redacted] tiff, which the learned Judge on the tr[redacted] should not have withdrawn from the ju[redacted]

The case must be considered by [redacted] quite irrespectively of the evidence gi[redacted] on the part of the defendants. T[redacted] may have been abundant evidence [redacted] duced by the defendants to entitle [redacted] to the verdict, but the jury might [redacted]

(1) 18 Com. B. Rep. N.S. 584; s. c. 34 Law J. [redacted] C.P. 182.

(2) 4 Hurl. & C. 93; s. c. 35 Law J. R[redacted] Exch. 7.

(3) 36 Law J. Rep. (N.S.) C.P. 255 n[redacted] Law Rep. 2 C.P. 634 note.

(4) *Ante*, Q.B. 185; s. c. Law Re[redacted] 481; in House of Lords, *ante*, Q.B. [redacted] Law Rep. 7 H. L Cas. 12.

(5) 4 Hurl. & C. 83; s. c. 35 L[redacted] (N.S.) Exch. 34.

(6) 36 Law J. Rep. (N.S.) C.P. 24[redacted] Rep. 2 C.P. 631.

(7) 6 B. & S. 709; s. c. 34 Law [redacted] Q.B. 204.

rance from his own underwriters, and will thus obtain for himself at the expense of the shipowner or his underwriters a bonus or profit of 1*l.* a ton in respect of the coal lost over and above the value of such coal.

It is, I think, impossible not to suspect some error in a judgment which has led to a result so strange and inequitable. It was said, indeed, in argument before us that this startling result arises from the mode in which the charterer effected his insurance, and that the apparent anomaly would not have existed if valued policies had not been allowed by our law, and the charterer had effected an insurance simply on the prepaid moiety of the freight; but I cannot concur in this view, for suppose he had insured separately the prepaid moiety of the freight in identical terms with the insurance effected by the shipowner in respect of the other moiety of the freight, the underwriters of the last-mentioned moiety would, according to the principle of the judgment, have borne the whole loss, and the other underwriters nothing, a result which appears to me equally strange and inequitable as the former.

I venture, however, with great deference to think that the assumption upon which the judgment proceeds is erroneous, and that the prepayment of a moiety of the freight ought not in this case to be taken as a payment on account of the freight actually earned by delivery of the cargo, but on account of what might contingently be earned in respect of the whole cargo.

No doubt it might have been stipulated, as it frequently and perhaps generally is in practice, that the prepayment of freight should be taken as a payment on account of freight actually earned; but in the charty-party in question there is no express provision to that effect, and I am of opinion that there are sufficient indications to be found in it that it was not so intended by the parties.

Freight is by the charter-party to be paid after the rate of 42*s.* per ton on the quantity delivered, and such freight is to be paid, one-half in cash on signing bills of lading, with certain deductions, and the remainder on the delivery of the cargo. Now all this proceeds upon the assumption that the whole freight will be earned and does not contemplate or provide for the case of a loss, either total or partial. It is clear that the half to be prepaid must be calculated on the whole cargo, without reference to possible loss: and as it is admitted on all hands that according to English law, however much it may be disapproved of by high authority, no part of such prepayment could be recovered in any event, it appears to me that the most reasonable construction of the charter-party is to hold that for all purposes the prepayment should be taken as made in respect of the whole cargo, and, consequently, in the event which has happened, distributable between the part lost and the part saved.

This view of the case appears to be strengthened by the deduction allowed for insurance, which denotes according to Lord Selborne in *Watson* v. *Shankland* (5) (which in other respects has not, I think, any material bearing on the present case), that it was in the contemplation of both parties that each should bear the risk of or insure for one moiety of the freight. This construction too has at least the merit of doing complete justice between the parties in every event. In the actual case before us the result will be that the charterer will have to pay to the shipowner to the relief of the latter's underwriters one moiety of the freight upon the cargo saved, and be recouped for the same out of the moneys received on his own policy, which virtually covers freight as well as cargo.

If on the other hand the shipowner and charterer had each insured for the value of a moiety of the freight, the loss would have fallen, as in justice it ought, equally between the respective underwriters.

Or lastly, if neither had insured, or in other words if each had been his own insurer, each would have borne a moiety of the loss, which again would be quite just, inasmuch as the premium of insurance in respect to the charterer's moiety was allowed to him out of the prepayment of freight.

(5) Law Rep. 2 H. of L. Sc. App. 304.

For these reasons I am of opinion that the plaintiff was not entitled to recover from the defendants as for a total loss; and it being admitted that in that case the defendants have paid into Court all that is due from them, I think that the judgment of the Court below ought to be reversed.

CLEASBY, B.—In this case the plaintiff, a shipowner, claimed a total loss upon valued policies on freight, the voyage being from Greenock to Bombay. The defendant paid into Court half the amount.

The plaintiff alleged that he had insured the freight which he was to receive at the termination of the voyage, and that, as in consequence of the perils insured against he was entitled to receive none there was a total loss.

The defendant contended that, in the events which had happened, the plaintiff was entitled to receive at the termination of the voyage half the freight insured, and so there was a partial loss only.

Thus the subject of dispute between the parties, viz., the right to freight at the termination of the voyage, under the circumstances, depended upon the proper construction of the charter-party, which was admitted to be the only question raised in the case, and was the only one argued before us. The charter-party between the plaintiff and one De Mattos, under which the freight was to be earned, was dated the 7th of March, 1867, and provided that the ship should load a full cargo of coals at Greenock for Bombay, freight to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwt. on the quantity delivered, and it was further provided as follows—"And such freight is to be paid, say one half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than five per cent. per annum, five per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coal short delivered, in cash at current rates of exchange for bills on London at six months' sight."

The cargo was put on board, and half the estimated amount of frei 2,286*l.* 10*s.*, the receipt being as "Received from W. N. De Ma the sum of 2,286*l.* 10*s.*, being a half freight on within shipment, having paid all charges, inclu signment commission at Bombe charter-party."

The plaintiff effected his p freight, and De Mattos effected on the cargo, adding to the valu freight paid by him. The vess sailed on the voyage, and half having been lost by the perils o arrived at Bombay with half t and it appearing that the freig per ton of what arrived was than the sum of 2,286*l.* 10*s.* al ceived by the owner for frei captain delivered the cargo free c and the plaintiff brought hi having, as he contended, totall the perils the freight which he to receive at Bombay, and whic insured. So that the question the captain bound to deliver t which arrived, free of freight be already paid, or could he have upon payment of one half frei the quantity delivered? There i unusual in the terms of this char It is quite common for the ship be put in funds by a prepay freight, although, properly freight is what is earned by the of goods to their destination; a that is done the deductions ma present case are intended to put owner in the same position freight had been paid at the e voyage; the first deduction bein for the estimated duration of th four months, which the owner the prepayment, the second th of insurance which he saved the payment actually made, longer subject to risk requiring i and the third the consignm mission, or the commission would have to pay to the broker the ship was consigned at the for collecting the freight. A only a mode of calculating the be paid for one-half the frei clearly imposes no obligation

the insurance accrue to his benefit. But this appears to us to be a mistaken view of that deduction, which is in reality only a mode of arriving at an equivalent for what the shipowner would receive at the end of the voyage, and placing the charterer in the same position as the shipowner would have been in as regards insurance, and with the same option to insure or not.

The learned counsel also relied very much upon the obvious gain to the charterer, if he insured his cargo at a value increased by the prepayment in the event which happened, namely, of one-half being lost by the perils. It was said that he would be repaid one-half of his advance by the underwriters on the goods, and then get the one-half of his goods delivered free of freight, and so have the benefit of the whole advance, the result being a gain of one-half of the amount so advanced. This was explained by the learned counsel for the defendants, but not so fully as it might have been, probably because he thought the matter too clear to need further explanation. It is accounted for in this way. If the charterer had insured his real interest at risk, namely, the prepaid freight, 2,268*l.* 18*s.*, then if at the end of the voyage the freight payable had amounted only to that sum, he would have had the full benefit of the payment made in discharge of the freight, and would of course have recovered nothing under his policy, and no profit would have been made. But by means of a valued policy in which the value of the goods is increased by the amount of prepaid freight, this falsehood (as it may be called) is introduced, namely, that all the goods are supposed to be so increased in value, whereas in reality those only are increased in value which arrive at their destination; and thus, if any are lost, the charterer recovers, not upon the real value, but upon that value increased by the proportion of freight, and he so makes a profit by insuring the goods beyond their value. He may do this in any case by insuring beyond the value if the underwriters agree to it, and they cannot object to it because they get paid the premium in proportion. This is the explanation of the profit made by Mr. De Mattos, namely, that the goods lost were insured beyond their value, and so a profit was obtained instead c indemnity.

We cannot depart from th meaning of the word freight meaning expressly given to it charter-party, namely, the amou paid at the end of the voyage fo ready for delivery at the stipula This had been wholly satisfied b vance made, and so the shipow entitled to receive no more, and tain was right in delivering the h free of freight.

A case, *Watson* v. *Shankland* referred to in the argument Benjamin. In that case a qu Scotch law arose upon a charter i terms to the present, and the was, whether a sum paid on ac freight could upon a loss of the recovered. The argument ap have been that, according to Sc it must be taken to be, not a prepa freight properly so called, but an on account of freight. The jud the House of Lords was, that it necessary to decide whether it w payment or an advance, because, a for the sake of argument that it a prepayment but an advance, stil not be recovered back by reaso neglect to insure. And upon the tion that it was not a prepaymen advance, it was necessary to acc the deduction and give some r and the meaning given would be proper one if it was founded u assumption *argumenti causa*, u assumption agreed with the real f the present case we know that t mission deducted was not upon sumption referred to, but upon th prepayment, and that it was not i what was suggested in that case, as it is called in the receipt, cons commission which is saved by payment.

I beg to add one other rema the construction of this contract. parties containing provisions for ment or advances to the master, same effect as prepayment, ha usual as long as I remember; a not too much to say that thou such charters have been effect

which the captains of vessels have acted in all parts of the world, with the responsibility of delivering or refusing to deliver the cargoes, and in order to discharge their duty, they must have made themselves acquainted with the effect of prepayment. And their duty ought to be a plain one and not to depend upon nice distinctions, and it is a plain one if they have to consider only what is the freight earned and what amount has been prepaid. In the present case there appears to have been no question between the shipowner and the charterer as to the proper mode of performing the contract. The captain delivered the goods free of freight, because a sum of money equal to the freight earned had been paid. But a third party, the present defendants, now say that the captain was so ignorant of his rights as to have delivered goods free of freight when he had a claim of 1,000*l.*

It would be strange, but he may have acted in ignorance of the proper effect of the agreement. I could not properly construe an agreement, especially in a Court of Appeal, by what the parties understood to be the effect of it; but I must say my own clear view of the legal effect of an agreement in common use is confirmed by finding that the parties to it, who may be taken to be well acquainted with such agreements, act in conformity with that view.

The result is that the freight which was insured was wholly lost by the perils, and the judgment of the Court below which is founded upon that conclusion must, in our opinion, be affirmed.

My brother Pollock concurs in this judgment.

MELLOR, J.—The plaintiff was the owner of the ship *Merchant Prince*, and the defendants are an insurance company.

The action is brought to recover against the defendants as for a total loss on several policies of assurance effected by the plaintiff with the defendants on freight valued at 2,000*l.*, and if under the circumstances of the case, the plaintiff is entitled to recover as for a total loss, the judgment of the Court below must be affirmed; but if the loss is to be considered as partial only, the defendants have paid into Court sufficient to cover such partial loss, and the judgment of the Court below must be reversed.

The facts are singularly few, and the question turns entirely on the true construction of a charter-party dated the 7th of March, 1867, made between the plaintiff and one W. N. De Mattos, which provided that the ship should load a full cargo of coals at Greenock for Bombay "freight to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of twenty cwt. on the quantity delivered," and it was further provided as follows—"and such freight is to be paid, say one half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coal short delivered, in cash at current rate of exchange for bills on London at six months' sight."

On the 15th of April, 1867, bills of lading were signed by the captain of the said ship for 2,178 tons of coal, and on or about the same day, the plaintiff received from the charterer 2,286*l.* 18*s.*, for which he gave the following receipt indorsed on the bill of lading—"Received of W. N. De Mattos, Esq., the sum of 2,286*l.* 18*s.* sterling, being advance of half freight on within shipment, the owner having paid all charges, including consignment commission at Bombay, as per charter-party."

On the 20th of April, 1867, the charterer effected an insurance on the cargo of the *Merchant Prince* for the voyage. The insurance was stated in the policy to be "on 2,178 tons of coal and increased value thereof by prepayment of freight valued at 4,500*l.*"

On the 27th of April, 1867, the ship left Greenock for Bombay, and on the 8th of August, 1867, struck on a reef, about eight miles from Bombay, and there became a total wreck. About 1,050 tons of the cargo were saved and landed at Bombay, and there sold for account of whom it might concern. No further sum

received by the plaintiff or paid to on account of the said freight beyond sum of 2,280*l.* 18*s.* paid in advance. It was admitted on the argument before us, that the question turned upon the proper construction of the charter-party, and the payment of one-half freight in advance on the signing of bills of lading. It was contended for the plaintiff that the freight being made payable on unloading and right delivery of the cargo, at and after the rate of 42*s.* per ton, was a mere mode of estimating the total freight, and that the words "such freight is to be paid say one-half in cash on signing bills of lading, less four months' interest," secured a payment of half the total freight; and assuming that the total freight to which he would have been entitled on unloading and right delivery at Bombay to be 4,000*l.* in round numbers, he had only received 2,000*l.*, and was entitled to claim from the defendants for the residue as representing his loss by the perils insured against.

I cannot accede to that view of the case, and I do not think such is the true effect of the charter-party. The agreement that the freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of twenty cwt. on the quantity delivered, is followed by a stipulation that "such freight" was to be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than five per cent. per annum, five per cent. for insurance and 2½ on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, &c. Not only, therefore, was one half of such freight to be paid in cash on signing bills of lading, but there was a deduction of five per cent. for insurance in respect of the amount paid in advance. And the charterer did accordingly on the 20th of April, 1867, effect an insurance "on 2,170 tons of coal, and increased value thereof by prepayment of freight valued at 4,500*l.*"

It was agreed on all hands that no part of the freight so paid in advance could ever thereafter be recovered back from the plaintiff by the charterer, and consequently the sea risk of so much the freight as was so paid in advance was transferred from the plaintiff to the charterer. It seems to me that the effect of the contention on the part of the plaintiff must be, that the payment in advance was really a payment of the freight upon *one-half of the cargo*, leaving the freight on the *other half of the cargo* to be paid on right delivery. The agreed freight was to be at and after the rate of 42*s.* per ton on the quantity delivered, but there is nothing by which half the cargo can be separated from the remainder, &c., or marked as the portion in respect of which the freight was paid in advance. The *whole* cargo was insured by the charterer as made more valuable by the prepayment of half freight in advance; and it appears to me under the words "at and after the rate of 42*s.* per ton on the quantity delivered," both the freight and payment must be distributed over the entire cargo, and that the payment in advance was equivalent to the payment of 21*s.* on every ton of the cargo, so as to reduce the amount of the freight payable by the charterer on delivery to the like sum per ton.

I cannot agree that the true mode of estimating the loss sustained by the plaintiff is to lump the freight at, say 4,000*l.* for the voyage; and seeing that, inasmuch as he received payment in advance of 2,000*l.* only, that therefore his loss is the difference between that sum and 4,000*l.* I think that he lost by the perils of the sea 21*s.* per ton upon all the coals that were lost and became incapable of delivery by reason of such perils, and that under the circumstances it constituted a partial loss only, and that he was only entitled to be indemnified by the defendants to that extent, and as the amount paid into Court covers that loss, the defendants are entitled to succeed, and that the judgment of the Court below ought to be reversed.

COCKBURN, C.J.—I concur in the conclusion of my brothers Mellor and Amphlett in this case.

The facts are simple. The plaintiff claims for a total loss on a policy of insurance on freight to be earned on

voyage of the ship the *Merchant Prince*, from Greenock to Bombay. If, according to the terms of the charter-party, the plaintiff as between himself and the charterer of the ship was under the circumstances entitled to claim a portion of the freight, he cannot recover on a claim for a total loss. The question turns, therefore, on his right under the charter-party —in other words, on the true construction of the charter-party.

Now, by the terms of the charter-party, the freight which was to be earned on the carriage of a cargo of coals was to be paid on the unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwt. on the quantity delivered, and "such freight" was to be paid, one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than five per cent. per annum, five per cent. for insurance and two and a-half on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coal short, in cash, at current rate of exchange for bills on London at six months' sight.

Bills of lading were signed by the captain for a certain amount of coal, and a sum was thereupon paid by the charterer to the owner, calculated to amount to one-half of the freight, so as to satisfy the stipulation of the charter-party.

A portion of the cargo was lost on the voyage by the perils insured against. The remaining portion was delivered up by the captain on the completion of the voyage to the consignees of the charterer, without any further demand of freight, on the assumption that the freight was only demandable in respect of the portion actually delivered, and that such freight was satisfied by the amount paid in advance on account of freight. But the insurers are not bound by the acquiescence of the shipowner in this view of his rights, and if the shipowner was entitled in point of law, on the true construction of the charter-party, to claim additional freight, the insurer is justified in insisting that there has not been a total loss of freight, and if this contentention is right, the loss can only be a partial loss, in which case there having been a payment into Court, as on a partial loss, the defendants will be entitled to our judgment.

The question depends on whether the remainder of the freight being payable on the right delivery of the cargo, the portion of the freight paid in advance can be appropriated to the amount of cargo actually delivered, or whether the amount so prepaid must be considered as paid in respect of the entire cargo, and distributed over the whole cargo, including the part of it which was lost as well as the part actually delivered.

It appears to me that this question must be considered irrespectively of the insurances which the shipowner or the charterer may have effected for the protection of their actual or supposed interests; in other words, according to the terms of the charter-party and the rights and liabilities of the parties as thereby created.

Now I cannot but suppose that on a charter-party of this description a payment of freight in advance, which by the English law, in case of the loss of the cargo, cannot be recovered back, presupposes, in the contemplation of the parties, a delivery of the entire cargo, and is paid in respect of the entire cargo, and is therefore distributable over the entire cargo, for which reason it is not, as it appears to me, competent to the owner of the cargo to appropriate the whole of the amount prepaid to that portion of the cargo which is actually delivered, and he can only have the benefit of such prepayment *pro rata* on the cargo delivered.

On this short ground I am of opinion that one-half of the freight remained payable on the cargo delivered, and that consequently there was no total loss, so that the claim of the plaintiff as for a total loss fails.

Judgment reversed.

Attorneys—William Nash, for plaintiff; Argles & Rawlins, for defendants.

1874. April 25. July 8. } KELLY *v.* PATTERSON.

Landlord and Tenant—Notice to quit—Commencement of Tenancy — Receipt of Rent.

Wherever a tenancy for years comes to an end either by efflux of time, or by the death or end of title of the lessor, so that either he or his representative, or any independent owner of the demised hereditament, can without notice eject the tenant, and the person entitled to eject leaves the tenant in possession, and receives rent from him without explanation or stipulation, the person receiving the rent is to be assumed to have created a tenancy upon the terms on which the tenant held in the demise originally made to him; and the holding to be presumed is as of a tenancy from year to year according to the former holding of the tenant, and therefore commencing at a time corresponding to that from which he originally held.

Certain premises had been let by the tenant in fee on a lease expiring at Midsummer, 1866: *at that date the defendant was in occupation as tenant from year to year to the intermediate lessee, on a demise commencing at Michaelmas; the tenant in fee let the premises on a fresh lease to the plaintiff commencing at Midsummer,* 1866: *the defendant continued in occupation and paid rent to the plaintiff. Notice to quit at Midsummer was given by the plaintiff to the defendant, who refused to leave the premises. The plaintiff having sued in ejectment,*—Held, *that the plaintiff having allowed the defendant to hold over, and having received rent as from year to year without explanation or stipulation, the inference was that there had been a tacit agreement that the defendant should hold from year to year according to the terms of his former tenancy, that is to say, from Michaelmas to Michaelmas, that the notice to quit at Midsummer was wrong, and that the plaintiff must be non-suited.*

This was an action of ejectment to recover possession of a messuage situate at Westminster.

The cause came on to be tried at the sittings in Middlesex, during Michaelmas Term, 1873, before Honyman directed a verdict for the plai leave to the defendant to move nonsuit, the Court of Commor decide upon the case.

A rule was accordingly obtair ground of the insufficiency of t to quit.

Noel H. Paterson (on April 2 cause against the rule.

Macrae Moir supported it.

[The facts of the case and the a are sufficiently stated in the hereinafter set forth.]

The following authorities w during the argument—*Doe d. Geekie* (1), *Crowley* v. *Vitty* (2 *Savage* v. *Stapleton* (3), *Doe d. v. Johnson* (4), *Doe d. Cornwal thews* (5).

Cur. ad

LORD COLERIDGE, C.J. (on July As I was not in Court when was argued, I take no part in sion: but I will now read the prepared by my brother Brett.

BRETT, J.—In this action of the facts proved were that the had been let by the owner in lease expiring at Midsummer, 1 intermediate lessee had during hi underlet to the defendant on a l year to year, commencing at Mi The defendant was in possessio summer, 1866, when the lea immediate lessor, and therefore lease, came to an end. At Mi 1866, the owner in fee let the on a new lease to the present The plaintiff, instead of ente personal possession of the pren them in the occupation of the d The defendant afterwards pai equal to a quarter's rent on on which he had held the premi year to year, to the plaintiff as

(1) 5 Q.B. Rep. 841; s. c. 13 Law J. Q.B. 239.
(2) 7 Exch. Rep. 319; s. c. 21 La (N.S.) Exch. 135.
(3) 3 Car. & P. 275.
(4) 6 Esp. 10.
(5) 11 Com. B. Rep. 675.

m Midsummer to Michaelmas, 1866. Michaelmas, the plaintiff insisted upon ent increased by 5*l.* per annum, and h increased rent had been thenceforth d by the defendant to the plaintiff. The plaintiff in 1872 gave to the dedant a six months' notice to quit at dsummer. At Midsummer the defend- ; refused to quit the premises, and this ion of ejectment was brought. The aintiff insisted that the defendant's nancy to him commenced and ended at idsummer, and that the notice was con- equently right. The defendant con- nded that his tenancy was one ending t Michaelmas, as his original tenancy had commenced at Michaelmas, and con- sequently that the notice was invalid.

It was argued on behalf of the plaintiff, that at Midsummer, 1866, there was no tenancy of the defendant existing, which it could be said he was holding or holding over, and there was none therefore which the plaintiff could be supposed to have recognised or adopted, that the tenancy of the defendant's former lessor was then at an end, that there was then no one from whom the defendant could be said to hold, that the plaintiff did not claim through or as successor to the lessor of the defendant, that the receipt by the plaintiff of a quarter's rent at Michaelmas, 1866, was therefore only a recognition of a tenancy commencing at Midsummer.

It was argued on behalf of the defendant that he was originally a tenant under a lease commencing at Michaelmas, that when the plaintiff became intermediate owner of the premises he had an option either to turn out the defendant or to adopt the defendant's then holding, that by receiving rent from the defendant he adopted the then holding of the defendant, which was a holding as upon a tenancy from year to year, commencing and ending at Michaelmas.

Both sides agreed that the increase of ent at Michalmas, 1866, did not affect he dispute.

The point to be decided seems to be his : is it a true proposition of law to ay that wherever one is in possession of and or premises as tenant and his tenancy omes to an end either by efflux of time r by the death or end of title of his lessor, so that either his own lessor or the representative of his lessor or any independent owner of the property can without notice eject him, and the person entitled to eject him does not do so, but receives rent from him without explanation or stipulation, the person so receiving rent is to be assumed to have adopted the person so in possession as his tenant, upon the terms on which the latter held in the demise originally made to him? The difficulty of affirming the proposition as a general one is, that in some cases, as for instance in a case like the present, the owner is assumed to assent to the terms of a contract, of which neither he nor anyone through whom he claims or for whom he is responsible has had any knowledge. The difficulty of negativing the proposition is that if the owner does adopt the person in possession as his tenant, and if it is not to be assumed that he adopts him as tenant on the terms on which he held, there seem to be no other terms on which he can have adopted him. If he does not in fact know the terms on which the person in possession held, should he not, unless he means to adopt those terms without enquiry, enquire what they are? In *Roe d. Jordan* v. *Ward* (6), John Jordan, tenant for life, made a lease to the defendant to commence from old Lady-day, *i.e.* the 5th of April, for twenty-one years. During the term, namely, on the 30th of September, 1785, John Jordan died. The defendant's lease was thereby at an end. The ownership in fee of the property passed to the son of John Jordan as remainderman. He therefore did not take as successor to his father, but as a purchaser or stranger. There was no privity of estate between him and the defendant's original lessor. He was not in any way bound by the lease to the defendant. The defendant continued in possession and paid rent on the same days as before, namely, on old Lady Day and old Michaelmas Day. Before old Michaelmas Day, 1787, the lessor of the plaintiff gave to the defendant notice to quit on the next old Lady Day, the 5th of April, and on his refusal to quit brought eject-

(6) 1 H. Black. 97.

ment. The learned Judge who tried the cause left it to the jury to say whether they would not presume a new agreement, that the defendant should continue to hold according to the terms of the original lease. The jury found for the defendant, that is to say, they declined to make the proposed presumption. The Court set aside the verdict. This case seems to be a considerable authority in favour of the defendant in the present case. If the objections taken on behalf of the plaintiff in the present case were correct, they apply equally to that case in which they were overruled. The same decision as to a remainderman was arrived at in *Doe d. Collins* v. *Weller* (7).

In *Berry* v. *Lindley* (8) the defendant entered at Michaelmas, 1823, under a letter signed by him proposing to take the premises for five years and a half. That would end at Lady Day, 1829. But the letter could not be treated as a lease, being void as such by virtue of the statute of frauds. The rent was paid yearly as from Michaelmas to Michaelmas. The first point decided in the case was that from the entry at Michaelmas and the payment of rent, it was to be assumed that the parties had agreed to a tenancy from year to year beginning and ending at Michaelmas to last for five years and a half, so that the tenancy might be put an end to at any Michaelmas by six months' notice to quit, and would be at an end without notice in five years and a half. Before the end of the five years and a half there were negotiations between the plaintiff and defendant as to a lease on different terms to commence at the end of the former lease. It was held that these negotiations did not end in a new lease. The original demise therefore remained in force. The defendant held on over the five years and a half, paying a higher rent, which had been proposed in the negotiations—paying it still from Michaelmas to Michaelmas. The defendant eventually gave notice to quit at Michaelmas. The plaintiff refused to recognise such notice, and brought his action for rent in the shape of an action for use and occu was contended on behalf of t that there was a new tenancy to year to be inferred from t over, the negotiations and th of rent, to commence at Lad at the end of the former te was contended on behalf of t ant that the further tenancy year to year, but in correspon the commencement of the or ancy, and therefore still from l to Michaelmas. The Court favour of the defendant, and ground: "It is convenient," man, J., "not to depart from t rule of construction in cases o from year to year, which rule i time for giving notice to quit i determined by the period of t entry." He had said before— he must be considered as tena ference to the period of the orig unless something appears wh that a different arrangement to." That seems to be an au saying, that where rent as fr year is received from a person sion of premises without expl stipulation, the holding to be p as of a tenancy from year to ye ing to the holding of the tenant, fore commencing at a time con to that from which he origina or held.

In *Humphreys* v. *Franks* (9 ant's husband had entered at On his death, in June, the tena lowed to remain on paying ownership in fee passed to a who received rent for a time, notice to quit at Christmas. I tended for the defendant that inference was, that she was l upon a June tenancy commenc time of her husband's death Court held otherwise. "Sh lowed," says Willes, J., "to c hold in consideration of pa nothing being said about the ment of her tenancy. It was, natural that it should remain a holding. It seems to me not

(7) 7 Term Rep. 478.
(8) 3 Man. & G. 498; s. c. 11 Law J. Rep. (N.S.) C.P. 27.

(9) 18 Com. B. Rep. 323.

there was evidence, but such evidence that the jury could not properly have found that there was any other than a holding from Christmas to Christmas."

In *Doe d. Buddle* v. *Lines* (10) one Taft was intermediate lessee of property. In 1832 Taft underleased to Pilcher and Carter for fourteen years and a half, to commence from the 25th of December, 1831; that lease would end on the 24th of June, 1846. Taft's interest was assigned to or otherwise came to the plaintiff. The interest of Pilcher and Carter came to the defendant. The plaintiff and defendant therefore were in the relation of landlord and tenant; the lease to end by efflux of time on the 24th of June, 1846, the defendant's predecessor having commenced his tenancy in December. After June, 1846, the defendant held over and paid rent to the plaintiff. The plaintiff gave notice to quit on the 24th of June, 1847. The validity of this notice was disputed, it being urged that the proper inference was that the defendant was holding as on a tenancy from year to year, commencing in December, in accordance with the original entry of the defendant's predecessors. The judgment of the Court was as follows: "We are of opinion that the tenancy from year to year commenced at the expiration of the previous lease. This is not at variance with any of the cases. The original entry spoken of in them is the original entry of the lessee himself. That is not so here." The Court left the verdict to stand for the plaintiff, refusing a rule to shew cause why it should be entered for the defendant. This case, therefore, indicates that the rule enunciated in former cases, which cases, it says, are not at variance with it, is only applicable to the entry of the lessee himself who holds over, and not to the entry of his predecessor, through whom he held his lease. Where the question arises with a lessee who is holding over the expiration of a lease originally granted, or a demise originally made to himself, the rule does apply. That is the present case. The present defendant held over the expiration of the lease granted to himself, which lease commenced at Michaelmas. The inference as between him and the plaintiff, who allowed him to hold over, and who received rent as from year to year from him without explanation or stipulation is, that there was a tacit agreement that the defendant should hold as tenant from year to year according to his former holding, that is to say, as from Michaelmas to Michaelmas. The notice to quit at Midsummer was, therefore, wrong, and the rule to enter a nonsuit must be made absolute.

My brother Denman concurs in this judgment, although he has felt so much doubt that if this were not ejectment he would withdraw the restriction upon the leave to appeal; but he agrees that under the circumstances a nonsuit ought to be entered.

Rule absolute.

Attorneys—J. F. Holcombe, for plaintiff; Stapleton Cotton, for defendant.

1874. June 8. } RHODES AND ANOTHER *v.* THE AIREDALE DRAINAGE COMMISSIONERS.

Arbitration — Reference under Lands Clauses Consolidation Act, 1854—*Power of Umpire to state Special Case—Common Law Procedure Act*, 1854, *s.* 5.

An umpire appointed to ascertain the amount of compensation under the Lands Clauses Consolidation Act, 1845, *has no power to state a special case for the opinion of a superior Court; and if by consent of the parties the time for making the award be extended and power to sit with the arbitrators be conferred upon the umpire, a reference under the foregoing statute will not become a reference by consent within the meaning of the Common Law Procedure Act*, 1854, *s.* 5.

The first count of the declaration stated that at the time of and after the passing of the Airedale Drainage Act, 1861, the plaintiffs were the occupiers of certain lands known as the Marley Hall Farm, in

(10) 11 Q.B. Rep. 402; s. c. 17 Law J. Rep. (N.S.) Q.B. 108.

manner, the said umpire might act and make his award on the evidence so heard and taken by him, and without any further or other hearing; and further that should any question or questions arise in the course of the hearing of the said matters in respect to the admission or reception of evidence, the construction of documents or any other matter or thing whatsoever as to which the arbitrators might differ, and as to which an immediate decision might be necessary or desirable, the said umpire should be at liberty then and there to give his decision thereupon, and the same should be accepted and acted upon by all parties. And after the making of the last mentioned agreement the arbitrators by writings under their hands from time to time duly extended the time for making their award until the 1st day of February, 1873. And the arbitrators and the said umpire, before entering into the consideration of any of the matters so referred as aforesaid, did respectively in the presence of a justice make and subscribe the declaration in that behalf required according to the provisions of the Lands Clauses Consolidation Act, 1845. And after the making and subscribing of the said declaration as aforesaid, and before the expiration of the time so extended for the arbitrators to make their award as last aforesaid, the arbitrators and the said umpire having taken upon themselves the burthen of the said reference, did according to the provisions of the agreements so made and entered into as aforesaid act together in the matter of the said arbitration, and together sit and hear and take the evidence adduced by the said parties concerning the matters so referred as aforesaid. And the arbitrators failed to make any award within the time so extended for the making thereof as last aforesaid, and after the time so extended for the arbitrators to make their award as last aforesaid had expired without their making any award and within three months after the expiration of such extended time, the parties to the said reference agreed that the time within which the said umpire might make his award should be extended to the 1st day of June, 1873. And the said umpire having duly weighed and considered the several allegations of the said parties and also the proofs, vouchers and documents given in evidence before him, made and published his award in writing of and concerning the matters so referred as aforesaid, and awarded and adjudged that the plaintiffs as occupiers of Morley Hall Farm, being the said land of the said William Ferrand, Esq., hereinbefore referred to, had sustained damages by reason of and consequential upon the exercise by the defendants of the powers of the said Act to the amount of 110*l.*, and were entitled to be paid compensation for the same to that amount, of which said award the defendants had notice and were required by the plaintiffs to pay to the plaintiffs the said sum of 110*l.*; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to be paid the said sum of 110*l.* and to maintain this action. And the defendants were possessed of funds available for the purpose of paying the said sum; yet the defendants have not paid to the plaintiffs the said sum of 110*l.*, but have therein made default.

The second count stated that the plaintiffs repeat the allegations in the first count contained down to and including the words "of which said award the defendants had notice." And the plaintiffs were and are personally interested in being paid the said sum of 110*l.*, and have sustained and are sustaining damage by the non-payment by the defendants of the said sum, and payment of the said sum has been demanded by the plaintiffs of the defendants, and the defendants have refused and neglected to pay the same. And all conditions have been fulfilled, and all things have happened, and all times elapsed necessary to entitle the plaintiffs to the payment of the said sum by the defendants. And the plaintiffs claim 200*l.* under the first count, and under the second count a writ of mandamus commanding the defendants to pay the said sum of 110*l.* to the plaintiffs, and to make and levy under the provisions of the said Act such rate as may be necessary to raise the said sum.

Plea—That the said award of the said

umpire in the declaration mentioned was and is in the words, letters and figures following, that is to say—

"Whereas by the Airedale Drainage Act, 1861, being an Act of Parliament passed on the 22nd day of July, 1861, for the draining of lands in Airedale adjoining and near to the river Aire, in the West Riding of the county of York, and for other purposes, the Airedale Drainage Commissioners (hereinafter referred to as the Commissioners) were incorporated for executing the said Act. And whereas by the 45th section of the said Act it was enacted that full compensation should from time to time after the passing of the said Act, but not beyond twenty years from and after the completion of the cuts, embankments and works by the said Act authorised, be made by the Commissioners, out of the rates to be levied under the said Act, to the owners, lessees and occupiers for the time being, sustaining any damage by reason of or in any way consequential upon the exercise of any of the powers of the said Act of the lands and hereditaments of William Ferrand, Esq., situate in the parish of Bingley, in the West Riding of the county of York, or any part or parts thereof respectively; and that in case of dispute as to the amount of such compensation the same should be settled by arbitration in the manner provided for settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act, 1845; and whereas Abraham Rhodes and Pickles Rhodes, the owners and occupiers of certain lands known as the Morley Hall Farm, in the parish of Bingley, being part of the lands of the said William Ferrand, Esq., referred to in the said 45th section of the Airedale Drainage Act, 1861 (hereinafter referred to as the Drainage Act), made a claim against the Commissioners for compensation for damages sustained by them, the said Abraham Rhodes and Pickles Rhodes, as such occupers of the said lands as aforesaid, by reason of and consequential upon the exercise by the Commissioners of the powers of the Drainage Act; and whereas the Commissioners disputed the said claim; and whereas the said Abraham Rhodes and Pickles Rhodes (hereinafter referred to as the claimants), on the 29th day of November, 1870, nominated and appointed John Wignall Leather, of Leeds, in the county of York, civil engineer, to be an arbitrator, to whom the said question of disputed compensation should be referred, and requested the Commissioners to appoint an arbitrator to whom the said question of disputed compensation should be referred; and whereas the Commissioners, on the 7th of December, 1870, nominated and appointed Charles Edward Cawley, of the city of Manchester, civil engineer, to be an arbitrator to settle and determine, in conjunction with the said John Wignall Leather, the said question of disputed compensation, and the amount (if any) which should be paid by the Commissioners in respect of the said claim; and whereas the said John Wignall Leather and Charles Edward Cawley (hereinafter referred to as the arbitrators) did, before entering upon the matters referred to them, by writing under their hands dated the 2nd day of February, 1871, nominate and appoint me, James Kemplay, of 1, King's Bench Walk, Temple, barrister-at-law, to be the umpire in the matter of the said arbitration pursuant to the provisions of the Lands Clauses Consolidation Act, 1845; and whereas the arbitrators duly enlarged the time for making their award until the 6th day of March, 1871; and whereas after the arbitrators had extended the time for making their award and nominated and appointed me to be such umpire as aforesaid, and before the said extended time for making their award had expired, an agreement was entered into by and between the claimants and the Commissioners, whereby after reciting (amongst other things) that it was not possible, having regard to the convenience of the parties, to complete the hearing of the case so as to enable the arbitrators to make their award within such extended time, it was agreed by the parties to the said reference that the time within which the said arbitrators might make their award should be and was thereby extended to the 1st day of June 1871, and that the time within which I the said umpire, might make my award should count from such day or from such earlier day as the arbitrators might d[illegible]

volve it upon me; and further, that I the said umpire might sit and hear and take the evidence along with the arbitrators, and in case they failed to make any award I might act and make my award on the evidence so heard by me; and whereas on the 25th day of May, 1871, and before the expiration of the said 1st day of June, 1871, a further agreement was entered into by and between the claimants and the Commissioners, whereby after reciting (amongst other things) the said extension of time to the said 1st day of June, 1871, and that regard being had to the convenience and engagements of the parties and their counsel and witnesses, and of the said arbitrators and umpire, it was not possible to hold such meetings for the purpose of the said arbitration as might enable the award to be made within such extended time as last hereinbefore mentioned, it was agreed by the parties to such reference that the time within which the arbitrators might make their award should be extended to the 1st day of September, 1871, or to such other day and time as the arbitrators might by any writing or writings under their hands appoint from time to time, and that the time within which I, the said umpire, might make my award should count from the said 1st day of September, 1871, or from the last of such other days as might be appointed as hereinbefore mentioned by the arbitrators, or from any earlier time at which the arbitrators should by any writing under their hands request me to make my award in the said matter; and further, that I, the said umpire, might sit and hear and take the evidence, and act in the matter of the said reference along with the arbitrators, and in case they failed to make any award within the proper time in that behalf as extended as aforesaid, or in any other manner, I, the said umpire, might act and make my award on the evidence so heard and taken by me, and without any further or other hearing; and further, that should any question or questions arise in the course of the hearing of the said matters in respect to the admission or rejection of evidence, the construction of documents or any other matter or thing whatsoever as to which the arbitrators might differ, and as to which an immediate decision might be necessary or desirable, I, the said umpire, should be at liberty then and there to give my decision thereupon, and the same should be accepted and acted upon by all parties; and whereas after the making of the last-mentioned agreement the arbitrators by writings under their hands from time to time duly extended the time for making their award until the 1st day of February, 1873; and whereas the arbitrators and myself before entering into the consideration of any of the matters so referred as aforesaid did respectively, in the presence of a justice, make and subscribe the declaration in that behalf required according to the provisions of the Lands Clauses Consolidation Act, 1845, and which said declarations are respectively hereunto annexed; and whereas after the making and subscribing of the said declarations as aforesaid, and before the expiration of the time so extended for the arbitrators to make their award as last aforesaid the arbitrators and myself, having taken upon us the burthen of the said reference, did, according to the provisions of the agreements so made and entered into as aforesaid, act together in the matter of the said arbitration, and together sit and hear and take the evidence adduced by the said parties concerning the matters so referred as aforesaid; and whereas after the time so extended for the arbitrators to make their award as last aforesaid had expired without their making any award, and within three months after the expiration of such extended time the parties to the said reference agreed that the time within which I might make my award should be extended to the 1st day of June, 1873.

Now I, the said umpire, having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers and documents given in evidence before me, do hereby make and publish my award in writing of and concerning the matters so referred as aforesaid in manner following, that is to say—

If I have no power to state my award in the form of a special case for the opinion of the Superior Court, of which the submission to arbitration of the

than they otherwise would have reached that farm.

11. From the evidence before me, I find that the claimants as occupiers of the said farm sustained damages on the occasion of the aforesaid floodings by reason of and consequential upon the execution by the commissioners of all the said works which were in operation at the respective times of the said floodings, to the amount of 110*l.* And that the damages so sustained by them would have been substantially the same, if the said weir had not been removed.

12. There was no sufficient evidence before me to enable me to determine either one way or the other, whether the said works, exclusive of the removal of the said shoals and weir as aforesaid, caused the said farm on the occasions of the said floodings to be flooded to greater extents or for longer periods of time or to be more damaged than it otherwise would have been.

13. The Drainage Act is to form part of this case.

The questions which I respectfully submit for the opinion of the Court are—

First, whether the claimants are entitled to compensation for damages sustained by them as occupiers of Morley Hall Farm by reason of or consequential upon the removal of the said shoals as hereinbefore stated.

Second, whether, if the Court should answer the first question in the negative, the claimants are, under the circumstances hereinbefore found and stated by me, entitled to compensation at least for nominal damages or entitled to no compensation at all.

If the Court should answer the first question in the affirmative, then I award and adjudge that the claimants as occupiers of the said farm have sustained damages, by reason of and consequential upon the exercise by the commissioners of the powers of the Drainage Act, to the amount of 110*l.*, and are entitled to be paid compensation for the same to that amount.

If the Court should answer the first question in the negative, and should be of opinion that the claimants are entitled to compensation at least for nominal damages, then I award and adjudge that the claimants as occupiers of the said farm have sustained damages, by reason of and consequential upon the exercise by the commissioners of the powers of the Drainage Act, to the amount of 40*s.*, and are entitled to be compensated for the same to that amount.

If the Court should answer the first question in the negative, and should be of opinion that the claimants are entitled to no compensation at all, then I award and adjudge that the claimants as occupiers of the said farm have sustained no damages by reason of or consequential upon the exercise by the commissioners of the powers of the Drainage Act, and are not entitled to be paid any compensation. (Signed by the umpire.)

And the defendants say that the various matters so recited in the said award as aforesaid were and are respectively true in fact, and that no opinion or judgment of any superior Court has been pronounced or obtained upon the power of the said umpire to state such special case as aforesaid or upon the said several questions so stated for the opinion of such Court in the said special case as aforesaid or any of them.

Demurrer and joinder.

Manisty in support of the demurrer.—The question to be decided is whether an umpire, under the Lands Clauses Consolidation Act, 1845, has the power to state a special case for the opinion of a superior Court of common law. On behalf of the plaintiffs it is submitted that an arbitration, pursuant to that statute, is a mere assessment of damages, and merely ascertains the amount of compensation—*Re Newbold and the Metropolitan Railway Company* (1). The umpire, therefore, had no power to state a special case, and the plaintiffs are entitled to the sum of 110*l.* awarded by him.

Kenelm E. Digby, in support of the plea.—The umpire had power to state a special case under the provisions of the Common Law Procedure Act, 1854, s. 5. The reference mentioned in the plea may

(1) 14 Com. B. Rep. N.S. 405.

s. 5. I think that this result did not follow from the agreement. I think it remained a compulsory reference under the Lands Clauses Consolidation Act, 1845. It was agreed that certain steps should be taken; the only consequence of that was to prevent the parties from objecting to matters which they themselves had authorised; it did not alter the nature of the arbitration. I think that the umpire could not state his award in the form of a special case. The authorities cited for the defendants do not support the contention, that the reference having been commenced in compliance with the Lands Clauses Consolidation Act, 1845, the whole nature of the proceeding was altered by the circumstance of other matters being introduced by consent varying the requirements of the statute. *Re Newbold and The Metropolitan Railway Company* (2) is in truth conclusive in its principle, which is to be applied to this case. It was a unanimous decision. The award must be enforced, and the plaintiffs are entitled to judgment.

KEATING, J.—The plea is bad. The parties no doubt arrived at an agreement varying the statutory provisions; but they had no intention to change the character of the reference. They merely introduced an alteration in the arrangement of the proceedings. It would require a strong authority to make me hold that the agreements mentioned in the plea made this a reference by consent, and the authority of this Court is to the contrary. *Re Newbold* and *The Metropolitan Railway Company* (2) shews that an umpire under the Lands Clauses Consolidation Act, 1845, cannot state a special case. I think that decision consistent with good sense. Judgment will be entered for the plaintiffs.

GROVE, J.—I am of the same opinion. It would be an extreme decision upon our part to hold that an arrangement, which was probably entered into to save expense, should have the effect of altering the nature of the proceedings *ab initio*. This was not originally a reference within the Common Law Procedure Act, 1854, s. 5. Can it be made a reference within the meaning of that enactment by subsequent agreement? Can it be converted into a reference by consent? No authority has been adduced to shew that it can, and it hardly could be expected that one could be found. I do not think that the whole nature of the proceedings was changed by the agreements mentioned in the award.

Judgment for the plaintiffs.

Attorneys—Field, Roscoe & Co., for plaintiffs; Phelps & Sidgwick, agents for T. Brown, Skipton, for defendants.

1874. June 22, 23. } MALCOLM *v.* INGRAM AND PARRY.

Parliament—Election Petition—Scrutiny—Evidence of Corrupt Intent in Voter—The Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 25—*Right of Voters to be heard as parties to an Election Petition.*

The Ballot Act, 1872, *s.* 25, *enacts that, "where a candidate, on the trial of an election petition claiming the seat for any person, is proved to have been guilty by himself or by any person on his behalf of bribery . . . . in respect of any person who voted at such election, ... there shall, on a scrutiny, be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election, and is proved to have been so bribed."*

P. having been accepted by the Liberal party in the borough of B. as a candidate at the next election, he afterwards distributed amongst the inhabitants coals by means of tickets bearing the signature of his political agent. Many of the inhabitants who accepted the coals were voters in the borough, and were not objects of charity. The coals were given corruptly. Parliament being soon after dissolved, P. was declared to be returned as member by a majority of votes over M. another candidate. A petition having been presented against the return of P. claiming the seat for M., P. was ad-

judged to be unseated on the ground of bribery; and a scrutiny being held, M. claimed to strike off the poll for P. one vote for every elector who had accepted the coals, and had voted at the election, without ascertaining for whom he had in fact voted. The voters were not called to deny that they had received the coals corruptly:—

Held (*per* LORD COLERIDGE, C.J., *and* BRETT, J., *dubitante* GROVE, J.), *that the bribery contemplated in the Ballot Act*, 1872, *s.* 25, *was a corrupt bargain made with an elector by or on behalf of the candidate, and that under that enactment it was necessary to prove a guilty intent in the voter. But* Held (*per* LORD COLERIDGE, C.J., *and* GROVE, J., *hæsitante* BRETT, J.), *that a prima facie case of corruption had been made out against the voters, which they were bound to displace; and that as they were not called to rebut the inference of corruption, one vote for every elector who received the coals and voted at the election must be struck off the poll of P.*

Quære, *whether the voters inculpated were entitled, after P. had been unseated, to appear by counsel upon the petition, and to defend themselves from the charge of bribery.*

This was a case stated by Grove, J., under the Parliamentary Elections Act, 1868, as to an election for the borough of Boston, held on the 29th of January and the 3rd of February, 1874.

At the last parliamentary election for this borough William James Ingram and Thomas Parry were returned.

A petition against their return was duly presented and tried before me on the 1st of June and four following days. I have thought it right to reserve for the opinion of the Court of Common Pleas a question which arises as follows.

Mr. Thomas Parry of Sleaford declared himself a candidate for the borough of Boston at the next general election, and was adopted as such by the Liberal party on or about the 2nd of December, 1873. About the end of December, 1873, Mr. Parry determined to give away about 230*l.* in coals among the poor in Boston, and wrote a letter to Mr. Wright, an alderman of the borough, of which the following is a copy.

"My dear Mr. Wright,—I have been in the habit of sending a small gift to your mayor and also to the vicar about this time of the year; but the weather has become suddenly so seasonable and sharp, that I think I can best help the poor people by a direct gift of coal. My trouble is in the arrangements needful to such an end, and in finding friends willing to interest themselves to distribute 100 or 120 tons of good household coals at once. The selection of the recipients need not be political nor confined to the mankind—widows and deserving people of all classes may be thought of. I do not mind if you go up to 150 tons, but that will be my limit. Harris, if he be in the coal trade, may supply a third, unless you can propose to me any other better process. Lester Daulton, I think, is in the coal trade, and he might supply some. You will perhaps enlist some persons to help you and issue tickets, or take other means to carry out the gift to warm poor people's firesides. This need not be made public, nor, as I have said, need it be political. Dyer will help, and so I think will Mr. and Mrs. Bailey. Do the best you can. Distribute the coal and send the accounts to me.

"Yours faithfully,
"Thomas Parry.

"P.S.—I should like to know the names of the people you intend to deal with. Maltby is a coal merchant, is he not?"

The coals were distributed by means of tickets ordered by Thomas Wright, and bearing the signature of Benjamin Bissill Dyer, and circulated with his knowledge. The coals were distributed by, amongst others, John Falkner and George William Thomas, who were engaged in canvassing for the respondent, Thomas Parry, to procure his return at the said election.

The mode of distribution was as follows. Persons were sent round to the houses in Boston of those who were thought likely to accept a present of coal, to ask if they were willing to accept a bag of coals from Mr. Parry. If they replied in the affirmative, their names were taken down in a book, and they were told they would receive a ticket.

Between the 14th of January, 187[illegible] and the day of the dissolution, the ticke[illegible]

were distributed, and were in the following form—

Mr. (Name of a coal merchant.)
Please to deliver to
(Name of the donee.)
10 stones of coal,
for Thomas Parry, Esq., Sleaford.
(Delivered free.)
B. B. Dyer.

On the back of the tickets were the words:—

"(With Mr. Parry's compliments.)"

B. B. Dyer is the said Benjamin Bissill Dyer, Mr. Parry's political agent. Mr. Dyer did not know that the cards were being printed with his signature attached, but he knew that they were distributed with his name upon them.

In many cases the persons selected as donees were not objects of charity, some of them being small shopkeepers, and others having votes in respect of the occupation of premises exceeding 10*l.* in annual value; and in many cases the donees were non-electors. Mr. Parry was not aware of the mode of distribution adopted. The coals were given by the respondent, Thomas Parry's said agent, in order to influence the votes of the donees, and several of the persons who were employed to ascertain if the intended donees were willing to accept the coals and to deliver the coal tickets, canvassed the electors on behalf of the respondent, Thomas Parry.

The nomination was on the 29th of January, 1874, when William James Ingram, Thomas Parry, John Wingfield Malcolm and Thomas Collins were nominated as candidates.

The polling was on the 3rd of February following, when the number of votes recorded was as follows—Ingram 1,572, Parry 1,347, Malcolm 996, Collins 676. Mr. Malcolm was the petitioner in the said petition, and claimed the seat.

I was of opinion that Mr. Parry had through his agents been guilty of corrupt practices and must be unseated.

Mr. Malcolm by his counsel then proceeded with the scrutiny, and under the 25th section of the Ballot Act, 1872, claimed to strike off from the number of votes appearing to have been given for Mr. Parry, one vote for every person who voted at such election, and was proved to have received coals as above stated, without further proof that the donees had received them corruptly or knew that they were corruptly given, and without ascertaining for whom such voters voted, under rule 41 of the Ballot Act. If the petitioner was entitled so to do, it was proved that a sufficient number of votes would be struck off to place Mr. Malcolm in a majority over Mr. Parry.

The question for the opinion of the Court is whether he was so entitled.

The parties have agreed if any point arises upon the argument, making it necessary that I should report further to the Court, that I should do so as the Court may require.

Dated this 17th day of June, 1874.

W. R. Grove.

Hardinge Giffard (on June 22), for the petitioner.—One question will arise upon the construction of the Ballot Act, 1872, s. 25, and of 17 & 18 Vict. c. 102. ss. 2 and 3. By the latter statute the common law has been greatly extended, which regarded bribery as a corrupt bargain between the candidate and the elector; whereas by this enactment "bribery" is made to include a mere offer of the candidate, unaccepted and even refused by the elector. It is contended for the petitioner that bribery in the 25th section includes a corrupt offer on behalf of a candidate, and that it is unnecessary to consider whether there was corrupt intent in the voters who accepted the coals. The object of the section was to inflict a penalty upon the candidate if he or his agents acted corruptly. If, however, the Court is of opinion that it is necessary, under the 25th section of the Ballot Act, 1872, to show a corrupt intent in the voters receiving the coals, then upon the facts stated in the case, it was for the voters to shew that they had accepted the gift innocently: the burden of proof was upon them. It would have been useless for the petitioner to attempt to prove a guilty receipt by calling the voters as witnesses. When the petitioner had established that a consideration had been given on behalf of the candidate with a corrupt intent, the *onus* was thrown

upon the voters to shew that they in accepting the gift were free from corruption.

P. F. O'Malley, for some of the voters accepting the coals.

[LORD COLERIDGE, C.J.—How can the voters claim a right to be heard?]

The Court has to decide upon the merits of the election under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 11, sub-sec. 13, and s. 12, and it never could have been intended that the result of the scrutiny should be arrived at *ex parte*, for in most cases before the scrutiny can be gone into the respondent to the petition has been declared to be disqualified to take his seat under the election. Before the Parliamentary Elections Act, 1868, voters might be made co-respondents with the candidate—9 Geo. 4. c. 22. s. 10; 11 & 12 Vict. c. 98. s. 19. Voters may be admitted to oppose a petition under the Parliamentary Elections Act, 1868, s. 38, although this enactment may not apply to the present case. In *The Evesham Election Case* (1), it appears to have been held that a member may carry on a scrutiny after he has been disqualified; but if he does not adopt that course, and if the voters inculpated have no *locus standi*, they may remain exposed to the charge of corruption without having an opportunity of defending themselves, and the scrutiny would be most unsatisfactory—*The South-West Riding Case* (2).

[LORD COLERIDGE, C.J.—We will hear the counsel for the voters as a matter of grace; and it is to be understood that we express no opinion whether he is in law entitled to argue the questions submitted to us. The counsel for the petitioner does not object that the counsel for the voters has no right to address the Court.]

Then it is contended that the Court must be satisfied that a corrupt intent existed in the voters, and further that the evidence set out in the case is insufficient to prove that intent. The question of corruption is to be looked at as if the voters were upon their trial for bribery.

[LORD COLERIDGE, C.J.—I do not agree with that proposition. GROVE, J.—Nor do I.]

The penalties imposed upon a voter guilty of bribery are severe (31 & 32 Vict. c. 125. s. 45), and care should be taken that a person is convicted of that offence only upon clear evidence.

[GROVE, J.—My intention in reserving this case was to obtain a decision, whether the circumstances mentioned therein constitute a *prima facie* charge calling upon the voters to rebut it.]

If these voters were guilty of corrupt practices, the names of all of them ought to be reported to the Speaker of the House of Commons—see 31 & 32 Vict. c. 125. s. 11, sub-sec. 14.

LORD COLERIDGE, C.J. (on June 23).—As to the construction of the Ballot Act, 1872, s. 25, a majority of the Court assents to the argument for the voters; but as to the inference to be drawn from the facts, a majority concurs with the reasoning advanced on behalf of the petitioner. Therefore we need not trouble further the counsel upon either side. It appears that a great many persons in Boston received coals from Mr. Parry, and I understand that the number of persons who accepted this kind of gift was 877. Two questions have been raised upon the argument before us. The first is, what is the true construction of the Ballot Act, 1872, s. 25? The second is, can the voters accepting the coals be deemed to have taken them with a guilty intent upon the evidence set out in the case?

As to the second question, assuming that to constitute bribery under the Ballot Act, s. 25, there must be a corrupt bargain, I think the evidence of guilty intent in the voters sufficient to enable me to say that they were bribed. Corruption may be inferred from the following circumstances. The number of persons who received these coals was 877 out of a constituency of about 2,500 electors. The parliament was an old one, having existed about five years since the last dissolution. Mr. Parry had been accepted as the candidate of the Liberal party, and the tickets containing the orders for the coals bore the signature of his political agent. It seems to me that

(1) Falc. & F. (Elec. Ca.) 529.
(2) 1 O'M. & H. (Elec. P.) 213.

these facts constitute evidence (and in my opinion abundant evidence) of corrupt receiving by the voters, if it is necessary to establish corruption in them. At the time of agreeing that the case should be laid before us in its present form, it was pointed out to the counsel for the voters that there was a risk of this Court holding that a guilty intention in accepting the coals had been established; and the counsel elected that we should decide upon the present materials. I am of opinion that the facts stated in the case are sufficient to put upon their defence the voters who took the gift, and that if they did not rebut the inference of corruption, my brother Grove will be justified in striking the votes off the poll for Mr. Parry.

I may also express my opinion upon the first point which has been raised before us, namely, the construction of the Ballot Act, 1872, s. 25. We have now to deal with a statute which makes bribery consist merely in the intention of the person wishing to give the bribe, and to consider whether it applies to the bribery mentioned in the Ballot Act. That statute is 17 & 18 Vict. c. 102 s. 2, and section 3 of this statute treats as a separate offence the receipt of a consideration for voting. But in my view, before a vote can be struck off the poll, under the Ballot Act, 1872, s. 25, in respect of a bribe, it must be shewn that there was a corrupt receiving by the elector. It is said that this construction will very materially diminish the protection intended to be afforded by the Ballot Act against corruption. I am of a different opinion, for upon proving a guilty intent in the elector, a vote will be struck off the poll for the candidate on whose behalf the bribe has been tendered, without ascertaining how the elector has voted. The Ballot Act will then have a very stringent operation, and by adopting this construction we shall put a great check upon corrupt practices; at the same time we shall not interfere with secresy as to the mode in which the elector has voted, and the preservation of secresy as to this matter was the object of the Ballot Act.

BRETT, J.—It seems to me necessary, in order to decide both the points that have been raised, to consider the true construction of the 25th section of the Ballot Act. To determine what it is necessary to prove under that section, and the mode of proof, it is desirable to consider what the law was before the Act passed. Before the 17 & 18 Vict. c. 102, and afterwards with reference to the cases to which it applied, in cases of petitions where the seat was claimed, the first question to be considered was, whether the sitting member was to be unseated for the bribery alleged; and if he was so, it was necessary to have a scrutiny in order to seat the petitioner. Before the 17 & 18 Vict. c. 102, in the case of a voter bribed whose vote was to be struck off on such scrutiny, it was necessary to prove an agreement between the person bribing and the person bribed, and then to enquire on which side the latter had voted. His name was then struck off from the poll of the candidate for whom he had voted. After the 17 & 18 Vict. c. 102, it was no longer necessary to prove an agreement between the party bribing and the voter, and either of them might be found guilty of bribery without any such agreement. The person bribing by the statute was to be guilty if he gave or agreed to give anything with the intention of influencing the vote, independently of the question whether the vote was in fact influenced; but the fact of the giving alone not only did not conclusively shew that the voter was bribed, but, I should have thought, was no evidence of it against him at all. It was necessary further to inquire whether the voter on his side was bribed, and if the conclusion was arrived at that he was, it was then necessary to enquire also which way he voted, in order to see which poll he was to be struck off. So that both before and after the 17 & 18 Vict. c. 102, it was necessary to go into the enquiry how each person had in fact voted. There were, therefore, at the time of the passing of the Ballot Act three necessary points of enquiry, namely: first, whether the candidate had been guilty of bribery; secondly, whether the voter was bribed; and, thirdly, which way he had voted. When the Ballot Act was introduced, the intended effect of the Act would have been greatly contravened, if the third enquiry had remained necessary. It was

desired to obviate this difficulty and to preserve the secrecy, which was the essential object of the Act, and, therefore, the 25th section was passed, and its meaning seems to me obvious when we look at the state of the law previously. The occasion to which the section refers is that to which I have referred, namely, when there is a trial on a petition claiming the seat; then, if bribery is proved against the candidate, and his seat is thereby lost, there is still to be a scrutiny in order to see whether the petitioning candidate can be seated, which seems to me to indicate that the case of each voter is to be examined into, and, "on such scrutiny there shall be struck off from the number of votes appearing to have been given to such candidate, one vote for every person who voted at such election and is proved to have been so bribed," &c. I agree with my Lord that the phrase "so bribed" only refers to the words "by himself or by any person on his behalf:" but unless the whole of the second phrase of the latter part of the section be struck out, it is impossible to stop at the enquiry into what the candidate has done, and not enquire further whether the voter has been bribed. The truth is, that the section leaves the nature of the scrutiny just as it was before, except that the Judge cannot enquire into the question how the voter voted, for this would be contrary to the spirit of the Act. That is the only change, and the necessary result is, that as it cannot be enquired which way the voter voted, so as to see from whose poll the vote is to be struck off, some other and more stringent method of dealing with the case must be adopted, and accordingly one vote, though of course not necessarily the bribed vote, is to be struck off from the poll of the person bribing. The effect is much greater than under the old law in many cases; for, to take the illustration suggested in argument, if under the old law the candidate bribed fifty voters, and twenty-five voted for him and twenty-five for the other side, and such votes were struck off on both sides, he was not hurt; but now the fifty would be struck off from his poll, and the other side would retain the twenty-five that were in their favour. Then what effect has this section on the mode of proof? One of the most effective pieces of evidence formerly to prove that a voter had been bribed, if it could be procured, was, that after receiving a gratuity, the recipient voted contrary to his previous promise or known political opinions. Such evidence often could not be procured in cases of bribed voters, because some voters were bribed to vote in accordance with their opinions, it being often the case that a man, though he would not vote against his party, would not vote for it unless bribed; but in many cases such evidence was forthcoming, and most effective. If the secrecy that it was the object of the Act to secure was to be preserved, it is obvious that this source of evidence must be given up; but it does not seem to me to follow that the Act has made any difference in this, that it is necessary to establish by evidence that the voter has been bribed. The Judge must be satisfied by the evidence that a sufficient number have been bribed by the candidate to reduce his majority to a minority. Then was there sufficient evidence here? I cannot say I am of the same clear opinion as my Lord on this point. In acquiescing with his opinion, and that which I understand to be my brother Grove's opinion, the utmost I can say is that I am not prepared to differ. It seems to me that the evidence, if any, is of the slightest kind, and I have the greater difficulty in deciding, because the point is brought before me in such a manner that I have the greatest difficulty in exactly saying, what the evidence was with regard to the different voters. The question, as I understand it, is, whether there was evidence against the voters that were bribed, on the assumption that it was necessary to prove that they had been bribed. This is reserved as a question of law, and it amounts to this: whether there was such evidence as, if the case were to be tried by a jury, would be evidence that the Judge would be justified in leaving to them. The question being raised as a point of law, it seems to me to be identical, whether the case is of a civil or criminal nature, the laws of evidence are the same in either case. In a civil case, the

defendant can be called, it seems to me, in deciding whether there is evidence to go to the jury, the plaintiff has no right (except in a particular case I will afterwards refer to), to ground himself on the fact that the defendant might have gone into the box but declined to do so; for the plaintiff has no right to call on him to do so, unless there is previously a *prima facie* case. The exception is in the case of some matter which is exclusively or peculiarly within the knowledge of the defendant, and as to which he could easily give an explanation, but does not do so. In such a case the plaintiff has a right to take into account that the defendant has offered no explanation. What, then, is the evidence in the present case, which is alleged to be such evidence as ought to be left to a jury? It seems to me of a very different kind, as affecting different voters. It is stated in the case that Mr. Parry before the dissolution was a candidate, and accepted by the Liberal party as such. It is not stated, nor does it appear, how many of the voters were likely to know it. The usual course would be to announce the fact at some public meeting of influential persons belonging to the party; but we are not told how that was, or that the candidate had issued an address, or whether his candidature was proclaimed in any open manner. The evidence would be of very different weight as affecting persons who knew, and persons who did not know, of the candidature. The candidate appears to have written a letter at the time of year when people may dispense small charities, and coals were subsequently distributed in the manner described in the case; certain persons went round and asked the voters and others whether they would receive a gift of coals. It is stated that some of those who were small shopkeepers, and would not require such presents, and some 10*l.* householders were asked. Now the evidence would be of very different weight in the case of persons, who were fit recipients of the charity, and those who were not. If persons in comparatively affluent circumstances were offered coals, it would naturally put them on enquiry as to the reason of such offer. Then with respect to the card that was given to a person who knew Mr. Parry to be a candidate, the effect would be very different from what it would be to a person who did not know. It must be remembered that Mr. Parry had given charitable gifts before, and if no address had been issued the gift might have no peculiar significance to the recipient. Then, again, in the case of those who knew Mr. Parry to be a candidate, the case would be much stronger against those who knew that Dyer was his political agent than against those who did not. Beyond the facts that I have mentioned there was no further proof that the donees received the coals corruptly or knew that they were corruptly given. With respect to persons who were voters, I do not lay much stress on the supposition that they did not know that Parry was a candidate, though I do not think it ought to be entirely disregarded; but with respect to those voters who from their position might fairly be considered as the fit recipients of a charitable gift, and who did not know that Dyer was the political agent of Parry, or that the persons who came to ask if they would receive coals were canvassers for him, though I refrain from saying there was no evidence, I think it was evidence of the slightest kind. It seems to me that this would appear to be so more clearly if such a question arose in an ordinary criminal trial, and if this was not the case of a political contest, in which what one knows about the motives of the briber is apt to colour one's view of the conduct of the voter. It appears to me most difficult to determine this question without having been present at the trial and knowing what happened there, and how much the counsel for the voters intended to admit. I am not prepared to say that there was not some evidence even against all the voters; but in my opinion it was for the learned Judge who heard the case to say on such evidence whether he thought that such voters were bribed, and that it ought to be for him, and not for the Court, even now to decide on the evidence.

GROVE, J.—The question as to the evidence of corruption in the voters taking the coals arose in the following manner.

When I had determined that Mr. Parry must be unseated, Mr. Malcolm claimed to strike off the former's poll one vote for every person taking the coals and voting at the election without ascertaining how that person had in fact voted; no person at the time objected: on the next morning a learned counsel, Mr. Chandos Leigh, stated that he was instructed to appear on behalf of some of the voters who had accepted the coals. If the investigation had proceeded before me, it would have become necessary to ask a very large number of electors whether they had acted corruptly. The counsel for both the petitioner and the voters felt themselves in a difficulty, for it was hardly to be expected that the voters would be willing to confess that they had acted corruptly; the counsel therefore agreed that the matter should remain without further investigation, it being admitted that the coals must be taken to have been given corruptly on behalf of Mr. Parry; the special case has been drawn up on that understanding. As to the question of corruption on the part of the voters taking the coals, I agree with the Lord Chief Justice that a case has been made out which they were bound to rebut. But as to the question whether a vote may or may not be struck off merely upon proving the offer of a bribe, I do not feel satisfied as to the true construction of the Ballot Act, 1872, section 25, although I do not formally dissent from the Lord Chief Justice and my brother Brett. The counsel for the petitioner has relied upon the definition of bribery contained in 17 & 18 Vict. c. 102. s. 2, and his argument seems to me plausible. If bribery in the Ballot Act, 1872, section 25, means a corrupt bargain between the candidate and the elector, the counsel for the petitioner might have found himself in a difficulty; but, possibly, "bribery," as used in that section, may include the offer of a bribe which has been refused. It seems doubtful whether the word can in that section be confined to its meaning at common law. Moreover, on referring to schedule 1, part 1, rule 41, it will be found that the vote of a corrupt voter may perhaps be struck off pursuant to that enactment: possibly his vote may be declared invalid under that rule when he i proved to have taken a consideration fo his vote, and it may be struck off th poll of the candidate for whom it has bee given. If this construction of rule 41 l correct, the vote of a bribed elector ma be struck off both under its provisio and under the twenty-fifth section, a why should the Legislature have p vided a two-fold remedy against corr tion? Moreover, if proceedings be ta under the twenty-fifth section, the vo to be struck off without inquiring how elector has in fact voted; but under forty-first rule power is conferred to a tain for which side the vote has been g The construction contended for by O'Malley seems to me to create this maly; therefore I express no opinion of own as to the construction of the twen fifth section. I reserve myself until shall be necessary to determine the poi

But as to the question of corruption the voters I think a case has been mad out, and with all respect to my brother Bret I decline the office which, in his opinion, ought to undertake. We may consider th facts stated in the case in the same lig as if a point had been reserved at a trial Nisi Prius, whether sufficient evidence go to the jury had been given; and think that sufficient evidence of corru tion in the voters is set forth to enab this Court to say that their votes must b struck off. Suppose, that instead of sack of coals, sovereigns had been dist buted amongst the humbler classes Boston? This circumstance would h afforded a *prima facie* case against a v who accepted a sovereign, and prob no difficulty would have arisen as to inference ought to be drawn. The am of testimony necessary to prove guilt person taking what is *prima facie* a may vary in degree. Bribery is s directly committed. In the presen coals were given whilst Parliamen sitting, but a dissolution was at and the donees in many instance not objects of charity. It is obvic Mr. Parry wished to make himsel lar amongst the electors for the b Do not the circumstances stated in amount to *prima facie* evidence of tion? The commission of the offe

not be reduced to a matter of mathematical certainty; but it may be reasonably assumed that a large number of the recipients knew of Mr. Parry's candidature, and the circumstances proved before me at the trial of the petition did raise a *prima facie* case. The voters inculpated no doubt felt that after accepting the coals it did not lie in their mouths to say that they had not received the gift corruptly. At the trial their counsel adopted a reasonable course, for he would have run a great risk if he had gone into the whole case as to the voters. I am of opinion that there was evidence upon which a jury might properly find that the voters had been guilty of corruption. At the time of reserving the case for the consideration of this Court I did not contemplate the difficult questions which have been discussed before us. I cannot undertake to say that I should have sat to examine every instance, in which an elector had accepted a present of coals from the friends of Mr. Parry; but at the trial I certainly did not foresee how many important points might be brought forward owing to the form in which the case has been drawn up. I agree with the Lord Chief Justice as to the evidence of corruption; but as to the Ballot Act, 1872, and the true construction of the twenty-fifth section, I reserve my opinion.

Judgment for the petitioner.

Attorneys—Collyer-Bristow, Withers & Russell, for petitioner; Paterson, Snow & Burney, for respondents.

1874. June 1; July 8. } MAVRO AND OTHERS *v.* THE OCEAN MARINE INSURANCE COMPANY.

Marine Insurance—Foreign Adjustment—General Average.

The plaintiffs were owners of a cargo of wheat upon a vessel called the C., to be carried from Varna to Marseilles; they insured the wheat with the defendants, and by the policy general average was to be paid, "as per foreign statement," and a warranty against average unless general was also inserted. Upon the voyage the C. met with bad weather, and was compelled to hoist a press of canvas; in consequence she shipped heavy seas and sprang a leak, and part of the cargo was damaged. Upon arriving at Constantinople it was found necessary to repair the C., and Her Majesty's Supreme Consular Court ordered, with the acquiescence of the parties interested, the sound portion of the cargo to be transhipped and forwarded to Marseilles, and the residue to be sold. An adjustment was held by order of the above-mentioned Court at Constantinople, whereby the damage to the wheat was treated as a general average loss. Nearly three months elapsed before the repairs of the C. were finished:—Held, *that the Supreme Consular Court had jurisdiction to make the foregoing orders, that the voyage was broken up at Constantinople, and that the defendants were bound by the adjustment, treating the damage to the wheat as a general average loss.*

This was an action brought on a policy of insurance on wheat and advances, valued at 9,200*l.*, at and from Varna to Marseilles, on board the vessel *General Chassé.* In the declaration the plaintiffs sought to recover—first, a general average loss; secondly, a total loss; and thirdly, a loss under the suing and labouring clause in the policy contained. The defendants paid into Court the sum of 110*l.*, which sum the plaintiffs denied to be sufficient to satisfy their claim; and, by the consent of the parties, and by the order of Grove, J., the following case was stated for the opinion of this Court.

1. The plaintiffs carried on business as merchants and brokers in London and Marseilles, and the defendants were an insurance company carrying on business in London.

2. In September, 1867, Mr. Sovorono, who was a Greek merchant domiciled at Constantinople, and who was desirous of consigning to the plaintiffs at Marseilles for sale a cargo of 29,156 kilos. of wheat belonging to him, chartered the vessel, *General Chassé*, which was a British vessel belonging to Giuseppe Saliba, a Maltese subject resident at Constanti-

ple, to carry the said cargo of wheat m Varna to Marseilles. Mr. Sovorono so made advances to the master of the *eneral Chassé*, amounting to the sum of 49*l.* 1*s.* 9*d.*, on account of the freight payable under the charter-party. The plaintiffs and the said Sovorono were jointly interested in the adventure relating to the said cargo of wheat.

3. On the 22nd of November, 1867, the plaintiffs effected with the defendants a policy of insurance for 1,000*l.*; this insurance was declared to be "upon 29,156 Constantinople kilos. wheat and advances, valued at 9,200*l.*: general average as per foreign statement," on the ship *General Chassé*, at and from Varna to Marseilles, and it was also declared to be warranted free from average unless general.

4. On the 6th of November, 1867, the *General Chassé*, with the said cargo of wheat on board, sailed from Varna for Marseilles; very soon after leaving port she encountered heavy gales and thick weather, which continued for some hours before she came to anchor in the Bosphorus, as hereinafter mentioned. In fair weather the vessel would have taken from four to five days to make the voyage to the Bosphorus.

5. On the 7th of November, during a heavy gale from the north, it became necessary, on account of the vessel nearing land, that she should carry a press of sail in order to prevent her making further lee way; this was accordingly done, and in consequence the vessel laboured very much, and shipped heavy seas, which carried away the jolly boat, and other parts of the vessel's apparel and furniture; it was also found necessary to throw overboard sundry articles which were on deck, in order that the working of the ship might not be impeded. The next day there was a strong gale from the north, and as the vessel got very near the land it became necessary, for the safety of ship and cargo, that a still further press of sail should be carried in order to avoid a lee shore; more canvas was accordingly set; this caused the *General Chassé* to strain very much; several of her sails were split and carried away, and she soon sprang a leak; the leak was however kept under by pumping, wheat being con stantly pumped up with the water.

6. On the 24th of November the *G neral Chassé* was brought to anchor Bajuk Linron in the Bosphorus; and the following day, having been taken tow by a steam tug, which it was nec sary to employ by reason of the vess damaged and disabled condition, she brought to anchor at Tophate in the of Constantinople.

7. On the 27th of November the ma of the *General Chassé* petitioned the J of Her Majesty's Supreme Consular C of Constantinople to appoint surveyo survey the vessel, and accordingly veyors were appointed by the Court, on the 28th of November, 1867, sur the vessel, in the presence of the Giuseppe Soliba, her owner, and Sovorono, and recommended tha voyage of the vessel should end at stantinople, and that the cargo of should be sold by public auction for the benefit of all concerned; thereupon the master petitioned the Court that an order might be made for the immediate sale of the cargo by public auction, and the order was made on the same day.

8. On the 2nd of December Fourtu Jourdain, agent of the Assurances Ma times de France, prayed the said Cou for leave to intervene in the proceeding on the ground that the cargo was insure in his company; such leave was accor ingly granted to him, and upon his ap cation the sale of the cargo was suspend and a fresh survey ordered by the Co

9. On the 7th of December Mr. H Lamb petitioned the said Court for to intervene in the proceedings, as for the Maltese underwriters, and was granted to him on the same also Mr. Hopper, Lloyd's agent, add a petition to the said Court, stati he approved of the steps taken Jourdain, and praying that, a for Lloyds', he might attend t survey; and his prayer was granted.

10. On the 10th of December survey took place in the prese surveyors and Messrs. Jou Hopper. It was found that fifth part of the cargo of

22. The defendants contended that they were not liable in respect of any damage to the wheat, and that they had paid enough money into Court to cover the plaintiffs' claim in respect of all items contained in the said average adjustment, with the exception of the item representing the damage to the wheat.

23. The Court was to be at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the defendants were or were not liable as aforesaid to pay the plaintiffs a sum exceeding that paid into Court.

Amongst the documents marked B. referred to in the 20th paragraph was an order in council dated the 30th of November, 1864, relating to her Majesty's Consular Courts in the Ottoman dominions and containing the following provisions:

"7. Subject to the other provisions of this order, the civil and criminal jurisdiction aforesaid shall, as far as circumstances admit, be exercised upon the principles of and in conformity with the common law, the rules of equity, the statute law, and other law, for the time being in force in and for England, and with the powers vested in and pursuant to the course of procedure and practice observed by and before Courts of justice and justices of the peace in England, according to their respective jurisdiction and authorities.

"8. Nothing in this order shall be deemed to deprive her Majesty's consular officers of the right to observe and to enforce the observance of any reasonable custom obtaining within the Ottoman dominions or to deprive any person of the benefit thereof, except where this order contains some express and specific provision incompatible with the observance of such custom."

Watkin Williams (*Macleod* with him) (on June 1), for the plaintiffs.—*Harris* v. *Scaramanga* (1), and *Hendricks* v. *The Australasian Insurance Company* (2), are conclusive in the plaintiffs' favour. *D* *enson* v. *Jardine* (3) is not against plaintiffs; that decision, so far as it is levant to the present case, establishes a custom cannot control the express t of a contract. The injury sustained the plaintiffs was not a general av loss according to English law; it w particular average loss, and the poli upon the cargo was warranted free fro average unless general; but the defendant were to be bound by a foreign statement, and a loss by general average is to be calculated between the owner of the ship and the owner of the goods according to the law of the port of discharge—*Simonds* v. *White* (4). *Fletcher* v. *Alexander* (5) she that in ascertaining the general aver contribution to be paid by the shipow in respect of goods jettisoned, the va of such goods is to be taken to be sum which it may fairly be assumed th would have been worth to the owner the port of adjustment. This princi establishes that the adjustment was p perly made at Constantinople. In *Wor* v. *Storey* (6), Parke B., said—"The ow discharges his duty if he sails with a s worthy vessel, and therefore, if the ves is afterwards damaged by perils of seas, he is not bound to repair it." sell the damaged wheat was a reasona course to take and therefore was just able—*Blasco* v. *Fletcher* (7). The ow of the *General Chassé* was justified abandoning the voyage—*De Cuadra* *Swann* (8). The judgment of the C sular Court at Constantinople was c clusive as to the rights of the parties *Messina* v. *Petrococchino* (9).

C. P. Butt (*J. C. Mathew* with him), the defendants.—The opinion expres

(1) 41 Law J. Rep. (N.S.) C.P. 170; s. c. Law Rep. 7 C.P. 481.

(2) Law Rep. 9 C.P. 460; s. c. *ante*, 188.

(3) 37 Law J. Rep. (N.S.) C.P. 321; s. c. L Rep. 3 C.P. 639.

(4) 2 B. & C. 805; s. c. 2 Law J. Rep. 159.

(5) 37 Law J. Rep. (N.S.) C.P. 193; s. c. Rep. 3 C.P. 375.

(6) 11 Exch. Rep. 427; s. c. 25 Law J. (N.S.) Exch. 1.

(7) 14 Com. B. Rep. N.S. 147; s. c. 32 J. Rep. (N.S.) C.P. 284.

(8) 16 Com. B. Rep. N.S. 772.

(9) 41 Law J. Rep. (N.S.) P.C. 27; s. c. Rep. 4 P.C. 144.

e B., in *Worms* v. *Storey* (6) is ous conclusion, and moreover is n *obiter dictum*. The case does ain a statement that it was im- to repair the *General Chassé* so as her fit for the voyage to Mar- d in point of fact she was made y in a reasonable time; and be- plaintiffs can succeed upon an adjustment made at Constanti- intermediate port, it is necessary to prove that the vessel could nade fit to go to Marseilles, her lischarge. The liability to pay verage depends upon the arrival lventure at the port of destina- this case the *General Chassé* got r than Constantinople. It may nded for the plaintiffs that the the Consular Court was obtained nt, and is therefore in any point alid; but *Power* v. *Whitmore* (10) at strong evidence of jurisdiction gn Court must be given, before the kind mentioned in the case recognised in England. By the n to pay general average accord- 'foreign statement," the defend- ely undertook to indemnify the against any loss which they stain by reason of having to ey to other persons under an ad- abroad. The defendants did l themselves to pay for what djusters might consider a general loss.

Williams replied.

Cur. adv. vult.

dgment of the Court (11) was , on July 8, by

COLERIDGE, C.J.—This was an ac- policy of insurance on a cargo . The ship, being disabled, and the cargo damaged, put into inople. Proceedings were taken nsular Court there, the result of s that by the order of the Court aged portion was sold and the sound portion transhipped. The entire cargo belonged to the plaintiffs. An adjustment of average was by order of the Consular Court made at Constantinople, in which the average adjuster treated the damage to the wheat as general average. The policy contained the words, "general average as per foreign statement," and "free from average unless general." The defendants have paid into Court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the item for damage to the wheat; this claim they deny their liability to pay.

They relied mainly upon three points. First, that the Consular Court at Constantinople had no jurisdiction to make the orders which were made in this case. Second, that the voyage was not necessarily broken up at Constantinople, and that the average should have been adjusted by an adjuster at Marseilles after the arrival of the ship and goods in safety there. Third, that the words, "free from average unless general," were intended expressly to exclude such an item as the one in dispute, which by the law of England would not be a general average loss at all.

By the 23rd paragraph of the case the Court is to draw inferences of fact, and this enables us easily, and, as we think satisfactorily, to dispose of the first two points in the case. We are clearly of opinion, upon the facts stated in the case, that the Court at Constantinople must be taken to have had jurisdiction to make the orders which it did, and which were acquiesced in at the time. We are also clearly of opinion upon the facts found in the case that it must be taken that the voyage was necessarily broken up at Constantinople.

Some reliance was placed in argument upon the fact that the law of Marseilles, the port of ultimate destination, was the same on the subject of general average as the law of Constantinople; but this fact alone would not be conclusive of the subject, and we notice it only to shew that we have not overlooked it.

There remains only the question upon the true construction of the policy, and with respect to this the cases of *Harris* v. *Scaramanga* (1) and *Hendricks* v. *The*

M. & S. 141.
rd Coleridge, C.J.; Mellor, J.; and

Australasian Insurance Company (2) appear to us to be undistinguishable. The latter case was very recently argued before us, and we adhere to the opinion we then expressed. We think, therefore, that there should be

Judgment for the plaintiff.

Attorneys — W. Nash, for plaintiffs; Waltons, Bubb & Walton, for defendants.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Common Pleas.*)

1874. June 15. { THE CITY DISCOUNT COMPANY (LIMITED AND REDUCED) *v.* M'LEAN.

Principal and Surety — Appropriation by Creditor—Presumption of Payment by Principal Debtor.

The plaintiffs had had discount transactions with S., who applied to them for an advance of 5,000*l.; the plaintiffs agreed to lend him that sum upon a guarantee, and on the* 3*rd of May,* 1867, *the defendant became surety for a portion of the amount required. The plaintiffs advanced* 5,000*l. to S., and subsequently discounted bills to a large extent for him; when the bills which he brought were discounted, the plaintiffs credited him with the amount thereof in their ledger, and then re-discounted the same. This method was adopted in order to keep the plaintiffs out of cash advances. Sometimes when the plaintiffs discounted bills for S., the transaction was not entered upon their ledger. If the discounted bills were not paid at maturity by the acceptors or by S., and were paid by the plaintiffs, the amount was debited to S. According to the plaintiffs' ledger, between the* 8*th of May and the* 12*th of June,* 1867, *S. was credited "by bills discounted" with various sums, amounting in the whole to more than* 5,000*l. It appeared from the books of the plaintiffs that from May,* 1867, *to December,* 1868, *the accounts were made up, and sometimes shewed only a small balance against S., e.g., at the end of* 1867, *a balance against him of* 273*l., and at the end of June,* 1868, *of* 1,060*l.; but in December,* 1868, *the account shewed a balance against him of* 27,704*l. The foregoing balances in* 1867 *and June,* 1868, *were arrived at by taking into account the sums on the credit side, which represented the amount of the bills less interest and commission for discount which were current at the date of the balance being struck, and of promissory notes of S., some of which bills and promissory notes were not paid at maturity, and were included in the ultimate balance of* 27,704*l. against S. The plaintiffs from time to time during* 1867 *and* 1868 *sent to S. accounts, which were copies of their ledger, and thus shewed the above balances. The bills discounted with the plaintiffs by S. at the time of the loan of* 5,000*l. were renewed and were never paid, and that sum was never liquidated. In December,* 1868, *S. became bankrupt:*—Held, *that the plaintiffs had not appropriated the bills discounted by S. after the loan of* 5,000*l. in payment thereof, and that as the loan to S. had never been paid by him, the defendant was liable to the plaintiffs upon his guarantee after S. had become bankrupt.*

The Court of Common Pleas having given judgment for the plaintiffs herein the defendant brought error to this Court and the following are the material paragraphs of the Special Case stated for the opinion of the Court below.

3. Between November, 1865, and May 1867, the plaintiffs had discounted in the way of their business certain bills for Mr. Henry Southgate, trading as Messrs. Henry Southgate & Co.; and at the time when the guarantee hereinafter set forth was entered into, Mr. Henry Southgate, trading as Henry Southgate & Co., was indebted to the plaintiffs in discount transactions about 208*l.*

4. He was also then indebted to the plaintiffs in about 1,660*l.* on discount transactions carried on by him when he traded as Southgate & Barrett, which he had done previous to November, 186[illegible] and this latter amount (as well as the sum of about 208*l.* mentioned in pa[illegible]

Southgate & Co., as noted at foot, in settlement of your claim upon them, we hereby guarantee the due payment of the said bills, provided they are not paid at maturity by the acceptors.

"We are, gentlemen,
"Your obedient servants,
"(for) City Discount Company,
"(signed) John Cooper.
"To Messrs. Ward, Lock & Tyler
and
"Messrs. Cassell, Petter & Galpin.

"Bills referred to in the foregoing letter of the 11th of May—'London, 6th May, 1867. Ward, Lock & Tyler on Southgate & Co., accepted payable at the City Bank, Ludgate Hill—

A 6 months' date, due 9th November, 1867	£382	16	7
A 9 months' date, due 9th February, 1868	382	16	7
A 12 months' date, due 9th May, 1868	382	16	7
A 15 months' date, due 9th August, 1868	382	16	7
An 18 months' date, due 9th November, 1868	382	16	7
	£1,914	3	0

Say nineteen hundred and fourteen pounds and three shillings.'"

And on or about the times of the said bills becoming due the plaintiffs advanced to Mr. Southgate, with other moneys, sums with which he might have taken up, and as a fact he did take up, all the said bills, and the sums are a portion of the debt of 27,704*l.* 8*s.* 9*d.* due from Mr. Southgate to the plaintiffs.

12. After the 3rd of May, 1867, and between that date and December, 1868, when Mr. Southgate stopped payment, and was indebted to the plaintiffs on the balance of accounts in a sum of 27,704*l.* 8*s.* 9*d.*, the company in various sums and at different times advanced to Mr. Southgate money, amounting in the whole to the sum of 44,784*l.*, Mr. Southgate being on several occasions during that period indebted to the plaintiffs in respect of advances made by them to him in a sum exceeding 5,000*l.* A large portion of this debt of 27,704*l.* 8*s.* 9*d.* was made up of returned and renewed bills and discounts and commissions.

13. During the same period, from the 3rd of May, 1867, to December, 1868, Mr. Southgate discounted with the plaintiffs trade bills amounting in the whole to the sum of 40,326*l.* 5*s.*, he being at the date of such discount credited in the books of the plaintiffs with the amount of such bills, less interest and commission; and if such bills were paid at maturity to the plaintiffs by the acceptors, such credit remained; but if they were dishonoured, he was debited with the full amount of such bills.

14. After the 3rd of May, 1867, another class of bills was also discounted by Mr. Southgate with the plaintiffs. These were bills which he drew, and which were accepted for his accommodation, and were then discounted by him with the plaintiffs, who guaranteed the acceptors against all liabilities in respect of the same, and who credited Mr. Southgate at the time of the discount with the amount of the said bills, less interest and commission; and when the same became due, and as a matter of course were not paid either by Mr. Southgate or the acceptors, debited Mr. Southgate with the full amount of the same.

15. When the trade bills mentioned in paragraph 13 were not paid at maturity, and when the class of bills set forth in paragraph 14 arrived at, or were about to arrive at maturity, Mr. Southgate took to the plaintiffs other bills to something like the same amount, either trade bills as mentioned in paragraph 13, or bills of the nature mentioned in paragraph 14, and discounted those with the plaintiffs; and the same mode with crediting and debiting him was pursued as is set forth in paragraphs 13 and 14 respectively; and this mode of dealing between Mr. Southgate and the plaintiffs continued down to December, 1868, when he became bankrupt.

16. Mr. Southgate took the class of bills mentioned in paragraph 14 to the plaintiffs, at the request of Mr. Cooper, who was the manager of the plaintiffs' company, to keep the company out of cash advances, they re-discounting these bills which Mr. Southgate had discounted with them; and the gross amount of such bills was about 14,000*l.*

17. Both one or other of these classes of bills were brought as above by Mr.

gate to the plaintiffs' company in to keep the company out of cash ces, and were brought from time to having regard to the amount of advances, though not exactly cor- ding with such amounts or with nes when the said advances were

The advances made as mentioned graph 12, were made from time to and extended over the whole period the 3rd of May, 1867, to December, and as a part of them the follow-

	£
8th May, 1867	500
10th May, 1867	1,000
14th May, 1867	300
21st May, 1867	600
25th May, 1867	250
31st May, 1867	500
	£3,150

which, the plaintiffs contended, vered the 3,000*l.* mentioned in the nute of the directors of the 14th of ay, 1867, set forth in paragraph 10 of is case. But the only evidence upon is that was given was that the 1,000*l.* ven on the 10th of May, 1867, was pro- sedly given to pay 1,000*l.* off Ward, ck & Tyler's debt of 2,914*l.* 3*s.*, and hich was paid, leaving the sum of 914*l.* 3*s.* due to them upon the South- e bills guaranteed by the plaintiffs, as forth in paragraph 11, and that at time such 1,000*l.* was given to South- te he handed over the guarantee to the aintiffs' agent, Mr. Cooper.

19. About the time of the advance set rth in the last paragraph 3,000*l.* worth bills of the character set forth in para- raph 14 were discounted by Mr. South- ate with the company in order to cover ese advances, which bills were from ime to time renewed according to the ode set forth in paragraph 15, and have ever been paid; and on all advances nade to Southgate by plaintiffs, bills of me sort or other were brought by South- gate to the plaintiffs to be discounted by them with the object of keeping them out of cash advances.

20. Between the 3rd of May, 1867, and December, 1868, considerably more than 5,000*l.* worth of the trade bills had been paid.

21. More than 5,000*l.* was advanced by the plaintiffs to Southgate between the 3rd of May, 1867, and the 24th of September, 1867, and more than 5,000*l.* between the 24th of September, 1867, and December, 1868.

22. It appears from the books of the plaintiffs that from May, 1867, to December, 1868, the accounts were made up and shewed only a small balance against Southgate: *e.g.* at end of 1867 a balance against him of 273*l.*, and at the end of June, 1868, of 1,060*l.* odd; but at the time of his bankruptcy, occurring in December, 1868, the account shewed a balance against him of 27,704*l.* 8*s.* 9*d.*

23. The plaintiffs, in order to carry out the guarantee, exercised, in January, 1869, the power of sale contained in the mortgage, and the premises were accordingly sold on the 20th of February, 1869, and the sale realised the sum of 500*l.*

24. And this action had been brought to recover the sum of 750*l.*, being one-sixth part of the sum of 4,500*l.*, the deficiency remaining from the sum of 5,000*l.*, after the realisation of the proceeds of the mortgaged premises.

25. It was agreed by the plaintiffs and the defendant that the Court should on the hearing of the Special Case be at liberty to draw inferences of fact.

The question for the opinion of this Court was whether the defendant was liable to pay the aforesaid sum of 750*l.* or any part thereof.

The case in error came on before the Court of Exchequer Chamber, upon the 6th of February, 1873, when the hearing was adjourned in order that certain facts might be ascertained, and thereupon a statement of additional facts with reference to advances and payments was drawn up, of which the following are the material portions:—

It was not proved that the guarantee, after it was so handed over to the plaintiffs' agent, as mentioned in paragraph 18 of the original case, was ever mentioned either verbally or in writing between the plaintiffs and Southgate or the plaintiffs and defendant until the time

when the plaintiffs sought to put it in force.

Previously to the date of the guarantee the company had advanced large sums to Southgate upon discount of bills. This was their sole business, and their mode of keeping accounts not only with Mr. Southgate, but with all their customers was this: The amount of discount and commission was arranged and deducted from the nominal amount of the bills; this transaction was entered in the day-book. If the total amount of the balance was then and there received and taken away by the customer, the transaction was frequently not entered in the ledger at all. If part only was taken, then the amount left and not then received was entered to his credit in the ledger, and when that amount was afterwards taken up by the customer and was paid to him, the amount was then debited to him in the books. If the balance, after deducting discount and commissions, was not then taken up, the whole amount of the balance was credited to the customer in the ledger, and as and when the customer received the advance, which was usually within a day or two, the amounts so paid and received were entered in the ledger. If the discounted bills were not paid at maturity by the acceptor or the customer, and were paid by the plaintiffs, the amount was debited to the customer, as stated in paragraph 13.

Sometimes the customer came to the manager and told him that he intended to bring bills for discount, and requested an advance by anticipation. This advance was then debited to him in the ledger, and when the bills were brought he was credited with their nominal amount, less the interest and commission as above mentioned.

Nothing was said at the time of the loan being negotiated as to the rate of interest to be charged on the advance. As the bills were brought the terms of interest and commission were arranged, as had been done on previous discount transactions before the date of the guarantee.

Southgate endorsed to the plaintiffs all bills brought by him for discount of both classes mentioned in paragraphs 13 and 14 of the original case; and the plaintiffs either by endorsement or guarantee became responsible in their turn to subsequent parties for all bills which passed out of their hands.

The balances mentioned in paragraph 22 were arrived at by taking into account the sums on the credit side, which represented the amount of the bills less interest and commission for discount, which were current at the date of the balance being struck, and of promissory notes of Southgate, some of which bills and notes were not paid at maturity, and were included in the balance of 27,704*l.* against Southgate. The plaintiffs from time to time during 1867 and 1868 sent to Southgate accounts, which were copies of their ledger, and which thus shewed the above balances.

Among certain documents annexed to the statement of additional facts was an extract from the plaintiffs' ledger, which shewed that between the 8th of May and the 12th of June, 1867, Southgate had been credited "by bills discounted" with various sums amounting in the whole to 5,763*l.* 19*s.* 6*d.*

Joseph Brown (*C. J. Thrupp* with him) for the defendant in the Court below.—The defendant is entitled to succeed on the ground that the plaintiffs have been paid the sum guaranteed by him. Their books clearly shew that they have elected to appropriate the amounts received from the principal debtor in liquidation of the liability under the guarantee. They had the option to extinguish the debt which the defendant was liable to discharge, and having taken that course they cannot now recede from it—*Clayton's Case* (1). If a payee has made an act of appropriation which he has communicated to the payer, he cannot set up against it a subsequent act of appropriation—*Bodenham* v. *Purchas* (2), and it appears from the additional statement of facts that the plaintiffs sent to Southgate copies of their ledger shewing that the guaranteed debt was satisfied. They cannot now alter the

(1) 1 Mer. 585; s. c. Tudor's L. C. on Mercantile Law 1.

(2) 2 B. & Ald. 39.

position, when he has become insolvent, and from this circumstance *Simson* v. *Ingham* (3) is not an authority against the contention on behalf of the defendant. The conduct of the parties does not raise the inference that it was intended to keep on foot the guaranteed debt, and therefore the plaintiffs cannot rely upon *Henniker* v. *Wigg* (4). It follows from *Laing* v. *Campbell* (5) that the subsequent credits must be applied to the discharge of the earliest debt.

[BLACKBURN, J.—In *Laing* v. *Campbell* (5) the parties were changed, a new firm was established. A different principle applied.]

No doubt by the consent of all parties the dealings with the debtor before and after the dissolution of partnership were treated as one transaction. It is, nevertheless, a much stronger case than the present.

[BLACKBURN, J.—I am not of that opinion. CLEASBY, B.—Has not the doctrine as to appropriation of payments been discussed in cases relating to the statute of limitations?]

Mills v. *Fowkes* (6) is a case where a question arose as to the right of a creditor to apply payments on account in liquidation of debts barred by the statute. The principal debtor, Southgate, assented to the appropriation and the plaintiffs are bound by it.

F. Meadows White (*English Harrison* with him), for the plaintiffs in the Court below, was not called upon to argue. He admitted that certain items must be struck off the amount claimed in the action, and that the plaintiffs were entitled only to the sum of 550*l.*

BRAMWELL, B.—We all are of opinion that the judgment of the Court of Common Pleas must be affirmed for the reduced amount now claimed by the plaintiffs through their counsel. We can decide this case upon the footing that the document, dated the 3rd of May, 1867, was not a continuing guarantee. We may treat this case as if it were an action between the plaintiffs and the principal debtor. In such an action would Southgate be entitled to say, that he has paid the plaintiffs the sum sought to be recovered from the present defendant, M'Lean? I quite agree with the cases cited, in which the parties have been changed either by death or by the creation of a new firm; but we must decide every case according to its own circumstances. It is impossible for us to hold that Southgate would before his insolvency have been entitled to demand from the plaintiffs the return of any securities deposited with them on account of the guaranteed debt: it would have been contrary to the intention of the parties in entering upon the contract. By the terms of the guarantee it was to last for a period not exceeding two years from its date, but according to the construction of the defendant it would have speedily become inoperative. It was intended to cover discount transactions, for trade-bills usually do not require a guarantee. The question would have been too clear for argument by the defendant, if the plaintiffs had kept their books in a more convenient form: the fallacy of the contention for him would have been too transparent to admit of discussion. The nature of the original transaction remains unaffected by what has subsequently happened. The plaintiffs kept their accounts in the method described in the statements before us for the purpose of shewing what would be the balance if all the securities held by them were realised at their supposed value: but no book-keeping arrangements can alter the legal position of the parties.

BLACKBURN, J. [after stating the facts, proceeded as follows].—It has been contended on behalf of the defendant that the whole of the guaranteed debt has been paid off, because after the advances by the plaintiffs more than 5,000*l.* worth of trade bills delivered by Southgate to them have been paid. It has been urged that by the doctrine as to the appropriation of payments, or at least by inference of law, the advances must be deemed to have been liquidated. The rule of law

(3) 2 B. & C. 65; s. c. 1 Law J. Rep. K.B. 234.
(4) 4 Q.B. Rep. 792.
(5) 36 Beav. 3.
(6) 5 Bing. N.C. 455; s. c. 8 Law J. Rep. (N.S.) C.P. 276.

is that when a debtor pays money to a creditor to whom he owes several sums, he may direct the appropriation of it to any specified debt; but if he omits to do so, the creditor may appropriate the payment as he thinks fit, as was decided in *Simson* v. *Ingham* (3) and *Mills* v. *Fowkes* (6). In the former case Best, J., seemed to think that the appropriation must be made within a reasonable time, but other authorities shew that it may be made at any time. Has the creditors' option to appropriate been exercised in the present case? It is said that when a balance was struck between the plaintiffs and Southgate, a fresh start was made in the transactions existing between them. I do not quite agree with that. *Clayton's Case* (1) related to a change of parties by death. That circumstance does not present itself here. The question is, whether there was a change in the relationship existing between the plaintiffs and Southgate as to the guaranteed debt? Now it is to be recollected that the plaintiffs held security, and it is not to be assumed that they would be willing to appropriate payments made by the principal debtor to the liquidation of the amount which was secured to them by the defendant and other persons. No conclusion can be drawn that the plaintiffs intended to absolve the parties to the guarantee of the 3rd of May, 1867. Upon this matter we can derive assistance from *Henniker* v. *Wigg* (4). That case shews that there must be evidence of appropriation of payments in discharge of a guaranteed debt. It was a judgment of the Court of Queen's Bench delivered by Lord Denman, C.J., and the view taken by the Judges was founded upon good sense. The facts of the present case establish that there was no appropriation by the plaintiffs in exoneration of the defendant's liability. There never was a time when the loan of 5,000*l.* could be said to have been paid. The plaintiffs never were bound to admit that Southgate was discharged from liability.

MELLOR, J., concurred.

CLEASBY, B.—As the facts stand, I agree with the other members of the Court. The rendering to Southgate of the accounts copied from the plaintiffs' ledger might be evidence of appropriation by the plaintiffs of payments by him in discharge of the guaranteed loan. But, as appears from paragraph 14, the plaintiffs credited Southgate with the amount of accommodation bills: how can an unreal transaction of that kind be deemed to be payment? And the statements in the case and the additional facts shew that trade bills were treated upon a similar footing.

ARCHIBALD, J., and AMPHLETT, B., concurred.

Judgment affirmed.

Attorneys—George Booth, for appellant; Mercer & Mercer, for respondents.

1874. June 2, 4. } HALLIDAY *v.* HARRIS.

Bankruptcy—Bankruptcy Act, 1869, 32 & 33 *Vict. c.* 71. *s.* 72—*County Court—Admiralty Jurisdiction—Prohibition to restrain Admiralty Proceedings.*

H., who was a debtor to the bankrupt estate of C., a bankrupt, seized in the Vice-Admiralty Court at Sierra Leone a vessel which formed part of the bankrupt's estate for a debt claimed to be due to him for necessaries supplied to such ship, and thereupon the trustee in bankruptcy of C. obtained an interim injunction from the County Court of Manchester, in which C.'s bankruptcy proceedings had been instituted, to restrain H. from prosecuting his suit in the Vice-Admiralty Court at Sierra Leone, and pending the continuance of such injunction issues were directed by the Judge of such County Court to be tried before him, as to whether H. had a lien on such ship for necessaries. Upon an application by H. for a prohibition to prohibit such County Court proceedings,—Held, *that the County Court Judge had jurisdiction under section* 72 *the Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *to grant the injunction and to try such issues, if he deemed it expedient to do so for the purpose of doing complete justice or making a complete distribution of the bankrupt's property, and that if such Court*

was improperly exercising its jurisdiction in the matter, the remedy of H. was by appeal to the Court of Appeal in Bankruptcy.

This was a rule, calling on the Judge of the County Court of Manchester and the plaintiff, James Halliday, to shew cause, respectively, why a writ of prohibition should not issue to prevent the said Judge from further proceeding with the cause in the said Court, wherein the said James Halliday, as trustee of the property of Child, Mills & Co. was plaintiff, and the said John Myer Harris was defendant, on the grounds—First, that the parties were beyond the jurisdiction; and, secondly, that the subject matter was altogether beyond the jurisdiction of that Court.

It appeared from the affidavits, that the said Child, Mills & Co. filed their petition for the liquidation of their affairs on the 13th of December, 1872, and that the said J. Halliday was appointed the trustee under the said liquidation proceedings, and that as such trustee he had a claim against the said John M. Harris, which, by an arrangement between them, come to in April, 1873, was settled at 30,000*l.*, to be paid by the said J. M. Harris, according to the terms of such arrangement. At that time the said J. M. Harris had a claim against a steam vessel, the *Sir Arthur Kennedy*, which had belonged to the bankrupts, Child, Mills & Co., but which claim was excluded from the arrangement, because it was then considered that the said J. Halliday had no interest, as such trustee, in the vessel, as she was fully mortgaged. The said J. Halliday, however, afterwards got rid of the mortgages, and, as such trustee, became the registered owner of the *Sir Arthur Kennedy*, when, in January, 1874, the said J. Harris caused such vessel to be arrested in the Vice-Admiralty Court of Sierra Leone, for a debt of 3,500*l.*, which he claimed to be due to him for necessaries supplied to her since the appointment of the said J. Halliday as such trustee.

On the 7th of February, 1874, the said J. Halliday obtained an interim injunction from the County Court of Manchester, in which the proceedings for liquidation of Child, Mills & Co. had been instituted, to restrain the said J. M. Harris from further proceeding with his suit in the Vice-Admiralty Court of Sierra Leone, and ultimately, after argument by counsel on both sides, the said County Court made an order continuing the injunction, and directing issues to be tried before the Judge of the said County Court, as to whether the said J. Harris was entitled to a lien upon the *Sir Arthur Kennedy* for the sum of 3,500*l.*, for necessaries supplied to such vessel.

No appeal was lodged on behalf of the said J. Harris against such order of the County Court, but he attended to settle the issues, and applied for a commission to examine witnesses. Afterwards, in the course of this Term, the present rule *nisi* for prohibition was obtained. Against this rule,

Ambrose shewed cause.—The ship *Sir Arthur Kennedy* formed part of the assets of the bankrupts, and the question of Harris's lien would have to be decided before there could be any division of such assets, and it was the policy of the Legislature that the Court of Bankruptcy should have jurisdiction to try all such questions. The 72nd section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), accordingly enacts that, "subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act, shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case; and no such Court as aforesaid shall be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions, except in manner directed by this Act." Under this enactment it was held in *Ex parte Andersen* (1), that the Bankruptcy Court has jurisdic-

(1) 39 Law J. Rep. (N.S.) Bankr. 49; s. c. Law Rep. 5 Chanc. App. 473.

tion to grant an injunction against strangers, to restrain them from doing acts which might be material to the estate of the bankrupt; and in that case, Giffard, V.C., referring to the 72nd section, said—"The terms of this clause, in my opinion, give the Court complete jurisdiction to decide every question that it may be considered necessary to decide, with a view to the distribution of the bankrupt's estate. . . . I have no doubt it was the intention of the Legislature that the Bankruptcy Courts should be complete and sufficient in themselves; and that they should, for the purpose of making a complete distribution of the bankrupt's property, exercise, at least, all the powers possessed by any Judge of the Court of Chancery." The cases of *Ex parte Rumboll* (2); *Ex parte Cohen* (3); and *In re White* (4), also shew that where it is necessary to have any question decided, in order to know how and what assets are to be divided, the Bankruptcy Court has jurisdiction. It was considered not necessary to have this question decided in *Ex parte Lyon* (5), and consequently it was held there that the Bankruptcy Court had not jurisdiction. In *Ex parte Cohen* (3), Lord Justice Mellish said—"For the purpose of getting a better distribution of the estate, the Court of Bankruptcy, and no other Court, is to decide questions relating to that estate. No other Court is to restrain proceedings in the Court of Bankruptcy, and the Court of Bankruptcy has power to restrain proceedings in any other Court." The case of *Ellis* v. *Silber* (6), which will be relied on by the other side, only decides that the Court of Bankruptcy has no exclusive jurisdiction in cases involving the rights of other parties.

Hilbery, in support of the rule.—The 72nd section of the Bankruptcy Act, 1869, only gives power to the Bankruptcy Court, "subject to the provisions of that Act," and section 83, sub-section 7, authorises the trustee of a bankrupt to be sued by his official name. This suit against him by the said J. M. Harris was rightly brought in the Vice-Admiralty Court, and the present defendant has a right to go on with that suit.

[BRETT, J.—The answer is that such suit may go on, but that if Harris prosecutes it, he is liable, as he is in this country, to be sent to prison for contempt.]

That substantially is prohibiting the continuance of such suit. In *Ellis* v. *Silber* (6) the bill was filed by the trustees of a deed of inspectorship for the purpose of setting aside a deed of dissolution of partnership, and the defendants demurred for want of equity and also on the ground that the Court of Bankruptcy was the proper Court to exercise jurisdiction in the matter, and Lord Selborne, L.C., overruled such demurrer, and after stating that there was no case or enactment to the effect that when a trustee or assignee in bankruptcy has a demand against a third person which but for the bankruptcy would be proper to be prosecuted in a Court of law or a Court of Equity, the jurisdiction of such Court is, as against that third person, transferred to the Court of Bankruptcy, his Lordship said—"The general proposition that whenever the assignees in bankruptcy, or the trustees under such deeds as these, have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority." A decision such as this being in the Court of Chancery ought to have greater weight upon a question of jurisdiction of the Court of Bankruptcy than those in the Court of Bankruptcy itself. As said by Blackburn, J., in *Smith* v. *Brown* (7) —"In a case of prohibition, where we are called upon to restrain the Court of Ad —

(2) 40 Law J. Rep. (N.S.) Bankr. 82; s. c. Law Rep. 6 Chanc. App. 842.

(3) 41 Law J. Rep. (N.S.) Bankr. 17; s. c. Law Rep. 7 Chanc. App. 20.

(4) 42 Law J. Rep. (N.S.) Bankr. 76; s. c. Law Rep. 8 Chanc. App. 214.

(5) 41 Law J. Rep. (N.S.) Bankr. 41; s. c. Law Rep. 7 Chanc. App. 494.

(6) 42 Law J. Rep. (N.S.) Chanc. 666; s. c. Law Rep. 8 Chanc. App. 83.

(7) 40 Law J. Rep. (N.S.) Q.B. 214; s. c. Law Rep. 6 Q.B. 737.

miralty, we are not bound by any decisions either in the Court of Admiralty or in the Court of Privy Council, when sitting in an appeal from that Court." In *ex parte Maule, Maule* v. *Davis* (8) it was held by Lord Selborne, L.C., and the Lords Justices, that the 72nd section of the Bankruptcy Act, 1869, does not give the Court of Bankruptcy jurisdiction over property, or the owners of property, not vested in the assignee and not originally subject to the administration in bankruptcy. The case of *White* v. *Simmons* (9) also shews that a suit may be brought in equity by an equitable mortgagee against the trustee under liquidation of the mortgagor for a sale of the security. In that case a demurrer, on the ground that the Court of Bankruptcy was the proper tribunal, was overruled. It is clear that the plaintiff had a lien in the ship for the necessaries which had been supplied, and that if they had been supplied before the bankruptcy he would have been a secured creditor. What jurisdiction has the County Court of Manchester in such a matter? The Court has no Admiralty jurisdiction, and if it held that the plaintiff was entitled it has no power to make any order for the sale of the vessel or otherwise to enforce his right.

Cur. adv. vult.

The following judgments were delivered on the 4th of June:

LORD COLERIDGE, C.J.—This is an application to this Court for a prohibition to the County Court at Manchester under the following circumstances:—

A firm, carrying on their business as Child, Mills & Co., were adjudicated bankrupts on the 13th of December, 1872, on a petition for liquidation. In that liquidation the plaintiff was appointed trustee, and in September, 1873, he discovered that a ship named *Sir Arthur Kennedy*, had been in the reputed ownership of the bankrupts at the date of the petition. There had been certain mortgages of the ship which the plaintiff, by a suit in the County Court succeeded in setting aside; the registration of the mortgages was cancelled; the plaintiff was placed upon the register and became the owner of the *Sir Arthur Kennedy*.

Pending these proceedings and while both parties were ignorant of any claim on the part of the plaintiff to the ship, he and the defendant had entered into a compromise as to the claims by the plaintiff, as trustee, upon the defendant, as a debtor to the estate of Child, Miles & Co., for a sum of 30,000*l.* to be paid by the defendant by instalments. As soon, however, as the title of the plaintiff to the ship was discovered the defendant put forward his claim for having supplied her with necessaries to the extent of 3,500*l.* and seized her through the Vice-Admiralty Court at Sierra Leone. Thereupon Mr. Halliday, the now plaintiff, asked for an injunction in the County Court to restrain the now defendant Harris, from prosecuting his suit in the Vice-Admiralty Court at Sierra Leone, which was granted *ad interim*, and issues were ordered to be tried to settle the questions between the parties. The now defendant, although his counsel objected, at the hearing, to the jurisdiction of the County Court, acquiesced apparently in the decision of the County Court after it was pronounced and intimated through his attorney that he had no intention to appeal. He now applies to this Court for a writ of prohibition to prevent the County Court from continuing the injunction, against which he has not appealed, on the ground, first, that this is not a matter within the words of the 72nd section of 32 & 33 Vict. c. 71, and that even if it were within the letter of the section, it is not within the real meaning, as this is essentially an Admiralty cause, and the County Court has not and was never intended to have Admiralty jurisdiction.

We were properly enough referred to some of the preceding sections of the Act, but the important section and the one upon which the matter really turns is the 72nd, and it runs as follows:

[His Lordship here read the section.]

Now it is to be observed that in the case before us both parties had been par-

(8) 43 Law J. Rep. (N.S.) Bankr. 59; s. c. Law Rep. 9 Chanc. App. 192.

(9) 40 Law J. Rep. (N.S.) Chanc. 689; s. c. Law Rep. 6 Chanc. App. 555.

understand he is resident and carries on business in London, the County Court of Manchester can exercise its authority over him through the London Court of Bankruptcy. It has assumed to exercise such authority by restraining him from proceeding against the ship in the Court at Sierra Leone. If, notwithstanding such prohibition, he had chosen to go on with the proceedings against the ship at Sierra Leone, he would have succeeded there, but he would have been liable to be sent to prison in this country for contempt of Court. I doubt very much whether the County Court of Manchester is exercising its jurisdiction rightly, and I think that if this case had been taken by appeal to the Lords Justices they would have said that it was a matter which the County Court of Manchester ought not to have entertained. It has no machinery for carrying out its judgment. Supposing it decided that necessaries had been supplied to the ship, it could not enforce its decision on behalf of Harris, and therefore it ought not to decide the matter against him. I think, however, that the wrong course has been taken in applying to this Court for a prohibition to the County Court of Manchester. The course was to have appealed to the Court of Appeal in Bankruptcy. This rule must therefore be discharged.

Rule discharged.

Attorneys—Phelps & Sidgwick, agents for Sale, Shipman & Co., Manchester, for plaintiff; T. W. Hilbery, for defendants.

1874. June 4, 5. { THE LAUNCESTON ELECTION PETITION. DRINKWATER, *petitioner*, *v.* DEAKIN, *respondent*.

Parliament — Election — Bribery — Disqualification of Candidate—Votes thrown away after Notice of Disqualification — Seating Opposing Candidate — Notice of Disqualification—31 & 32 *Vict. c.* 125.

Bribery by a candidate at a Parliamentary election, though rendering his election void, and by 31 & 32 *Vict. c.* 125, *making him incapable of being elected during seven years, does not so affect his capacity to be a candidate at that election at which he bribed as to make all the votes given for him by voters, with knowledge of such bribery, the same as if they had not been given at all, and thus to seat an opposing candidate.*

Quære, *whether a notice of a candidate's disqualification is sufficient which informs the voter of the existence of the fact which has rendered the candidate disqualified, without informing the voter of the consequences of his voting for such disqualified candidate.*

The following CASE was stated for the opinion of the Court under 31 & 32 Vict. c. 125.

James Henry Deakin and Herbert Charles Drinkwater were duly nominated as candidates for the borough of Launceston on the 30th day of January, 1874. The polling took place on the 2nd day of February, 1874. The returning officer declared the result of the poll to be: for Deakin, 457, and for Drinkwater, 216.

A petition against the return of Deakin was duly presented by Drinkwater who claimed the seat, and the petition was heard before Mellor, J.

Upon the evidence at the trial the Judge came to the conclusion that the respondent Deakin had by himself been guilty of a corrupt practice within 17 & 18 Vict. c. 102. s. 2, because he had at a meeting of the electors, on the day of nomination, and on the day after the nomination, consisting of tenants of the respondent and other electors, for the purpose of influencing voters and inducing voters to vote at the election, given to certain voters in the borough at the said election, being tenants of the respondent, a right to trap and shoot rabbits, and appropriate them to their own use, being the corrupt practice alleged in the petition, and the Judge found that the respondent was not duly elected and returned. It was proved before the Judge that, subsequent to the commission of the offence above referred to, viz., on the day of the poll, a printed notice was issued in the following words:—

"To the electors of the borough of

Launceston: Colonel Deakin having, for the purpose of influencing voters at this election, given to all his tenants on the Warrington estate and voters in this borough, a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice; and as agent of Herbert Charles Drinkwater, Esq., a candidate at this election, I hereby give you and each of you notice that under these circumstances the said Colonel Deakin is disqualified from being a candidate, and that all votes given for him will be thrown away.

"I am, yours obediently,
"John Gurney."

The Judge found as a fact that such notice was issued on the morning of the polling day before the opening of the poll, and was brought to the notice of the voters of the borough before they voted.

It was contended on behalf of the petitioner that the *status* of the respondent as a qualified candidate being destroyed by the corrupt practice so found to have been committed as aforesaid, and the voters having such notice, the petitioner was the only candidate before the constituency eligible to receive their votes and to be declared elected, and the Judge was asked to declare him so elected, in accordance with the prayer of the petition.

It was contended on behalf of the respondent that under the circumstances above stated the petitioner was not entitled to the seat, because the votes given by the voters for the respondent were not given for a candidate whom they then knew, or were bound to know, was disqualified, and that no disqualification attached to the respondent at the time of the nomination or poll, nor until he should have been found by an election Judge guilty of a corrupt practice, also that the notice was invalid, as it contained no positive statement of a disqualification, and even if valid that it was given too late. The Judge referred to the Court the following questions:—

First. Was the notice a valid notice?

Second. Were the votes of the voters who received the said notice on the day of the poll before voting and who voted for the respondent, thrown away as votes given for a candidate they were bound to know was disqualified?

Third. Was the petitioner, there being no disqualification on his part, entitled to be declared elected for the said borough?

Manisty (*Leresche* and *Batten* with him), for the petitioner.—The petitioner claims to be entitled to be seated on the ground that all votes given for the respondent, after notice of his disqualification, were thrown away. The questions which arise are as to the sufficiency of the notice itself, and next, whether, after such notice has been brought to the voter's attention, the vote given for the disqualified candidate is not thrown away, and the other candidate elected. In the first place, then, the notice which was given by the petitioner's agent was sufficient. It is unnecessary to do more than give the voter notice of the fact which constitutes the disqualification of the candidate — *The Belfast case* (1); *Rogers on Elections* (7th ed.), p. xiii. of Appendix; *The King* v. *Blissel* (19 Geo. 3, cited in *Heywood on County Elections*, p. 537). The cases shew that where the electors have had notice of the disqualification, and yet vote for the person who is disqualified, their votes are thrown away, and it is the same as if they had not voted at all, and the minority candidate becomes elected—*Taylor* v. *The Corporation of Bath* (2); *The Fife Election case* (3); *The Kircudbrightshire case* (4); *The Wakefield case* (5); *The Tavistock case* (6). It is true that in *The Cheltenham case* (7) the committee, though they declared the election void, did not seat the minority candidate who claimed the seat, but no reason was given by the committee, and it may have been that they considered the notice of bribery not sufficient, as it did not specify what were the acts constituting such bribery; but in *The Horsham case* (8), which occurred afterwards, the committee resolved that the

(1) Falc. & F. Elec. Cas. 595.
(2) 3 Luder, 324.
(3) 1 Luder, 455.
(4) 1 Luder, 72.
(5) Barr. & Aust. 306.
(6) 2 Pow. Rod. & D. 5.
(7) 1 Pow. Rod. & D. 234.
(8) 1 Pow. Rod. & D. 248.

sitting member was guilty of treating at a former election, and was disqualified from being elected; and that votes given for him were thrown away, and the committee seated the petitioner. *The Clitheroe case* (9) will be relied on by the other side, as there the committee declined to consider a vote given for a disqualified person as thrown away, and they seem to have thought that the vote must be wilfully thrown away, or there must be a previous adjudication of bribery against the candidate, in order to seat the other candidate. There are cases at common law which establish that where a candidate is disqualified at the time of the election, all votes given for him with knowledge of such disqualification are thrown away. These are *The King* v. *Hawkins* (10); *The King* v. *Parry* (11); *Claridge* v. *Evelyn* (12); *The Queen* v. *The Mayor, &c., of Tewkesbury* (13); *The Queen* v. *Cooks* (14). The late *Galway case—Trench* v. *Nolan* (15) is expressly in point, and entirely supports all that is now contended for on behalf of the petitioner.

Sir J. Karslake (*Parry, Serjt.*, and *Edwards*, with him), for the respondent.—It may be that where there is existing what is known to incapacitate the candidate from standing, and the voter, knowing and believing in such incapacity, chooses notwithstanding to throw his vote away, that the vote is so thrown away as to seat the minority candidate. Yet in the late *Cambridge case* (16) the committee refused to seat the candidate who had the minority of votes because they considered that, although the voters had notice of the existence of the fact which constituted Mr. Forsyth's incapacity, yet it was not a matter which was clearly known to produce such incapacity. The notice here was not sufficient, for the petitioner's agent does not state the fact of disqualification, but only his belief that what Colonel Deakin had done would disqualify him. To make the votes given thrown away the voter must have knowledge of the actual disqualification of the candidate, so that if, notwithstanding he votes for such candidate, he does so wilfully and against actual knowledge, as is pointed out by Lord Campbell in *The Queen* v. *Cooks* (14), by Alderson, B., in *Gosling* v. *Veley* (17), and by Blackburn, J., in *The Queen* v. *The Mayor, &c., of Tewkesbury* (13). The only case which is opposed to that of the present respondent is *The Galway case* (15), but Lawson J., there, in the course of his judgment, misapprehended a statement of Martin, B., in *The Norwich case* (18) as to bribery affecting the *status* of the candidate. Bribery of the candidate will prevent his being elected, and in that sense votes given for him will be thrown away; but to affect his *status*, so as to incapacitate him from being a candidate, he must have been previously adjudicated guilty of such bribery. By 17 & 18 Vict. c. 102. s. 36, the incapacity of the candidate is after he has been declared guilty of the corrupt practices by an election committee. Then sections 45 and 46 of 31 & 32 Vict. c. 125, shew that the report of the election Judge is substituted for the declaration of an election committee. The report of the Judge that bribery has been committed is not conclusive. The finding may be reversed on shewing perjury on the part of the witnesses, and it only proves the fact for the purposes of the petition.

Manisty replied.

Cur. adv. vult.

The following judgments were delivered on June 5.

LORD COLERIDGE, C.J.—This is a case arising out of the Launceston Election Petition, tried before my brother Mellor, at Launceston, and referred to us by him.

Colonel Deakin, the respondent, was returned as member for the borough at the last general election, and Mr. Drink-

(9) 2 Pow. Rod. & D. 276.
(10) 10 East 211, and in the House of Lords, 2 Dow. App. Cas. 124.
(11) 14 East, 549.
(12) 5 B. & Ald. 81.
(13) 37 Law J. Rep. (N.S.) Q.B. 288; s. c. Law Rep. 3 Q.B. 629.
(14) 3 E. & B. 249; s. c. 23 Law J. Rep. (N.S.) Q.B. 133.
(15) Irish Law Rep. 6 Com. Law, 464.
(16) Not reported.
(17) 12 Q.B. Rep. 328; s. c. 19 Law J. Rep. (N.S.) Q.B. 111.
(18) 19 Law Times, N.S. 619.

on notice of the disqualification, reat majority of the electors voted , his election would be void, with ther consequence as regards the that they would be held to have nally and deliberately abstained oting and to have acquiesced in ice by the other electors of the ndidate, because they would not do one could prevent such choice, viz., mselves for a candidate duly quali- be one. It is in this latter sense must hold Colonel Deakin to be ified before we can decide that inkwater is, as the result of this , entitled to be returned to the f Commons as member for Laun-

acts are simple. Colonel Deakin l by the Judge to have been guilty ry before the polling day. And ntended that, from the time of the sion of the act afterwards found Judge to be bribery, he was *ipso* nd *eo instante* disqualified, in the f the two senses I have explained word. There is indeed no doubt ere are certain disqualifications f they had existed in the case of Deakin would, upon notice of ave had the effect contended for. y cases in the Courts at West- and in several in the election tees the decisions have, undoubt- ne this length. *The King* v. *Haw-*)) was such a case, where votes r a man incapable of being elected orporate office under the provisions ar. 2. c. 12, by reason of his not taken the sacrament, were held to r notice of such incapacity, as if en; and Lord Ellenborough as- to the general proposition that given for a candidate after notice eing ineligible are to be considered e as if the person had not voted But this was upon the ground estate of a candidate was taken y the operation of the statute of 2; for in the later case of *The Parry* (11), Lord Ellenborough e other Judges held a man to elected who had been at the time lection disqualified for exactly the ason as in the former case, because before his election could be questioned he had become qualified, which he was not when elected, and his subsequent qualification, by retrospectively restoring his *status*, called into existence the votes which would otherwise have been treated as not given. These and other like cases were decided upon the Test Act, where a condition made by law a condition precedent to candidature had not been fulfilled, and where notice of its non-fulfilment was notice that the man who had not fulfilled it was not, and could not be, a candidate.

Under the same principle may be classed cases where the disqualification was infancy, such as was *Claridge* v. *Evelyn* (12), a want of estate as in the *Belfast case* (1), the *Tavistock case* (6), and some others. The case of a woman, of an alien under the old law, of a convicted felon, stand upon the same footing. In all these cases something is wanted in the candidate himself which cannot be supplied, the existence or non-existence of which is not dependant on argument or decision, but which the law insists shall exist in every one who puts himself forward as a candidate.

Bribery, however, is altogether a different matter, and is subject to considerations altogether different. No doubt, as Lord Mansfield says in *The King* v. *Pitt* (19), it was always a crime at common law, punishable by indictment or information. That, however, would not by itself prevent a person who had bribed from being a candidate at an election; and there is no case in which any such consequence has been held to flow from the commission of the offence, except under circumstances which, when rightly considered and properly understood, establish, and do not vary or qualify the rule. The offence of bribery has, however, been dealt with in various statutes, and the argument to be drawn from their language appears to me, I own, to be conclusive the other way.

The 17 & 18 Vict. c. 102, consolidated and amended the laws relating to bribery, treating and undue influence at elections of members of Parliament. It begins by repealing in whole or in part many of the

(19) 3 Burr. 1, 335.

disqualification, is bribery committed by the candidate at the election which was avoided; and it has been held, no doubt, that such bribery is a disqualification for a candidate at the election rendered necessary by such avoidance. It could not be held otherwise; for the second election under these circumstances is but a continuation of the first, the exigency of the writ not being satisfied till there is a good return; and by supposition the return of the candidate found guilty of bribery is not a good return, and there must therefore be a return of some one else. The cases in which a man guilty of bribery in fact at an election declared void had been held disqualified in a second election, though his bribery had not been enquired into on the first petition, fall under the same principle. On this point the decisions have been uniform, though as both consequences to the votes of such disqualification the decisions seem to be conflicting.

The principle of all the earlier cases will be found very well discussed in a note in 1 *Luders*, 69; and there is nothing in the later cases at all to qualify the law as there laid down.

There remains, however, one decision to be considered, to which these remarks do not apply, which I admit to be in point, but which I am unable to follow. It is the decision of the majority of the Court of Common Pleas in Ireland in the Galway case, in 1872 (*French* v. *Nolan* (15)), which I take from the report ordered by the House of Commons to be printed in July of that year. The case was peculiar. Captain Nolan, the candidate whose election was questioned, was found guilty by Mr. Justice Keogh of undue influence by himself and his agents, the undue influence having been practised as the result of arrangements made by the candidate and his agents previous to the election. The learned Judge held that by this, "the *status* of Captain Nolan as a candidate qualified to be elected was destroyed, and that he was disqualified to be elected for the county by such acts committed by him and his agents, and that such disqualification existed previous to the day of nomination for such election. On a case reserved for the Court of Common Pleas in Dublin the majority of the Court upheld this decision; and Mr. Justice Lawson, who delivered the opinion of the majority, uses the following language upon this part of the case—"If," says he, "the earlier sections of 17 & 18 Vict. c. 102. ss. 2, 4 and 5, defining the offences of bribery, treating and undue influence, and making them misdemeanour, do not disqualify the candidate who is guilty of them from being elected, and do not destroy his *status*, upon what ground is a Judge to unseat him? He cannot unseat a man because he has committed a misdemeanour; and it would seem therefore to follow in strictness from this argument that the Judge could not unseat him, unless he had already been found guilty." This might be so, no doubt, if avoiding the election of a candidate and destroying the *status* of a man to be a candidate, were the same thing. But I have already pointed out that they are very different things, that the Common Law of Parliament and the language of statutes have always treated them as very different; and being, which they are, very different it is only by treating them as being, which they are not, the same, that any such consequence follows as Mr. Justice Lawson supposes. He proceeds to say—"This is, however, an absurd consequence; and I think that the true construction of the statute is that the commission of any of these offences *ipso facto* disqualifies the candidate from being elected, or, to use the language of Baron Martin in the *Norwich Case* (18), annihilates his *status* as a candidate." I have already expressed the sense in which I conceive the statute is to be construed; and I am very glad to find that I do not conflict with any view of Baron Martin. It is probable that Mr. Justice Lawson was quoting from some unauthentic and imperfect report of Baron Martin's words; for in the full report of his Norwich judgment, printed by order of the House of Commons, he is careful to disavow in express and accurate language the sense which Mr. Justice Lawson has affixed to his words. He explains that he uses them only in a sense in which I entirely agree with them, and gladly adopt them as my own. His words are these—"But

by the 46th section, coupled with the 36th section of another Act of Parliament (the 17 & 18 Vict. c. 102), another offence is created. These two sections enact that, in the event of a candidate by an agent committing bribery, he becomes incapable of being elected, and where a candidate, by an agent for whom he is responsible, commits an act of bribery, by that act the capacity of the candidate to be elected ceases; his *status* is destroyed, and no vote given to him will be of any avail. Some misapprehension occurred with regard to what I stated the other day in reference to the matter. It is not that the vote is thrown away in the sense in which my brother Ballantine seems to have supposed. I did not mean it in that sense; I meant that the moment an act of bribery is done by the agent for whom the candidate is responsible, from that moment the man is incapable of being elected. The law puts its hand upon him, and says it cares not if nine-tenths of the electors voted for him. The act of bribery incapacitates him from sitting in Parliament, and the real question which is to be decided in the case, is whether or not the admitted bribery by Hardiment (the agent) about two or three o'clock in the afternoon is an act for which Sir Henry Stracey is responsible according to the law of England, or the election law, if you think fit to call it so." I adopt these words entirely in the sense in which Baron Martin is careful to explain that he used them. I reject them in the sense in which Baron Martin himself expressly rejected them. If this be, as I think it is not, a refined distinction, it is one not of my inventing. It is to be found in every case, whether decided in the Courts or in Parliament, with the exceptions only of the *Horsham* (8) and *Galway Cases* (15). It was recognised and acted upon by Baron Martin in the *Norwich Case* (18); for although he unseated Sir Henry Stracey, he expressly declined to seat the candidate of the minority, or to hold that the votes of the majority were as if they had not been given. I need hardly say that the Judge who thus decided has as much broad sense and was as little given to hair-splitting as any Judge of our time.

I do not apprehend such consequences in fact, as it has been suggested will follow from this view of the law. But whatever be the consequences, I am clearly of opinion that, although Colonel Deakin's conduct has properly avoided his election and subjected him to the consequences enacted by the 17 & 18 Vict. c. 102 and the 31 & 32 Vict. c. 125, he was not at the time of the election disqualified from being a candidate, so that all votes given for him after notice were in law as if they had not been given.

This being my opinion, it is, I think, not necessary to consider whether, if the disqualification had been such as I have already said I think it was not, the two further propositions for which Mr. Drinkwater's counsel had to contend, can be sustained. I content myself with saying that, as at present advised, I think they cannot. The case is indeed free from the objection which for myself I should have found insuperable (though the Court of Common Pleas in Dublin did not find it so in the *Galway Case*) (15), that the notice was not served upon a sufficient number of electors to turn the scale. I feel no difficulty, moreover, as to the language of the notice, which appears to me to be sufficiently definite and specific in its terms; and I entirely agree, as indeed I am in a special manner bound to do, in the general law laid down as to the throwing away of votes in the judgment in *Gosling* v. *Veley* (17), a judgment which was written by Sir John Coleridge. But I do not think that this case falls within the general law, and I further think, as at present advised, that in a Parliamentary election, "in order to give effect to the notice, the disqualification must be found on some positive and definite fact, existing and established at the time of the polling, so as to lead the fair inference of wilful perverseness on the part of the electors voting for the disqualified person."

These are the words of the Clitheroe Committee (9). They go on to state that they believe them to be "in accordance with the sound construction of the law as well as with justice and reason."

I was of that opinion, and acted upon it, when, as a member of the House of

Commons, I served upon the Cambridge Committee, in 1866, and I retain it still.

I am therefore of opinion that the first question put by my brother Mellor should be answered in the affirmative, and the second and third in the negative.

BRETT, J.—Two questions are raised by this case. The first is, whether, assuming that the corrupt practice of which the respondent was found guilty rendered him incapable of being a candidate at the election in question, the notice given to the electors was sufficient. The second is, whether such corrupt practice did incapacitate him from being a candidate. The first question, as it seems to me, depends on the question what are the true functions of such a notice, and to answer this it is necessary to consider under what circumstances a voter throws away his vote in the sense that the result is the same as if he had not voted. Now this proposition appears to be conceded on all hands:—When there are two candidates, the one qualified to be so and the other not, and the voter has actual knowledge of the existence of certain facts, and that they by law render the latter candidate incapable of being elected, then if the voter with such knowledge chooses to vote for such candidate, he throws away his vote, and it is the same as if he had not voted. So much seems to be conceded and is shewn to be the law by the cases that have been cited. And if the voter has that knowledge he cannot prevent the legal consequence following by asserting that he did not know that the law would, under such circumstances, give the seat to the candidate that was qualified. This further proposition I also think to be correct: When there are two candidates, one qualified to be so and the other not, and such knowledge is had of existing facts or such notice of existing facts is given to the voter as would convince a person of ordinary care and intelligence that such facts existed, and they are such as, if he knew what legally constituted incapacity, would convince him as a person of ordinary intelligence that such incapacity existed, then if he votes for the incapacitated candidate he throws away his vote. Again, when such a notice is given of facts as would put a person of ordinary care and intelligence on enquiry, and if he exercised ordinary diligence and intelligence in such enquiry, it would lead him to the conclusion that the facts did exist which would in law incapacitate the candidate, and when the person to whom such notice is given is a person having a duty to perform with relation to the subject-matter, then he cannot absolve himself by asserting want of knowledge either of the facts or the law. Such notice is equivalent to knowledge. When the validity or invalidity of an act depends on a question of law, no one can make such act valid in law when it would otherwise be invalid, by saying that he did not know the law. The case of *The Queen* v. *The Mayor of Tewkesbury* (13) seems to me to be somewhat opposed to these principles, but I cannot help thinking that the decision there to some extent contravened the propositions of law that had always previously been accepted. I accept that which seems to me to have been always admitted to be the law before the case of *The Queen* v. *The Mayor of Tewkesbury* (13), viz., the proposition which I have expressed, as generally applicable to all cases where notice of the law as affecting any subject-matter is material, that is to say, where by the law, if certain facts exist incapacity exists, and where by the law, if the law were known to the elector, his vote would be thrown away if he persisted in voting for the disqualified candidate, he cannot, if the facts exist to his knowledge, or if he have notice of the facts equivalent to knowledge, which by law produce incapacity for election in the candidate, render his vote valid by asserting that he did not know that the facts by law produced such incapacity, or that his vote would be thrown away if he voted for such candidate. Applying those principles to the present notice, if it were the law that personal bribery rendered the person guilty of it incapable of being a candidate I should have thought that the notice was sufficient.

But that raises the question whether such bribery as was here proved does render the person guilty of it incapable of being a candidate. I agree that there is nothing in the Acts concerning corrupt

practices which creates such an incapacity, and that we are thrown back upon the previous law of Parliament for a solution of the question. The first thing that strikes me is, that if the petitioner's proposition is law, the point must have arisen at almost every general election in modern times. I do not mean to say that at every election there must have been bribery, but at every election some candidate must have been ready to allege bribery against his rival, and to give notice of it to the electors, and yet no case can be produced in which this course has been pursued. One case was cited from the Parliamentary reports where the committee challenged the counsel engaged to produce any case in which bribery at the election in question had been held to produce an incapacity for being a candidate, and the counsel could not. Therefore, unless the *Horsham Case* (8) must be considered as a governing authority to the contrary, we are bound, as it seems to me, by the usage of Parliament, to hold that there was no incapacity in the present case.

The *Horsham Case* (8) was a very peculiar one. There being a petition, the petitioner and candidate, Mr. Fitzgerald, did not claim the seat. If he had claimed it, there would have been on that petition a counter case; but as he did not, it was not necessary. The member was unseated, and Mr. Fitzgerald stood again. The second election in many senses must be considered the same as the first; Mr. Fitzgerald was elected, but at the election a charge was then made against him of corrupt practices on the former occasion, and notice was given to the electors of it. There was then a petition against Mr. Fitzgerald. If, in such a case, a Parliamentary Committee were entitled to act on what they might consider an equitable view of the case, they might well think it unfair that, from the simple fact of his not having claimed the seat on the first occasion, he should get the advantage of there being no finding of the former committee of corrupt practices against him, assuming that he was guilty of them. It might strike a committee of gentlemen of honour that this was an equitable view of the matter, but if that was the view which they acted upon, it : to me erroneous in point of law. decision never appears to have b cepted as correct by any of the authorities in parliamentary law, case seems to have been always co as exceptional. I do not, therefor it is binding on us as an expositio law of Parliament. It seems to trary to the *Cheltenham Case* (7) : *Clitheroe Case* (9). I am, there opinion that if we are to determ question on the authority of the d of the committees as to parlia usage, there is authority for holdi bribery by a candidate, even if p at an election, though an offenc renders that election void, does no him incapable of being a candidat election. There is a manifest dis between an offence avoiding an and an incapacity. If a man is i tated, though at the election in c neither he nor any elector is gui fault, the election is void. Whe is bribery, that is an offence agai law, and the election will be v that result cannot be arrived at u or his agent have been guilty of Besides the decision of the parlia committees, we may look at other rities, such as works of acknowled thority on the subject. It will b that they set out long lists of fact will produce incapacity to be a ca but bribery at the existing election inserted in such lists. It is always as an offence which will avoid the e but never as an incapacity. With to the statutes on the subject, it : to me that the later statutes w tended to increase the severity law, but they shew that befor passing there was no such incap that suggested. In 1854 the 17 & 1 c. 102, was passed. There we find 1st section, enumerated what shall to bribery, and what the conseque it shall be; viz., that it shall amo midemeanour, and be the subject o but it does not go on to say a about incapacity for election. T section gives the definition of t and the result of that is to be t election shall be void; and so

section provides with regard to undue influence; but they neither of them expressly say anything about incapacity, whereas the 36th section shews that in this statute, when the Legislature intended to deal with incapacity for election, they used appropriate terms. [The learned Judge here read the section.] So it seems to me that the Act is an authority for the view we now take. It is right to notice the fact that this Act was settled by a committee that comprised amongst its members the highest authorities in parliament on parliamentary usage. If they had thought that bribery had the effect alleged, they would certainly have so expressed it in the Act, whereas we find that in an Act which was most carefully considered it is expressly stated that incapacity shall rest on the being found guilty of bribery by a parliamentary committee or a jury. Such finding is made to form a necessary element to produce incapacity, and as such element cannot exist till after the election, it follows that there can be no incapacity by reason of bribery at the election at which it took place. Therefore, on the authority of the decision of the committees, of the recognised works of authority, and the later statutes, I come to the conclusion that bribery, although it amounts to an offence, and avoids the election, does not render a person incapable of being a candidate.

We were pressed naturally by the decision of the Irish Judges in the *Galway Case* (15). With regard to that case, I was most anxious to defer to their decision, but after considerable hesitation I have come to the conclusion that if we are really convinced that it cannot be supported in point of law, however unwilling we may be to differ from it, we are bound to say so. It is worthy of observation that the point now in question was not reserved in the *Galway Case* (15) by the learned Judge who tried the case, and it seems to have been assumed that the point was so clear as not to require to be reserved. In one sense, therefore, the Court was not entitled to enter upon it; the respondent was found by the case to be incapacitated. Nevertheless it is true that observations were made concerning incapacity in the course of the most carefully written and elaborate judgment of Lawson, J., and in portions of that judgment he seems to have considered that question as still open; but whether it be from the fact that the point was not in fact reserved, or that it was assumed by the Judges that the point was clear without very much enquiry, it does not seem to me that the judgment is so elaborate or so clearly reasoned with respect to that point as to the rest of the case. Almost the whole contest seems to have been on the question of notice. However this may be, however reluctant I may be to differ from the decision of the Irish Judges, and however much doubt it may have caused me in arriving at my present view, if that decision is to be taken to be that corrupt practices at an election render a candidate incapacitated for that election, having given the case the best consideration that I can, I have come to the conclusion that it was incorrect, and I cannot follow it. My view, therefore, is that, though the notice would have been sufficient if an incapacity had existed, there was no incapacity, and consequently the notice was of no avail.

I am authorised by my brother Denman to say that he concurs with my judgment on both points.

Judgment accordingly.

Attorneys—John Gurney, for petitioner; Peacock & Goddard, agents for Higson & Son, Manchester, for respondent.

1874. May 22. } APPLEBEE *v.* PERCY.

Mischievous Animal — Scienter — Complaint to Servant—Knowledge of Servant the Knowledge of Master.

In an action against a publican for knowingly keeping a ferocious dog, a witness deposed that, having been attacked by the dog at a previous time, he complained to the barmen, who were serving the defendant's customers. Another witness also proved

that, having been attacked on a different occasion by the dog, he likewise complained to the barmen. At the trial the plaintiff was nonsuited, on the ground that the foregoing circumstances did not amount to knowledge in the defendant of the dog's ferocity:—Held (*per* LORD COLERIDGE, C.J., *and* KEATING, J., *dissentiente* BRETT, J.), *that, as the complaints had been made to persons who, in the defendant's absence, were managing his business, there was prima facie evidence of knowledge in the defendant of the dog's ferocity, and that the nonsuit must be set aside.*

The declaration alleged that the defendant wrongfully kept a dog of a fierce and mischievous nature, accustomed to bite mankind, well knowing the said dog was of such fierce and mischievous nature and so accustomed as aforesaid; and the said dog, whilst the defendant kept the same, attacked the plaintiff, whereby he suffered damage.

To this declaration the defendant pleaded not guilty, upon which issue was joined.

The cause came on for trial before Honyman, J., at the sittings in London after Trinity Term, 1873, when the following evidence was given on the part of the plaintiff in support of his case.

Samuel Applebee.—"I am the plaintiff, and a turner, and live at 27, New Inn Yard. I was in the counting-house of Smithers, 97, Curtain Road, on the 12th of April, 1873, at 6.30 p.m. Dring and Smithers were with me. Whilst we were talking, a dog, a large black and white Newfoundland dog, came in. A lad was at the door. The dog deliberately flew amongst the whole of us; he laid hold of me by the arm; he tried to get at my throat; he bit me on the arm. I punched him off; I beat him off, and he ran away. Arm bitten in three places. I called the lad to take the dog. Dog ran into the road." [It was admitted on the part of the defendant that the dog belonged to him.] "The defendant is a publican, 43, Paul Street. I had my arm cauterised. I saw defendant after that; he said he was very sorry; that the lad had not made any complaint of the dog having bitten me."

Cross-examined.—"There was another dog outside, an Italian greyhound. I cannot swear whether they had not been fighting; they were not fighting in the shop. I did not go to separate them."

Smithers and Dring gave confirmatory evidence as to what happened on the 12th of April.

Hunter.—"I am a furniture dealer in Curtain Road. I remember Good Friday, the 11th of April. I was taking furniture to a house four doors from defendant's. As I was passing defendant's, a large dog flew out, and seized me by the seat of the trousers. I had not given any provocation. On the following morning, Saturday, I called at the defendant's for a little refreshment. Whilst I was there, the same dog came into the bar, and he made a run at me again. I cocked my leg up and stopped him. My leg is a leather leg. There were two men serving behind the bar."

Q. "Did you make any complaint to them?"

It was objected on behalf of the defendant that statements made to or by these men were not evidence against the defendant. The Judge received the evidence, subject to the objection.

A. "I said, 'I wonder you allow such a ferocious animal to run about. Yesterday he attempted to bite me, as I was going by.' The barmen did nothing, and the dog went into the yard."

Cross-examined.—"That man" (pointing to a person in Court) "is one of the barmen."

King.—"I am a piano-forte cutter. Three weeks before last Easter I was passing along Paul Street, past the "Crown and Anchor." A very large dog flew at me; it caught me in the coat; nothing to speak of. I halloaed, and the dog ran away. I did not go into defendant's house. I reached my head in. I saw men in shirt-sleeves in the bar."

Q. "What did you say to them?"

(Question objected to on behalf of defendant, and received subject to the objection.)

A. "I said, 'Is this your dog?' He said, 'Why?' I said, 'He flew at me.' He went to the middle door in the bar, and a female came out."

Q. "What did she say?"

therefore, evidence that before the plaintiff was bitten, the defendant himself knew the dog to be savage. *Gladman* v. *Johnson* (2) supports this contention.

BRETT, J.—In my opinion this rule ought to be discharged. The question before us is whether any evidence was adduced at the trial of the defendant's liability. The cause of action relied upon was, that the defendant knowingly kept a ferocious dog, which injured the plaintiff. It is not necessary to prove knowledge in the defendant of the animal's vicious temper, if it can be shewn that the person having the care and control of the defendant's dog was aware of its mischievous disposition. A distinction has always been drawn between the liability of persons keeping ferocious animals by nature, as lions and tigers, and the liability of those keeping animals not naturally ferocious. If a lion does mischief, the owner is bound to compensate the person injured without formal proof that the owner was aware of its dangerous nature, for he is taken to be cognizant of its disposition; but a different rule prevails with respect to domestic animals, and the owner of a dog is liable only if he knows that the animal is accustomed to do mischief. In the present case evidence was given to shew that the defendant's dog was habitually ferocious: on two former occasions it had attacked persons, and complaint had been made to attendants serving at the bar of the defendant's alehouse. The business of a licensed victualler consists in buying and selling by retail beer and spirituous liquors; and the duty of a barman is to draw beer and liquors for customers and to receive the price fixed by his master; but the fulfilment of these duties does not constitute him the manager of his master's business, any more than the duties of a linendraper's shopman make him his employer's representative in the conduct of the business. The kind of servant whose knowledge will render his master liable is indicated in the judgment of Crompton, J., in *Stiles* v. *The Cardiff Steam Navigation Company* (1). In that case there was a manager, who could have determined whether the dog should be kept; but as there was not evi that he knew the dog to be sava action would not lie. The decis *Baldwin* v. *Casella* (5) carried the step further; but there the dog wa in a mews under the care of the coac who was put into the place of h ployer and had the control of the ar the coachman knew the dog to b chievous, and his knowledge was t his master. In this case the plaintif no evidence that the barmen had c of either the defendant's business dog. Then it was argued that the evidence shewing that the defenda been informed by the barmen of the having bitten other persons; for i contended that the barmen had a d inform their master of the complaint to them, and that they were to sumed to have fulfilled that duty. not think that any duty was in upon them to tell the defendant complaint; persons wishing to com cate with him ought not to have lef sages with his servants. It has bee tended that *Gladman* v. *Johnson* (2) that if a servant has a duty to info employer of a communication ma him, he is to be assumed to have fu that duty. If that were the decis *Gladman* v. *Johnson* (2), we sho bound by it; but are we to assum every servant will deliver a messa trusted to him, although it does n late to the duty discharged by h do not think that *Gladman* v. *Johns* warrants the construction whic plaintiff's counsel have attempted upon it. It appears to have been mined upon the ground that the d ant's wife was manager of his bus if she had been in the position of a servant, the Court would by a decis favour of the plaintiff have ove former authorities. To give jud for the present plaintiff seems to render it unnecessary to prove know in the owner of the dog's savage di tion. In my opinion my brother man was right, and this rule ought discharged.

KEATING, J.—I think that thi ought to be made absolute. The fe of the dog seems to have been c

proved, and it was further established that the animal had flown at other persons, namely the witnesses Hunter and King, who complained to the defendant's servants. King had been attacked some time previously in the street, and he then remonstrated with the barmen of the defendant, who appeared to be managing his business. If the rule of law required that notice should be given to the owner himself or to some person managing every department of his business, the complaints made by Hunter and King would not constitute sufficient notice to the defendant. But the barmen were acting as managers in retailing beer and spirituous liquors, and represented their employer in this portion of his business. The attack upon Hunter was a second attack, and in my opinion the plaintiff gave evidence which ought to have been laid before the jury. The facts here seem to me stronger than those in *Gladman* v. *Johnson* (2). The wife of the defendant in that case was not a manager of his business as a milkman in the extended sense of the expression; she could not have bought or sold cows for him; a dealing with her as to a matter of that kind would have been unlawful; she was no more general manager of her husband's business than the barmen were the general managers of the present defendant's business. I rely upon and adopt the language and the reasoning of my late brother Willes in *Gladman* v. *Johnson* (2). The wife had authority to receive the complaint, because she was left to conduct the business in her husband's absence. I think that the judgment of the late Lord Chief Justice Bovill supports my view, and that we cannot discharge this rule without overruling that decision. With all respect to my brother Brett I venture to differ from him, and in my opinion a new trial must be had between the parties.

LORD COLERIDGE, C.J.—The question argued before us has not related to the weight of evidence as to the *scienter*. It has not been disputed that the animal was of a ferocious temper; that was established by the evidence as to the attacks upon the witnesses. The question discussed was whether the complaints can be deemed in law to have been made to the defendant, and the plaintiff sought to fix him with liability by the notice given to the persons in his employment. It has been strongly urged by my brother Brett, and it is not denied either by my brother Keating or by myself, that before determining whether a master can be made answerable for the knowledge of his servant, we must consider what the position of the latter is in the service of his employer. In passing I wish to remark that, according to the evidence, ample notice was given of the dog's dangerous propensity. [His Lordship read the evidence as to the statements made to the barmen by the witnesses, Hunter and King.] The communications to the defendant's servants being such as I have read, are they not sufficient to fix the defendant with liability, are they not evidence to be laid before the jury? With the greatest respect for the opinion of my brother Brett, I think that the nonsuit must be set aside. The barmen, when the complaints were made, were conducting the business carried on across the counter; they alone then represented the defendant; they alone appeared to be connected with the dog. They may be considered as managers of part of the defendant's business; they were intrusted with the administration of a portion of it, and notice of the dog's vicious habits was given to them upon the defendant's premises where the animal was kept, whilst they were acting as managers. I think that these circumstances establish *prima facie* knowledge in the defendant. In *Stiles* v. *The Cardiff Steam Navigation Company* (1) Mr. Justice Crompton and Mr. Justice Blackburn appear to have been of opinion, that where the management of a business is deputed to an agent notice to that agent is notice to his employer; and it was upon a somewhat similar principle that *Baldwin* v. *Casella* (5) was decided; there the master was held responsible because he had deputed his coachman to act for him in the case of the dog, and the coachman knew the dog to be savage. The ground of decision in *Gladman* v. *Johnson* (2) is not identical with that in *Baldwin* v. *Casella* (5); but if *Gladman* v. *Johnson* (2) be sound law, it seems to me impossible to decide in favour of the de-

fendant, for we cannot discharge this rule without overruling that case. A mere complaint to a servant of the owner may be insufficient; but the notice will be sufficient if it be given to a person conducting the owner's business, in the form of a message to be delivered to him. I think that in the absence of evidence to the contrary we should be warranted in assuming that the message was duly communicated to the employer. This appears to have been the opinion of Mr. Justice Montague Smith in *Gladman* v. *Johnson* (2). The evidence adduced by the present plaintiff ought to have been laid before the jury: all the elements upon which the decision in that case was founded exist in this. The barmen were in a position to receive information as to the behaviour of the dog, and had a duty to communicate such information to their master. For the foregoing reasons I am of opinion that this rule ought to be made absolute to set aside the nonsuit, and that a new trial ought to be had between the parties.

Rule absolute.

Attorneys—John Long, for plaintiff; Fitch & Fitch, for defendant.

1874. June 2. { HAVERFORDWEST ELECTION PETITION. DAVIS, PETITIONER; LORD KENSINGTON AND ANOTHER, RESPONDENTS.

Parliament—Election—Payment to Returning Officer of Election Expenses—Validity of Election—Ballot Act, 1872.

A returning officer at a Parliamentary election has no right to insist, as a condition to taking the poll, on a candidate paying, or giving security for paying, his proportion of the money required to meet the election expenses.

Where, therefore, at an election for a borough returning only one member to Parliament two candidates were duly nominated as required by the Ballot Act, 1872, *but, because one of them would not deposit or give security for the sum required* (*meet his proportion of the election* (*the returning officer refused to n nomination, and without taking a turned the name of the other can duly elected, it was held that such was void.*

By the direction of the Court raised by the petitioner was ste Special Case, containing the f facts.

1. At the general election in 1874, the respondent William Harding was the returning of the borough of the town and of Haverfordwest.

2. The said borough is entitle turn one member to Parliament.

3. The election for the said was duly appointed by the said re officer to be holden on the 2nd of F 1874, in the grand jury room of t Hall at Haverfordwest aforesaid, the hours of 11 a.m. and 1 p.m.

4. Within the two hours appoi the election the respondent Will wards, Baron Kensington, appe the grand jury room as a candida two registered electors as his p and seconder, and accompanied agent; and handed in his nor paper signed by such proposer conder and purporting also to b by eight other registered electors the same time deposited with the turning officer 60*l.* as a deposit moiety of the returning officer's e in carrying into effect the provi the Ballot Act, 1872.

5. During the two hours afore petitioner also appeared in the sai jury room, unaccompanied by a poser or seconder or other pers handed in a nomination paper sig two registered electors as his prop seconder, and by eight other re electors.

6. The petitioner's address to t tors of the said borough was p the public places of Haverfordwes days previous to the day of elect immediately on its appearance t returning officer wrote and sent petitioner a letter in the following

joint expense of the several candidates, but that would not entitle the returning officer to demand a deposit or security for the amount. In *Morris* v. *Burdett* (2) Lord Ellenborough ruled that a candidate was only liable for such expenses as are imposed by statute, or by his own consent, express or implied. Clearly the returning officer was wrong in refusing to take the poll, and the election of Lord Kensington under these circumstances was void.

C. Bowen, for the respondent Lord Kensington.—The returning officer was right in insisting on the payment of his expenses, and in considering, therefore, that there had been no valid nomination; and next if he was not right in this, the election, nevertheless, was not void. The 8th section of the Ballot Act, 1872, leaves the law as regards the election expenses the same as it was before that Act. This brings one back to 2 Will. 4. c. 45. sec. 71, which declares that the expense of erecting the booths is to be borne by the candidates. At common law the sheriff was not bound to provide booths for borough elections, and the 18 Geo. 2. c. 18 dealt only with county elections. The 34 Geo. 3. c. 73. sec. 6 says, but the expenses are to be borne by the candidates. In the second case of *Morris* v. *Burdett* (3) the defendant was held not liable for the expenses, because he had been nominated and elected without his consent, so that in fact he had never been a candi-

to make such contract; or if they shall not make such contract, then the same shall be erected by the sheriff or other returning officer at the expense of the several candidates as aforesaid, subject to such limitation as hereinafter next mentioned (that is to say) that the expense to be incurred for the booth or booths to be erected at the principal place of election for any county, riding, parts or divisions of a county, or at any of the polling places so to be appointed as aforesaid, shall not exceed the sum of 40*l*., in respect of any one such principal place; and the expense to be incurred for any booth or booths to be erected for any parish, district, or part of any city or borough, shall not exceed the sum of 25*l*. in respect of any one such parish, district or part; provided always, that if any person shall be proposed without his consent, then the person so proposing him shall be liable to defray his share of the said expenses in like manner as if he had been a candidate."

(2) 1 Camph. 218.
(3) 2 M. & S. 212.

date; but the Court did not det that the sheriff was bound to go expense of putting up booths. T cision in *Muntz* v. *Sturge* (4) is no factory; for the returning officer is re to prepare books for taking the pol days beforehand, and yet, accord that decision, unless the candidat to the poll he would not be a can though he had been nominatec therefore he would not be liable a for any part of the expenses election.

Then as to the second point.

[Brett, J.—If the returning erroneously refuses to take the n tion of one of two candidates an that the other only is elected, ca possibly be said to be a good elect

It must then resolve itself in question as to whether the return ficer was right in acting as he did.

Le Marchant, for the returning contended that he ought not to b liable to the costs of this applicat he had acted in a *bona fide* mann according to usage.

Lord Coleridge, C.J.—In this c are asked to determine whethe Kensington was duly elected or the borough of Haverfordwest. borough is only entitled to retu member to Parliament, and on the occasion, all the preliminaries havi gone through, Lord Kensington w posed and nominated as one of the dates, and the petitioner, Mr. Dav proposed and nominated as anoth didate, and within the terms of graphs 1 and 2 of section 1 of the Act, 1872, the nomination papers c two candidates were duly delive the sheriff, who acted as the ret officer for the borough, and afte had been so delivered to him the declared Lord Kensington to be and we are to enquire whether the was justified in refusing to take n the nomination of Mr. Davis. It h argued that he was so justified l Mr. Davis declined to find the s

(4) 8 Mee. & W. 302; s. c. 12 Law (N.S.) Exch. 234.

quired of him as his proportion of the expense of the election; and the question is whether the sheriff was bound to defray the expense of the election without being first put in possession of the necessary funds for that purpose by the several candidates. There is no doubt but that Mr. Davis was told by the sheriff that if he did not deposit 40*l.*, or give security for the same, the sheriff would not take notice of his candidature, and it is found by the case that the sum of 40*l.* was not an improper or unreasonable sum for the purpose for which it was asked; and no one impeaches the character of the sheriff or suggests that he did not act pursuant to what he thought the statute empowered him to do. Now, was the sheriff entitled by law to require such deposit money or security from Mr. Davis before taking a poll? I am of opinion that he was not. The point depends on the construction of two Acts of Parliament, which have received a construction of the highest authority. The Ballot Act, 1872, in no way helps us, because section 8 of it directs that the expenses of the returning officer are to be payable in the same manner as expenses incurred in the erection of polling booths were by law payable. Now, what was the law as to the expenses of polling booths? It is to be found in sections 68 and 71 of the Reform Act 2 Will. 4. c. 45. The 68th section is not important, for the portion which relates to booths has been repealed, but it is useful as helping to construe section 71, which is the important section. [His Lordship here read the 71st section.] Now, the question is whether, under that section if it stood alone, and if the candidate declined to pay beforehand, or to give security, for the expense of erecting the booths, the returning officer would be justified in refusing him an election? I should have thought not. The section says that the booths are to be erected by contract with the candidates if they think fit to make such contract, and if they do not then they are to be erected by the sheriff or other returning officer at the expense of the candidates. There is no trace there of any condition precedent that if the candidate refuses to make the contract or to pay the expense of the erection his nomination is to be void. The refusal to put up the booths or to receive the votes is one of so serious a consequence that if it had ever been intended by the Legislature that such a power should have been placed in the hands of the returning officer it would have expressed it in clear words, and would not have left it to have been deduced by at least a doubtful construction. But the section is not now left to us to construe, because in 1841 it received the construction of the Court of Exchequer in *Muntz* v. *Sturge* (4). In that case the plaintiff, who was returning officer for Birmingham, sued Mr. Sturge for a proportion of the expense the plaintiff had been put to in erecting the booths. Mr. Sturge had been nominated, but had refused to go to the poll, and the question was whether he was liable for these expenses; and the Court held that he was not, on the ground that, although in a popular sense he was a candidate, yet as he had coupled his nomination with a statement that he would not stand a contest, he was not a candidate in the proper sense of the word. It is true that in that case there was not a decision on the point now before us, but this very section came before the Court to be construed, and one of the arguments urged on the Court in favour of the plaintiff was that "the returning officer is necessarily obliged to incur a large portion of the expense before the day fixed for the nomination, it being often impossible to erect the necessary booths between the time of the nomination and the actual commencement of the poll."

"It must be admitted," said Lord Abinger, C.B., in delivering the judgment of the Court, "that the construction which we put on these clauses," namely, sections 68 and 71, "may in some cases possibly, though not very probably, cast on the returning officer the burthen of preparing at least for the erection of booths, when there may never be any person answering the description of a candidate eventually liable to reimburse him." Shewing in the view the Court there took of the matter that the returning officer was to spend the money in the first instance, and to recover it afterwards from the person who was ultimately liable. "But at most,"

said Lord Abinger, "this only shews that in certain cases the post of returning officer may be one of an onerous character, and the Legislature may well have considered that to be a far less evil than it would be to prevent proper persons from being proposed, under the fear that the proposers might afterwards become liable to the expense of a poll in which they may have taken no part. We may further observe that the same enactment which makes the candidates liable to the expense of the booths also makes them liable to the expense of the deputies and poll clerks employed in taking the poll. It is difficult to believe that the Legislature could have meant to throw the burthen of these latter expenses on any persons except those for whose benefit they may have been incurred, namely, by the candidates who come to the poll, and this therefore is strongly confirmatory of the construction we put on the word candidate as used in the 71st section;" and in another part of the judgment his Lordship said, "this certainly shews that in some cases the returning officer must erect, or at all events have made preparations for erecting, booths before he knows whether there will or not be any necessity for them."

Now after that, which was a written judgment of the highest authority, shewing that what was intended by the Legislature was that the returning officer was, at his own expense in the first instance, to erect the polling booths, I am of opinion that in construing the Ballot Act, the 8th section means that the returning officer is to incur the expenses of the election, and to be afterwards reimbursed from those who are ultimately liable. We have been pressed by some authorities in an earlier state of the law. Prior to the Reform Act the law was governed by 18 Geo. 2. c. 18, extended to Westminster by 51 Geo. 3. c. 126. Now this 18 Geo. 2. c. 18, as so extended, received a judicial construction from Lord Ellenborough in *Morris* v. *Burdett* (3), and which is similar to what the Court of Exchequer in *Muntz* v. *Sturge* (4) put on the Reform Act. Lord Ellenborough held that the Bailiff of Westminster, who was the returning officer, must set up the booths in the first instance, and afterwards get reimbursed from the candidates, i if there were no candidates, then be prepared to pay the expenses so incurred out of his own pocke was never suggested that he had to insist on a prepayment of e penses. In the present case no us, the returning officer insisted c dition which he had therefore no insist on. I do not say that M acted courteously in thus standin rights, but the returning officer o to have refused to allow Mr. Dav put in nomination, and the ele Lord Kensington under the circu was a miscarriage and void.

The only remaining question is costs. Lord Kensington did wrong, and it would be unjust t him with the costs. The case of turning officer is more doubtfu think he will be sufficiently puni having to bear his own expen therefore Mr. Davis will not recov against anyone but have to pay h

BRETT, J.—On one side it h alleged that the returning offic mitted such a breach of duty as pr the electors from fairly choosing sentative, and on the other sid been contended that the candidate comply with what was properly tion precedent, and so the re officer was justified in what he di it is admitted that Mr. Davis w nominated in writing as required 1st section of the Ballot Act. Th section goes on to say that, if at piration of the hour after the t pointed for the election, "more ca stand nominated than there are v to be filled up, the returning offic adjourn the election, and shall take If the matter stood there it would ous that the returning officer did th he is forbidden to do, but it is s either by this Act or earlier statu Davis was bound before he was no to pay, or give security for 'pay proportion of the reasonable of erecting the election booths. section 8 of the Ballot Act says, " to the provisions of this Act every ing officer shall provide," int "polling stations" and "appoi

officers and do such other things as may be necessary ıally conducting an election in rovided by this Act." There- s there is something which im- luty to provide this on some t is a duty which is imposed on ıing officer. The 8th section on to say, that "all expenses ıcurred by any returning officer g into effect the provisions of ı the case of any parliamentary ıhall be payable in the same expenses incurred in the erec- ling booths at such election are yable." It seems, therefore, to he Ballot Act throws on the officer the burthen of providing ıces, but declares that the lia- pay for them is to be as it e that Act. For that we must e Reform Act, 2 Will. 4. c. 45. ınd 68th sections of that Act are strued together, and by these, , with regard to the county, and ing officer, with regard to the s to cause to be erected a rea- ımber of booths for taking the en the first part of the 71st ys, that all booths erected are ed at the expense of the several , but it does not there say by y are to be erected. It goes ards, to say that they may be contract with the candidates if fit, but if they make no such hen the section says they shall , not by the candidates, but "by or other returning officer at the the several candidates." There there in terms to say that the the money by the candidates expenses is a condition prece- has been said that the construc- rmer statutes implies this, and was made to 18 Geo. 2. c. 18. h says "that the sheriff shall the expense of the candidates ber of convenient booths.... as lates or any of them shall, three ıst before the commencement of desire." It is said that these ow that it is a condition prece- the candidates should provide f with the money, but I cannot agree to this. An interpretation was put on this very statute by Lord Ellenborough in the second case of *Morris* v. *Burdett* (3), and it is clear that Lord Ellenborough did not consider there was such condition precedent. Then the 71st section of the Reform Act came before the Court of Exchequer in *Muntz* v. *Sturge* (2), and although it is true that it was not necessary for the decision, yet it was clearly brought before the attention of that Court, and that Court was of opinion that the returning officer must erect the booths primarily at his own expense. I am, therefore, of opinion that the Ballot Act, 1872, construed by the light of the other Acts, contains no such condition precedent as to the payment of the election expenses by the candidate. Then that being so, the determining whether one or two candidates are put up for election is a matter which goes so entirely to the substance of the election, that what the returning officer did in refusing to take notice of the nomination of Mr. Davis vitiates the election.

With respect to the costs I entirely agree with what my Lord has said.

Election void.

All parties to pay their own costs.

Attorneys—C. C. Ellis, for petitioner; Wyatt, Hoskins & Hooker, for respondent.

1874. May 23. July 8. } BLOOMER *v.* BERNSTEIN AND ANOTHER.

Sale of Goods—Contract for Delivery by Instalments—Rescinding Contract.

The defendants contracted to sell a quantity of iron to the plaintiff to be delivered by instalments, and to be paid for by cash against bills of lading. The plaintiff having neglected to take up the bill of lading for the second instalment of iron sent under the contract, the defendants, after previous notice that they would do so, sold that portion of iron. They sold it for more than the contract price, as the market

for iron was a rising one, and they afterwards refused to deliver the rest of the iron contracted for, on the ground that the contract had been cancelled by the plaintiff not taking up the bill of lading. The plaintiff subsequently filed a petition for liquidation by arrangement, which ended in an agreement for a composition with his creditors, and he then brought an action against the defendants for not delivering the remainder of the iron according to the contract. On the trial of such action the jury found that the defendants, by reason of the plaintiff's conduct, had reasonable ground for believing, and did believe, that the plaintiff would be unable to pay for the future bills of lading to be presented under the contract, that the plaintiff had come to a determination to abandon the contract, and that he had so conducted himself as to lead the defendants to believe that he had determined to abandon the contract:—Held *that on these findings a verdict was rightly entered for the defendants, as the case was brought directly within the authority of* Withers *v.* Reynolds (2 B. & Ad. 882).

This was an action for not delivering a quantity of iron, pursuant to a contract by which the defendants, merchants at Antwerp, had contracted to sell to the plaintiff from 3,650 tons to 5,110 tons of old iron rails, delivery to take place during the year 1872, and to be completed in December of that year, at certain specified prices, "payment net cash in London, against bill of lading and sworn weigher's certificate." In January, 1872, the plaintiff duly paid the amount of the bill of lading for the first portion of the iron sent under the contract. On the 1st of February, the plaintiff received an invoice for the second portion, but he neglected to take up the bill of lading for the same, and afterwards on the 13th of February, the iron so invoiced was sold by the defendants, after due notice had been given to the plaintiff that unless the bills of lading were taken up such iron would be sold, and the plaintiff would be charged with any loss. The sale, however, realised more than the contract price, the market for iron being then a rising one. On the 14th of February, the defendants' agent in England wrote to the plaintiff, informing him tha had broken the terms of his cont not taking up the bills of lading had been presented for payment, h consider the contract cancelled. again, on the 20th of February, i to a letter from the plaintiff re the iron to be delivered the defe agent wrote to say that the contr cancelled. On the 28th of Febru plaintiff filed his petition for liqu under the Bankruptcy Act, 186 under the proceedings for liquid trustee was originally appointe ultimately the plaintiff's propert re-assigned to him, and his credito sented to take a composition in s tion of their debts, both the trus creditors having expressly refused to the plaintiff's contracts. Afte towards the end of July, the plain manded a delivery of the iron defendants, pursuant to the contra then brought the present action.

At the trial, which took place Brett, J., at the Middlesex sitting last Michaelmas Term, the learned asked the jury the following questi

1. Could the plaintiff at any tim the 1st of February, 1872, to the that year have been able to pay bill of lading when presented to accordance with the contract?

2. Had the defendants or their on the 13th of February, by reason plaintiff's conduct, reasonable grou believing, and did they, or he, belie the plaintiff would be unable to p the future bills of lading when pre under the contract?

3. The same on the 24th of July

4. Did the plaintiff, his trust bankruptcy, and creditors come t termination to abandon the contrac

5. Did they so conduct themsel to lead the defendants, or their reasonably to believe, and did they lieve, that the plaintiff, his truste creditors had determined to aband contract?

The jury answered the first quest the negative, and the other questi the affirmative. The learned Judg directed the verdict to be entered defendants; but gave leave to the

tiff to move to enter a verdict for him irrespectively of, or subject to, the findings of the jury.

A rule *nisi* was afterwards obtained to enter the verdict for the plaintiff for such damages as the Court should direct, the amount to be ascertained by an arbitrator, on the ground that there was no evidence to justify the Judge in ruling, or the jury in finding, that the defendants were entitled to cancel the contract as they did on the 14th of February, 1873.

Butt, *Benjamin* and *J. C. Mathew* shewed cause.

Manisty, *Field* and *Waddy* argued in support of the rule.

The following cases were cited—*Hochster* v. *De la Tour* (1), *Avery* v. *Bowden* (2), *Withers* v. *Reynolds* (3), *Hoare* v. *Rennie* (4), *The Danube & Black Sea Railway Company* v. *Xenos* (5), *Simpson* v. *Crippin* (6), *Roper* v. *Johnson* (7), *Planchè* v. *Colburn* (8), *Miles* v. *Gorton* (9), *Freeth* v. *Burr* (10), *Frost* v. *Knight* (11), and *Griffiths* v. *Perry* (12).

Cur. adv. vult.

The judgment of the Court (13) was (on July 8) delivered by

LORD COLERIDGE, C.J.—(After stating the findings of the jury in answer to the questions put to them by the learned Judge at the trial, as above mentioned, his Lordship said): We think that these findings of the jury conclude the matter, and the learned Judge who tried the cause is not dissatisfied with such findings. They shew that the circumstances were such as to justify the defendants in saying that the contract had been put an end to by its not being possible for the plaintiff to complete the contract on his part. The case, therefore, is directly within the authority of *Withers* v. *Reynolds*, and the verdict is rightly entered for the defendants.

Rule discharged.

(1) 2 E. & B. 678; s. c. 22 Law J. Rep. (N.S.) Q.B. 455.
(2) 6 E. & B. 953; s. c. 26 Law J. Rep. (N.S.) Q.B. 3.
(3) 2 B. & Ad. 882.
(4) 5 Hurl. & N. 19; s. c. 29 Law J. Rep. (N.S.) Exch. 73.
(5) 13 Com. B. Rep. N.S. 825; s. c. 31 Law J. Rep. (N.S.) C.P. 284.
(6) 42 Law J. Rep. (N.S.) Q.B. 28; s. c. Law Rep. 8 Q.B. 14.
(7) 42 Law J. Rep. (N.S.) C.P. 65; s. c. Law Rep. 8 C.P. 167.
(8) 8 Bing. 14; s. c. 1 Law J. Rep. (N.S.) C.P. 7.
(9) 2 Cr. & M. 504; s. c. 3 Law J. Rep. (N.S.) Exch. 155.
(10) *Ante*, page 91; s. c. Law Rep. 9 C.P. 208.
(11) 41 Law J. Rep. (N.S.) Exch. 78; s. c. Law Rep. 7 Exch. 111.
(12) 1 E. & E. 680; s. c. 28 Law J. Rep. (N.S.) Q.B. 204.
(13) Lord Coleridge, C.J.; Brett, J.; & Grove, J.

Attorneys—Crump, for plaintiff; Peckham, Maitland & Peckham, for defendants.

1874. May 28. { YATES AND OTHERS (*petitioners*) *v.* LEACH AND MILNES (*respondents*).

Municipal Election—Corrupt Practices Municipal Election Act (35 & 36 *Vict. c.* 60), *ss.* 13, 18—*Petition—Striking out name of Respondent—Person elected.*

A person who assumes to be elected, though not in fact elected, may be made respondent to a municipal election petition presented under 35 & 36 *Vict. c.* 60, *against his election.*

There were two candidates, M. & L., for the office of councillor at a municipal election. M. had the majority of votes and was declared elected, but being disqualified he did not accept the office; upon which L. claimed to be elected, made the declaration of acceptance of office prescribed by 5 & 6 *Will.* 4. *c.* 76. *s.* 50, *and sat and acted as councillor. Both M. and L. were thereupon made respondents to a petition against the election presented under* 35 & 36 *Vict. c.* 60, *and each gave notice under section* 18 *of that Act that he did not intend to oppose the petition.*

This Court held that L. was properly made respondent and refused an application made by him to have his name struck out as respondent.

At the election to the vacant office of a councillor of the borough of Oldham,

which took place in November, 1873, there were two candidates, viz., the above respondents Leach and Milnes. Milnes obtained the majority of votes and was declared elected, but being disqualified under 5 & 6 Will. 4. c. 76. s. 28, by being interested in a contract with the council, he declined taking the declaration of acceptance of the office, and never acted as councillor. Thereupon Leach insisted that he became thereby elected to the office, and he accordingly made the declaration prescribed by 5 & 6 Will. 4. c. 76. s. 50, and sat and acted as councillor and refused to resign the office. A petition against the election was then presented under the Corrupt Practices Municipal Elections Act, 1872 (35 & 36 Vict. c. 60), to which both Leach and Milnes were made respondents. Milnes and Leach severally gave notice that they did not intend to oppose the petition, and the petitioners then applied by a Judge's summons to get back the deposit money, and have the election declared void, but Cockburn, C.J., before whom the summons was heard, held that he had no power to make any such order, and accordingly the matter was left to go before the barrister appointed to hear the petition. The respondent Leach then obtained a rule to shew cause why his name should not be struck out of the petition. Against this rule,

J. O. Griffits now shewed cause.—Leach was properly made a respondent for he made the declaration under 5 & 6 Will. 4. c. 76. s. 50, and took upon himself the office of councillor. The petitioners had a right to say that Milnes was disqualified and that Leach was not elected by the majority. If this could not be done the only other mode of questioning Leach's right to act as councillor, would be by a *quo warranto*, and the 12th section of 35 & 36 Vict. c. 60 expressly declares that an election shall not be questioned by a *quo warranto* for a matter for which it might be questioned under the provisions of that Act. Leach is a councillor *de facto* and he refuses to resign, and until the office has become vacant there can be no fresh election. He wishes no doubt to escape from any pecuniary liability for having acted as he has done, and therefore he seeks to have his name struck out; but he must now take the consequences of his own conduct. There is no reason why his name should be erased. He was properly made a respondent, and his having given notice under the 18th section, of his intention not to oppose the petition, was an admission that he had rightly been made a respondent.

Douglas Walker in support of the rule.—The Court has only power under the Corrupt Practices Municipal Elections Act (35 & 36 Vict. c. 60) to deal with a respondent who has in fact been elected. Leach never was elected and is therefore not within the Act, and he ought not to be respondent to the petition. His having acted as councillor, as he did, only made him an intruder, and whatever remedy there may be against a person who is such intruder, it is not a remedy under this Act. The Superior Court has power under section 21, sub-section 5, to interfere by striking out the name of a person who is not properly a respondent, and the Court ought to exercise such power in this case, considering that notice having been given that the petition would not be opposed none of the respondents can appear at the hearing, and therefore the sending the case to the barrister for a hearing will be only to incur a useless expense.

Lord Coleridge, C.J.—I am of opinion that this rule should be discharged. This is an application to strike out the name of the respondent Leach from the petition which has been presented to set aside his election as councillor for the borough of Oldham. The facts which occurred are these—Leach and the other respondent Milnes, were candidates at the election for one of the wards, and Milnes had the majority of votes. Milnes, however, it appears was disqualified, and therefore neither took the oath or declaration required by the statute or acted as councillor; whereupon Leach, who had only the minority of votes, persisted that he became thereby elected, and he accordingly made the statutory declaration of acceptance of the office, and sat and voted

as a councillor. Under these circumstances the petition was presented against both Milnes and Leach. They both gave notice, under section 18 of the Corrupt Practices Municipal Elections Act, that it was not their intention to oppose this petition, and nothing afterwards took place until last March, when the petitioners were before the Chief Justice of England on a summons under which they sought to get the election declared void in order to save the expense of the hearing before the barrister, appointed pursuant to the Act to hear the petition. The Chief Justice was of opinion, and in this I think he was perfectly right, that he had no jurisdiction and that he was not the tribunal constituted by the statute to say whether the election was void or not. Mr. Leach, who has both sat and voted as if he had been elected, and who as I understand will not resign, now applies to this Court to have his name struck out of the petition, the petition being the only mode, unless a *quo warranto* can be had, of getting the seat made vacant. The statement I have just made of what has occurred shews that if Mr. Leach is fixed with costs, he has brought it on himself by his own conduct, which by the notice he gave under the 18th section he has himself confessed to have been wrong. Now the only ground on which this rule can be supported, is that he is not properly a respondent within the Act, and for this purpose we have been referred to the definition of "respondent" given by the 13th section in the following passage—"The terms 'petitioner' and 'respondent,' as hereinafter used in the Act, include respectively any one or more persons by whom a petition is presented, and any one or more persons against whose election a petition is presented." It was contended that as Leach was never elected, a petition could not be presented against his election, and he was therefore not a respondent within this section. I am of opinion that there is no ground for such contention. The word in the section is "include" and not "mean," and besides that, I think that a respondent within the Act means, as well as includes, a person who takes upon himself to act as if he had been elected, and that Leach having claimed as he did to be elected, and acted as such, was properly made a respondent. Then it was said that the 18th section would help him in this application, and we were referred to the 2nd sub-section of that section which says, "A respondent who has given the prescribed notice that he does not intend to oppose the petition shall not be allowed to appear or act as a party against such petition in any proceeding thereon." But the words there are not that after such notice he shall not be allowed to remain as respondent, but that he shall not be allowed to appear or act as a party against the petition. That, I think, assumes that the petition is to go on, and that he is to remain as respondent, but that he is not to be allowed to interfere in the proceedings. On these grounds I am of opinion that this rule cannot be made absolute. It does not appear to me that Leach was improperly made a party to the proceedings, and there is no reason for afterwards removing him. I see no inconvenience or improper expense of the barrister going down to try the petition under the circumstances of this case. It will be taken as an undefended case and will not occupy much time or occasion much expense.

BRETT, J.—The only question in this case is whether the rule which asks us to strike out the name of Leach as one of the respondents to this petition should be made absolute. It has been argued that he was improperly made a respondent because the only person who can under the Act be made a respondent, is a person who has been elected, and Leach was never elected, and the argument is founded on the definition of respondent in the 13th section. Now I think this Court has jurisdiction to strike out the name of a person who has been improperly made respondent, but I think also that the definition of respondent given in the 13th section, means not merely a person elected but also a person who assumes to have been elected. It appears to me that in the present case Leach considered that the votes given for Milnes were to be treated as votes thrown away by reason of the disqualification of Milnes, and that therefore he, Leach, really had the ma-

jority of votes. On the other hand, the petitioners may well say that for want of notice of disqualification the votes for Milnes were not thrown away and that Leach was not duly elected. That would be a proper ground for a petition and for making Leach a respondent, and the Court must I think decline to strike his name out as respondent. It was then said to be an idle and expensive proceeding for the barrister to go down and to declare the election void when there was no one to oppose it, and I rather think that this rule was granted in order to see if there was any way of getting rid of the last election without incurring this expense. It seems now that there is not and that such is the only way by which a new election may take place, and therefore it must be adopted.

GROVE, J., concurred.

Rule discharged.

Attorneys—Gregory, Rowcliffe & Co., agents for Ascroft & Sons, Oldham, for petitioners; Chester, Urquhart & Co., agents for J. Ponsonby, Oldham, for respondents.

1874. June 12. } HILLS AND ANOTHER *v.* WATES AND ANOTHER.

Interrogatories—Common Law Procedure Act, 1854—*Discovery in Equity—Payment—Death.*

Where in an action against the maker of a promissory note by the executors of a deceased payee, the defendant pleaded payment to the payee in his lifetime, the Court on the authority of Hawkins | *v.* Carr (35 Law J. Rep. (N.S.) Q.B. 81), *and because the person to whom the payment was stated to have been made was dead, allowed the plaintiffs to interrogate the defendant by interrogatories under the Common Law Procedure Act,* 1854, *as to the mode, time and circumstances of such payment.*

This was an action by the executors of Jane Eliza Wates, the sole executrix of Edward Wates deceased, on a promissory note made by the defendants on the 17th of February, 1869, and in the life the said Edward Wates, by which fendants promised to pay the said I Wates 120*l.*, six months after dat defendants pleaded, except as to 5 parcel, &c., that after the making said note and in the lifetime of t Edward Wates, the defendant V Wates satisfied and discharged the tiff's claim except as aforesaid I ment to the said Edward Wates as to the said 53*l.* 11*s.*, parcel, & ment of that sum into Court.

The plaintiffs applied in May Denman, J., at chambers, for leav liver the following interrogatories defendants under the Common La cedure Act, 1854.

"First. Have you or either of y paid any, and if any, what sum of in part payment of the note which subject matter of this action; if so, whom the said sum was paid and And state whether the said sum w by one or both of you or by an person. If by one only, state by of you, and if by any other perso the name and address of such pers

"Second. State in what manı said sum was paid, whether in n cash, or by cheque.

"Third. If by cheque, state upo bank the said cheque was drawn whom the said cheque was signed.

"Fourth. Did you, or either of any other person authorised by y ceive from the said E. Wates, or fr other person authorised by him e the time of the payment of the sa of money or at any other time, ceipt, or other note, or memoran writing relating to the payment said sum?

"Fifth. Have you or either of yo at any time whatsoever, had an transaction relating to any bill missory note with the said E. Wat

"Sixth. Have you or either of your possession, custody or powe the possession, custody or power o or some, or one, and which of y torneys or attorney, agents or divers, or some and what account of account, receipts, memorand ters, copies of or extracts from

minster Hall, and is one, therefore, of the highest authority, and considering that case was decided on the view I have taken of it, then the present case comes within it, and therefore this rule should be made absolute.

GROVE, J.—If we were to adopt the view which Mr. Paterson has argued we ought to take of *Hawkins* v. *Carr* (1), then there would have been no reason for the Court of Queen's Bench to have taken time to consider the matter. It must have been a case of an exception to the general rule, for if the interrogatories related there only to what was common to both parties, or if on the other hand they related only to what was the defendants' case, in either way there would have been no difficulty about allowing or disallowing them. The case, therefore, must be an authority that in a matter where by reason of death one of the parties to a cause has no power to meet the evidence of the other, it is not unreasonable he should be allowed to interrogate the party who sets up such matter as a defence.

Rule absolute.

Attorneys—Hook & Street, for plaintiffs; Stevens, Wilkinson & Harries, for defendants.

1874. May 26. } WILLIAMS AND ANOTHER *v.* WILLIAMS.

Landlord and Tenant—Breach of Covenant to repair—Damages—Injury to Reversion—Repairs done by Landlord before Action.

The plaintiffs, who were lessees of certain premises, underlet them to the defendant by a lease, in which there was the usual general covenant by the lessee to repair. The defendant having neglected to repair according to his covenant, the plaintiffs entered and did the repairs themselves in order to save a forfeiture of their own lease, with which they had been threatened by their landlord, and then and during the continuance of the lease to the defendant, the term of which had not expired, sued the defendant for breach of such covenant to repair:—Held, *that the plaintiffs could only recover nominal damages for such breach, since by having done the necessary repairs, they had sustained no injury to the reversion at the time of action was brought.*

This was an action for breaches of covenant contained in an indenture of lease made on the 14th of September, 1868, between the plaintiffs of the one part and one Thomas Tonson, who died before this action, and the defendant of the other part, by which the plaintiffs let to the said Thomas Tonson and the defendant a certain messuage for eight years wanting sixteen days, from the 24th of June, 1868, at the yearly rent of 50*l.*, payable quarterly; and the said Thomas Tonson and the defendant covenanted with the plaintiffs to pay the said rent, to paint the external wood and iron work of the premises once in every third year of the term, and to repair and keep in repair the premises during the said term, and further to repair within two calendar months after notice in writing of want of repair given on entry and view by the plaintiffs. The breaches assigned were, first, non-payment of two quarters of the rent; secondly, omission to paint the external wood and iron work once in the third year of the said term; thirdly, not repairing generally and keeping in repair the said premises; and fourthly, omission to repair according to notice given by the plaintiffs, pursuant to the covenant.

The defendant pleaded, first, a general denial of the breaches; secondly, to the fourth breach, a denial of want of repair being found; thirdly, to the said fourth breach, a denial that such notice was given; and fourthly, to the said fourth breach, a denial that two months following such notice had elapsed before action.

Issue was joined on these pleas, and the cause was tried before Brett, J., at the Middlesex sittings in last Hilary Term.

It appeared that the plaintiffs were the assignees of a lease of the premises the subject of this action, being No. 336, Goswell Road, which had been granted on the 31st of August, 1807, to one Robert Foot, and that in September, 1868, the plaintiffs let the same to Thomas Tonson and the defendant, by the lease

which has been before referred to, and which contained the covenant in respect of which this action was brought. It appeared also that the superior landlord, a Mr. Thomas Flight, who had the reversion upon the plaintiffs' own lease of 1807, caused a notice to repair to be served on the premises in September, 1872. This notice referred to the lease of 1807, and according to the lessee's covenant in that lease it required the repairs specified to be done within three calendar months from the time of such notice, and this expired on the 9th of December, 1872. The defendant paid no attention to this notice, and, the repairs not being done, Mr. Flight wrote as follows to one of the plaintiffs—

"No. 336, Goswell Road, London,
"January 17th, 1873.

"Sir,—I am much surprised to receive a report from my surveyor that the repairs called for by the notice to repair served on the premises, which expired on the 9th ult., are even now incomplete. I have no wish to put you to expense for legal proceedings if it can be avoided, and I am not unwilling to grant an extension of the time, provided some definite arrangement be made for the completion of the repairs, and on the payment by you of the expense to which I have unnecessarily been put for surveyor's charges, amounting to 2*l.* 2*s.* On receipt of this amount by the 21st instant I will forward a written consent to an extension for say one month, otherwise I shall be compelled to place the matter in the hands of my solicitors.

"Yours faithfully,
"Thomas Flight.

"Mr. Williams,
"28, Compton Street, Clerkenwell."

A copy of this letter was sent to the defendant by Mr. Thomas, the plaintiffs' attorney, accompanied by a letter of which the following is a copy—

"8, Gray's Inn Place,
"January 22nd, 1873.

"336, *Goswell Road.*

"Sir,—I send you copy of a letter received from Mr. Thomas Flight, the landlord of the above house, addressed to Mr. W. Williams. It has taken Mr. Williams by surprise as he had no knowledge of the notice to repair which was served on the premises. Mr. Williams would like to know the particulars of the repairs required to be done; and as by the covenants of your lease they must be done by you, I have to request your attention to Mr. Flight's letter, and compliance therewith to avoid the expense of legal proceedings.

"I am, sir,
"Your obedient servant,
"W. Thomas.

"Mr. John Williams,
"4, Vernon Square."

Not being able to come to any terms with the defendant, the plaintiffs caused the defendant to be served with a notice on the 20th of March, 1873, to repair the premises in accordance with the terms of his lease, and they also caused Mr. Flight's list of dilapidations to be placed in the hands of a surveyor, who made out a specification of the repairs to be done, which was sent to the defendant.

The defendant did not do the repairs required; and therefore the plaintiffs, in order to avoid a forfeiture of their lease, did the repairs themselves at their own expense, at 36*l.* 14*s.* They also refronted the premises at the cost of 12*l.* 15*s.* 7*d.*, and then brought this action before the expiration of two months from the notice of repair, which had been served on the 20th of March, 1873.

At the trial the defendant contended that there was no sufficient notice of repair to entitle the plaintiffs to recover on the fourth breach, and that the repairs having been done by the plaintiffs before action the plaintiffs could not recover the amount of the repairs sought to be recovered in this action. A verdict was found for plaintiffs for 25*l.* on the first breach, and for defendant on the other breaches, with leave to plaintiffs to move to enter a verdict for them on third and fourth breaches, and to increase the damages by the 36*l.* 14*s.* expended by them for repairs. A rule *nisi* to that effect having been obtained,

E. Pollock shewed cause.—It must be admitted that there has been a breach of the general covenant to repair, but the

plaintiffs are only entitled to nominal damages in respect of it. The amount of damages in respect of such breach is not what it cost to put the premises into repair, but the injury to the plaintiffs' reversion, which at the time when the action was brought was nothing, as the premises were then in repair—*Mills* v. *The Guardians of the East London Union* (1). As to the fourth breach, the plaintiffs cannot have a verdict with respect to this breach, since the notice which Flight gave was not a notice to repair under the defendant's lease, and cannot be used by the plaintiffs as a good notice to the defendant, as the covenants in the two leases are not the same. The case comes within that of *Walker* v. *Hatton* (2). The notice which was afterwards given on the 20th of March by the plaintiffs might have done, but the action was brought too soon for that to be of any avail.

Udall (*Huddleston* with him) in support of the rule.—The covenant to repair in the lease to the defendant is substantially the same as that in the lease under which the plaintiffs held, and the notice to repair given by Flight, and which the defendant received, was therefore sufficient to entitle the plaintiffs to a verdict on the fourth breach for substantial damages. At all events there was a breach of the general covenant to repair, and there can be no reason why the plaintiffs should not recover as the measure of damages in respect of such breach the amount they expended in the repairs, and which it was not disputed was a reasonable amount—*Colley* v. *Streeton* (3), *Davies* v. *Underwood* (4) and *Rawlins* v. *Morgan* (5).

Lord Coleridge, C.J.—I am of opinion that this rule should be discharged. The premises in question were held by the plaintiffs under a lease originally granted in 1807 to Foot, the reversion of which by certain mesne assignments became vested in one Flight. The plaintiffs, by a different lease made in September, 1868, demised the premises to Thomas Tonson (who has since died) and the defendant. In January, 1873, a notice was given by Flight for the assignees of the lessee the lease of 1807 (who were the plaintiffs) to perform the covenant to repair in that lease. That notice was on the premises occupied by defendant, but the defendant be no party to the lease of 1807 t no notice of it, and on the 22nd January, 1873, Mr. Thomas, on the p of the plaintiffs, wrote as follows the defendant: [His Lordship read letter and that of Mr. Flight of 17th of January, to which it refer The notice given by Flight would e pire on the 9th of December, 187 but the lease of 1868, granted to Tons and the defendant (and which has bee shewn to us), contains nothing in which incorporates the lease of 1807 binds Tonson and the defendant to ful the covenants in that lease, which t plaintiffs, as assignees of it, were bou to perform. In March, 1873, a notice repair was given by the plaintiffs to t defendant, pursuant to the provisions the lease of 1868, which lease contain in addition to the general covenant to pair, a covenant to repair after notice, a it may be that if there had been a brea of that covenant the measure of damag would have been the expense the la lords had been put to in doing the repa required by that covenant to be do but the action was brought before time had expired for the defenda doing the work according to that not Therefore as regards the only breac relied on, namely the third, which i the general covenant to repair, and fourth, which is on the covenant to pair after notice, the answer to the of these is that the measure of mages must be only nominal dam whereas here there have been no mages at all to the reversion, and plaintiffs as between themselves and defendant are not injured by what been done or omitted to be done by defendant (and Mr. Pollock has agreed

(1) 42 Law J. Rep. (N.S.) C.P. 46; s. c. Law Rep. 8 C.P. 79.
(2) 10 Mee. & W. 248; s. c. 11 Law J. Rep. (N.S.) Exch. 361.
(3) 2 B. & C. 273.
(4) 2 Hurl. & N. 570; s. c. 27 Law J. Rep. (N.S.) Exch. 113.
(5) 18 Com. B. Rep. N.S. 776; s. c. 34 Law J. Rep. (N.S.) C.P. 185.

near a draw-dock leading into the river Thames. The dock was free and public, but was principally used by the plaintiff and certain other persons whose premises were in proximity to it. A roadway existed between the edge of the dock and M.'s premises, which had an enhanced market value by reason of the proximity of the dock. The Metropolitan Board of Works in making an embankment, under their private Act, filled up and destroyed the dock, and thereby M.'s premises became diminished in value in the market:—Held, *that M. was entitled to compensation under* 8 *&* 9 *Vict. c.* 18. *s.* 68, *as his land had been injuriously affected by the defendants' works.*

Error from a judgment of the Court of Exchequer Chamber, which had affirmed a judgment of the Court of Common Pleas; the judgment of the Court of Common Pleas having been the judgment of Willes, J., and Keating, J., and the judgment of the Court of Exchequer Chamber that of Kelly, C.B. Bramwell, B., Channell, B., Blackburn, J., and Archibald, J., Cleasby, B., dissenting.

The facts of the case were stated in a Special Case, which is printed in 42 Law J. Rep. (N.S.) Q.B. 81, and they were, so far as is material, as follows.

The plaintiff at the time of stopping up of a dock upon the Thames, called the Whitefriars Dock, resided and carried on business as a carman and contractor for supplying builders with lime, bricks and other materials, and as a large dealer in sand and ballast, at premises which were only separated from the dock by a public road, and which he held under a lease for eighty years, from Michaelmas, 1854. Those premises consisted of a house, with warehouse, stables and business premises, and were situate in Whitefriars. The dock above-mentioned, known under the name of the Whitefriars Dock, led into the river Thames, and was very largely used by the plaintiff in the way of his business. This draw-dock was a free and open dock, it was principally used by the plaintiff, the City Gas Company, the Commissioners of Sewers for the City of London, and the other persons whose respective premises were in proximity of it. The plaintiff had no right or easement in or to the draw-dock other than his right as one of the public, nor was there appurtenant or otherwise belonging to the plaintiffs' premises any easement, right or privilege in or to the dock. But the proximity of the dock to the plaintiff's premises and the access given by the dock to and from the river Thames rendered the premises more valuable, as premises either to sell or to occupy with reference to the uses to which any owner might put them. In the execution of the works authorised by the "Thames Embankment Act," 1862, and the "Thames Embankment (North and South) Act," 1868, in the month of October, 1868, a solid embankment was carried along the foreshore of the Thames, and this permanently stopped up and destroyed the Whitefriars Dock. By reason of the stopping up and destruction of the dock, and the destruction thereby of the access to and from the river Thames, the plaintiff's premises became, and were, as premises either to sell or occupy, in their then state and condition, and with reference to the uses to which any owner or occupier might put them, in their then state and condition, permanently damaged and decreased in value. And the plaintiff alleged that consequently he became entitled to compensation. The defendants denied that plaintiff was so entitled, and issued their warrant to the sheriffs to summon a jury, without prejudice to their right to dispute the question, and the jury assessed the amount of damages and injury at 1,900*l.*, and for that sum the judgment of the Court was entered up.

The Board of Works having refused to pay the damages, the proceedings were taken, out of which this proceeding in error arose.

The Special Case concluded by stating that the question for the Court was whether the plaintiffs' interest in the premises was injuriously affected within the Lands Clauses Consolidation Act, 1845, so as to entitle him to recover compensation. The Court of Queen's Bench held that it was so affected, and that judgment was affirmed by the Court of Exchequer Chamber, Cleasby, B. dissenting.

Philbrick and *Hawkins*, for the appellants.—The real question on this appeal is, as was suggested by Blackburn, J., and by Bramwell, B., in the Court of Exchequer Chamber, whether *Chamberlain* v. *The London and Crystal Palace Railway Company* (1) was overruled by *Rickett* v. *The Metropolitan Railway Company* (2). If the language used by Lord Cranworth in the latter case truly expresses the principles on which that case was decided, there can be no doubt that *Chamberlain* v. *The London and Crystal Palace Railway Company* (1) was overruled by *Rickett* v. *The Metropolitan Railway Company* (2). His Lordship says—"Both principle and authority seem to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself as by loosening the foundations of buildings on it, obstructing its lights or its drains, making it inaccessible by lowering or raising the ground immediately in front of it or by some such physical obstruction," and his Lordship said that "if the complaining person's ground of complaint differs only in degree from that which is felt by all the neighbours who are affected in like manner more or less, he has no claim for compensation under the statute." And the reason which his Lordship gives is that "any other construction would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature." The same reason is given in different words by Lord Chelmsford, in giving his opinion in that case when he said "that damages in respect of the occupation of the premises are too remote." Therefore the ground of the decision in *Rickett* v. *The Metropolitan Railway Company* (2) was that injuries which are only consequential upon the construction of works, and which only affect the purpose for which the premises may be employed, but not the premises themselves structurally, are too remote; the injury must also have been actionable but for the statute. This is quite in accordance with the decision of this House in *The Caledonian Railway Company* v. *Ogilvy* (3), where a public road was obstructed by a level crossing, and Lord St. Leonards said that as the complainant was not damaged otherwise than as every one else was injured, his estate was not damaged. No doubt a person has a right to have his house, when on a highroad, bounded by that highroad or by a highway by water,—*The Duke of Buccleugh* v. *The Metropolitan Board of Works* (4), *The Queen* v. *The Eastern Counties Railway Company* (5), *The Queen* v. *The Great Northern Railway Company* (6), and it may even be that although it is not easy to reconcile the decisions in *Chamberlain* v. *The West of London and Crystal Palace Railway Company* (1), and in the recent case founded on it of *Beckett* v. *The Midland Railway Company* (7), with *Ogilvy's Case* (3) or *Rickett's Case* (2), yet perhaps those decisions may be approved on the ground that by the interference with the frontage of the plaintiffs' lands, and the only high road open to them, their land, to whatever purpose it might be applied, was permanently damaged in a peculiar manner, and the owners and reversions alike suffered a loss different in kind as well as in degree to that sustained by the rest of the public. The claims in those cases were not for probable loss

(1) 2 B. & S. 605; s. c. 31 Law J. Rep. (N.S.) Q.B. 201; s. c. in error, 2 B. & S. 617; s. c. 32 Law J. Rep. (N.S.) Q.B. 173.

(2) 5 B. & S. 617; s. c. 34 Law J. Rep. (N.S.) Q.B. 257; s. c. in the House of Lords, 36 Law J. Rep. (N.S.) Q.B. 205; s. c. Law Rep. 4 E. & I. App. 175.

(3) 2 Macq. 229.

(4) 41 Law J. Rep. (N.S.) Exch. 137; s. c. Law Rep. 5 E. & I. App. 418.

(5) 2 Q.B. Rep. 347; s. c. 11 Law J. Rep. (N.S.) Q.B. 66.

(6) 14 Q.B. Rep. 25; s. c. 19 Law J. Rep. (N.S.) Q.B. 25.

(7) 37 Law J. Rep. (N.S.) C.P. 11; s. c. Law Rep. 3 C.P. 82.

merely to a particular business by reason of the destruction of an easement to which the plaintiff had no right except as one of the public. So that even those cases are very distinguishable from the present case. No doubt also if the dock had been a private dock to which the plaintiff had a right by prescription, he would have a remedy because he would have a right of action; so if it had been a private road as in *Glover* v. *The North Staffordshire Railway Company* (8), or private stream as in *Miner* v. *Gilmour* (9). The injury in such case would be peculiar and special to the complainant. But the obstructing a public road or waterway being a matter which relates to the public, is a kind of public offence and gives no right of action—*Ashby* v. *White* (10), *Winterbottom* v. *The Earl of Derby* (11), *The King* v. *The London Dock Company* (12), *The King* v. *The South Eastern Railway Company* (13), unless the injury be special to the complaining party as in *Greasley* v. *Codling* (14), *Iveson* v. *Moore* (15), *Rose* v. *Miles* (16), or unless it can be shewn that there is an injury done to the reversioners—*Dobson* v. *Blackmore* (17). So, too, the fouling of the water of a river from which all the public is entitled to pure water, gives not the individual a right to compensation under the Act—*The King* v. *The Directors of the Bristol Dock Company* (18). In *Cameron* v. *The Charing Cross Railway Company* (19), the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, held loss of trade by the stopping up of a public road was not an injury which gave the plaintiff a right to compensation, and the only other cases in which action was held to be maintainable for damages for loss of business resulting from interference with a public road, namely—*Baker* v. *Moore* (20) cited in *Ireson* v. *Moore* and *Wilks* v. *The Hungerford Market Company* (21), were expressly overruled by the judgment of the Lord Chancellor Chelmsford in *Rickett* v. *The Metropolitan Railway Company* (2). For compensation can only be claimed under the statute where there would have been a right of action but for the statute—*Rickett's Case* (2), *Ogilvy's Case* (3), *The City of Glasgow Railway Company* v. *Hunter* (22), *The Hammersmith Railway Company* v. *Brand* (23), *The Queen* v. *Vaughan* (24). The case of *Rickett* v. *The Metropolitan Railway Company* (1), when read with the understanding supplied by a perusal of the above mentioned authorities, shews that a claim such as that of the respondent in this case cannot be maintained. Indeed, in an almost precisely similar case to the present, *The Queen* v. *The Metropolitan Board of Works* (25), it was held by the Court of Queen's Bench to have that effect. But we have on the other side the case of *Beckett* v. *The Midland Railway Company* (7), in which the Court of Common Pleas has sought to put a different construction on the decision in *Rickett* v.

(8) 16 Q.B. Rep. 212; s. c. 20 Law J. Rep. (N.S.) Q.B. 376.

(9) 12 Moore P.C. 473.

(10) Ld. Raym. 938.

(11) 36 Law J. Rep. (N.S.) Exch. 194; s. c. Law Rep. 2. Exch. 316.

(12) 5 Ad. & E. 163; s. c. 5 Law J. Rep. (N.S.) K.B. 195.

(13) 7 E. & B. 660; s. c. 26 Law J. Rep (N.S.) Q.B. 225.

(14) 2 Bing. 263.

(15) 1 Ld. Raym. 491.

(16) 4 M. & S. 101.

(17) 9 Q.B. Rep. 991; s. c. 16 Law J. Rep. (N.S.) Q.B. 233.

(18) 12 East 429.

(19) 33 Law J. Rep. (N.S.) C.P. 313; s. c. Ex. Ch. 19 Com. B. Rep. N.S. 764.

(20) 1 Ld. Raym. 491.

(21) 2 Bing. N.S. 281; s. c. 5 Law J. Rep (N.S.) C.P. 23.

(22) Law Rep. 2 S. & App. 78.

(23) 38 Law J. Rep. (N.S.) Q.B. 265; s. c. L Rep. 4 E. & I. App. 171.

(24) 9 B. & S. 892; s. c. 38 Law J. Rep. (N M.C. 49; s. c. Law Rep. 4 Q.B. 190.

(25) 10 B. & S. 391; s. c. 38 Law J. Rep. (M.C. 201; s. c. Law Rep. 4 Q.B. 358.

The Metropolitan Railway Company (2), and the learned Judges from whose judgment this appeal is brought expressed themselves as doubtful whether the Court of Queen's Bench or that of the Common Pleas was right. For the reasons we have mentioned it is contended that the Court of Queen's Bench was right in *The Queen* v. *The Metropolitan Board of Works* (25), and that the judgment now brought in error before your Lordships should be reversed; for except for the statute, the plaintiffs' remedy would have been by indictment, the matter complained of relating to the public. The premises in respect of which the damages are claimed are not injured structurally, and the loss or inconvenience is not special or peculiar to the individual complaining, but is only shared by him in common with the rest of the public, though perhaps in a greater degree. If the occupier has to remove to another locality the business he now carries on upon these premises, the premises may possibly become in the hands of the reversioner a more profitable property when applied to another purpose. It may be hard on the occupier, but on the other hand it is impossible to overrate the difficulties that would arise if claims of this sort were allowed both in the assessment of the amount of compensation for such claims, which must be a matter of pure speculation, and in the multiplicity of actions to which it could open the door.

Prentice and *Thesiger* for the defendants in error.—The apparent inconsistency between some of the cases decided on the question of compensation may be got rid of by adopting it as a principle that where by the construction of works, we do not say by the subsequent user of them, that was the case of *The Hammersmith Railway Company* v. *Brand* (23), but when by their construction there is a physical interference with any right, public or private, which the owner or occupier of property is entitled to make use of in connection with such property, and which gives an additional marketable value to such property apart from any particular use to which it may be put, there is a title to compensation if the property is thereby as a property lessened in value.

The counter proposition is, that where none of the owner's property is taken, unless the property is structurally injured, or the access to it interfered with, there can be no right to compensation. With regard to the arguments against the allowing the principle or proposition we have suggested are, first, that it would open the door to multiplicity of claims; and secondly, that it would be difficult to ascertain the proper amount of compensation. But there would be no difficulty if the damage was limited to the marketable value of the property. If that is permanently lessened, the reversioner is injured, thus satisfying the cases such as *Dobson* v. *Blackmore* (17). It would also satisfy cases where the injury was only to a personal right, as in *The Queen* v. *The Metropolitan Board of Works* (25), and also cases where the injury arose from the user of the railway when completed, as *Brand's Case* (23); and it would reconcile the cases which have been cited on the other side with those cases which are decidedly in our favour, as *The Queen* v. *The Eastern Counties Railway Company* (26), *Chamberlain* v. *The Western London and Crystal Palace Company* (2), *Wood* v. *The Stourbridge Railway Company* (27), *The Queen* v. *Rynd* (28), *Knock* v. *The Metropolitan Railway Company* (29), *Eagle* v. *The Charing Cross Railway Company* (30).

Philbrick replied.

THE LORD CHANCELLOR (LORD CAIRNS).—[His Lordship stated the nature and facts of the case as above set forth, and said]—Your Lordships have in this case to decide again one of the cases, of which

(26) 2 Q.B. Rep. 347; s. c. 11 Law J. Rep. (N.S.) Q.B. 66.

(27) 16 Com. B. Rep. N.S. 222.

(28) 16 I. R. C. L. 29.

(29) 38 Law J. Rep. (N.S.) C.P. 78; s. c. Law Rep. 4 C.P. 131.

(30) 36 Law J. Rep. (N.S.) C.P. 279; s. c, Law Rep. 2 C.P. 638.

ve come before the Courts of
also before your Lordships'
rning upon the meaning of the
s in the Lands Clauses Conso-
Act, "injuriously affected." In
rvations I am about to make I
entirely to accept the test which
n applied both in this House and
ere as to the proper meaning of
words as giving a right to com-
ation, namely, that the proper test is
nsider whether the act done in car-
g out the works in question is an act
ich would have been actionable, and
uld have given a right of action if the
orks had not been authorised by Act of
arliament. I do not pause to enquire
whether or not, if the question was now
to be decided for the first time, it is not
somewhat narrow. I accept that test as
being the test which has been laid down
and found convenient in application, and
which has formed the foundation for the
decision of so many cases before the
present.

The present case appears to me to
amount to this. The occupier or tenant
of a house has got in front of his house
two highways, the one highway being a
road or a street, and the other, imme-
diately beyond and abutting upon the
road or the street, being a highway by
water. The highway by water is taken
away from him, the highway by land re-
mains. It appears to me that it is impos-
sible to say that the destruction of the
highway by water, situate as I have
described it, is otherwise *than a perma-
nent injury* to the property in question,
for whatsoever purpose that property
may be occupied. The case appears to
me to be extremely analogous to a case
decided by the Court of Common Pleas,
before the present case, of *Beckett* v. *The
Midland Railway Company* (7) in which
there was a front of the premises in ques-
tion, in that case one single highway, the
further half or the further third portion of
which was taken off and blocked up by the
execution of the defendant company's
works. It was there held that that was an
injury which permanently and injuriously
[illegible] the premises in question, and it
[illegible] to be a matter entirely
indifferent whether you have one high-
way, the further half of which is blocke[illegible]
up and destroyed, or whether you have [illegible]
double highway, first by land and then b[illegible]
water, and that part of the highway whic[illegible]
consists of water is blocked up an[illegible]
destroyed.

In the argument at the bar, Mr. Th[illegible]
siger stated what he would rely upon [illegible]
a definition of the right to compensatio[illegible]
and having considered this case v[illegible]
fully, I myself should not be disposed [illegible]
find fault with any part of the def[illegible]
tion, although definitions are always n[illegible]
ters of very considerable difficulty.
Thesiger, in his very able argum[illegible]
stated that the test which he w[illegible]
submit as one which he thought w[illegible]
explain and reconcile the various ca[illegible]
upon this subject was this: that "wh[illegible]
by the construction of works there i[illegible]
physical interference with any rig[illegible]
public or private, which the owner or [illegible]
cupier of any property is by law [illegible]
tled to make use of in connection w[illegible]
that property, and which right gives i[illegible]
marketable value apart from the use [illegible]
which any particular occupier mig[illegible]
put it, there is a title to compensatio[illegible]
if by reason of such interference [illegible]
property as a property is lessened [illegible]
value.

A case was decided in your Lordship[illegible]
House which at first sight was suppos[illegible]
to militate against this proposition, an[illegible]
against the decision in the present ca[illegible]
I mean the case of *Rickett* v. *The Metro-
politan Railway Company* (2); but i[illegible]
truth that case has no application wha[illegible]
ever to the present. The circumstanc[illegible]
under which the claim was there ma[illegible]
were these: There was an interrupti[illegible]
only a temporary interruption, to a [illegible]
ticular trade carried on in parti[illegible]
premises, and the claim made was [illegible]
claim for injury to the property [illegible]
it was a claim in respect of lo[illegible]
fered in carrying on a trade. Th[illegible]
of the definition which I have [illegible]
entirely clear of a case of th[illegible]
and, although it is unnecessary [illegible]
I may observe that I do not t[illegible]
Lordships would in any wa[illegible]
now to depart from or inte[illegible]

the decision in *Rickett* v. *The Metropolitan Railway Company* (2).

I submit that the course to be taken upon this appeal is to affirm the judgment of the Court of Exchequer Chamber, and to dismiss the appeal.

LORD HATHERLEY.—I entirely concur in the propositions which have been submitted. All that we have to take care of is that we do not extend the rule which has been wisely laid down in cases where damage is occasioned to a person by any public works which have been constructed under an Act of Parliament for the purpose of a public improvement, with respect to the distinction between cases where you consider that the person injured is being injured as one of the public, and cases where you consider him as a person *specially* "injuriously affected." It is quite obvious that no public works of any description whatever could be carried into execution if the whole of the public were to be entitled to pecuniary compensation by way of damages in respect of injury they might sustain. Neither has Parliament intended any such consequence to follow. But I believe the rule to be a sound one, that wherever an action might have been brought for damages if no Act of Parliament had been passed, there the case falls within that class of cases in which it has been held that the property was "injuriously affected" within the meaning of the Act.

This case seems to me to be precisely following *Beckett's Case* (7), and not going one step beyond it. There would be no difference, if you suppose that upon one side of the house there had been a road which he had a right to use as a means of access to his house for whatever purpose he occupied it, and that this dock had been on the other side of his house, and he had been accustomed to use it for the purposes for which he occupied his house, and he would have had the accesses in fact on the other. I think there can be no doubt that the taking away one of those approaches would have been actionable at law, and that if it was done under a private Act, his property would have been "injuriously affected" under the Lands Clauses Consolidation Act. Now the circumstance of this water access, as distinguished from the land access, lying immediately on the other side of the house, from that which I have supposed, that is to say, its lying on the same side of the house as the land access, can, I think, make no substantial difference in the case.

I am perfectly willing myself to adopt the definition, which the learned counsel, Mr. Thesiger, has submitted as a definition which might reconcile the various cases which have come before the Court upon this delicate and contested point of law. But the particular case we have before us seems to me to be amply governed by *Beckett's Case* (7), and I think on that account I need not more fully investigate the circumstances.

LORD O'HAGAN.—I entirely concur in the judgment which it is proposed to pronounce, and in the observations which have been made by my noble and learned friends who have preceded me. Undoubtedly the authorities which have been cited in the argument of this case are conflicting and not entirely satisfactory; but I confess, for my own part, I shall be quite prepared to adopt the definition which was submitted to your Lordships in the very lucid and powerful argument of Mr. Thesiger at the bar. I think, having regard to that definition, that there is a very considerable reconcilement of the authorities, and your Lordships may very safely affirm the judgment of the Court of Exchequer Chamber in this case.

If the matter were *res integra*, and ungoverned by any authority, I think, on the facts as found, it would be extremely difficult to answer the question submitted to your Lordships, whether the plaintiff's interest in his premises is injuriously affected within the meaning of the Lands Clauses Consolidation Act, 1848, in any way but one. The policy of that Act I apprehend to have been to prevent private caprices or selfishness from interfering with the prosecution of works designed for the public bene-

fit, but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplates that the community should profit at the expense of a few of its members, and as the condition of redress it only required proof of injury by the owner to his property.

In the particular case before your Lordships, if the question had been as to taking the whole of this property compulsorily from the owner of it, the principle of compensation would have been ample, full and complete, so as to give a full indemnity to the individual. For my part, I confess, I cannot see why that principle is not to be applied in the case of damage to premises, which may be, more or less, according to circumstances, and which in a conceivable case may absolutely be a destruction, or a taking away of the whole of the property as much as if it had been in the first instance purchased against his will from the owner of it. I confess that, if the case were entirely new, I should scarcely be disposed to agree in the observations which have fallen from my noble and learned friend who last addressed your Lordships. I should have doubted whether it was within the view of the framers of this Act of Parliament to make the possibility of bringing an action, if the Act of Parliament had not existed, a condition of compensation under the statute. I should have been very much inclined to agree with the strong observation made by Lord Westbury in *Rickett's Case* (2), to the effect that there really is not in the statute itself anything to justify the importation of a narrow construction of that description. It appears to me, or it would appear to me, if the matter were *res integra*, as I have said, and unaffected by decision, that whenever there is injury there ought to be compensation, and that the statutable claim, which is now newly established with new machinery for enforcing it, needs no help from any operation of ancient law.

However, it appears to me to be quite unnecessary to [illegible] that question, upon which th[illegible] conflict of authority, which I do not think has yet been absolutely settled: because in the case before the House, whether it be necessary to make the supposition of an action independently of the statute, or whether the contrary view be taken, the matter is none the worse for the claimant here. Even if the thing complained of be not within the purview of the clause with which we are dealing unless it might have been the subject of an action, it seems to me that, under the circumstances, an action would have lain. No doubt what is merely a common injury to all the world may be indictable, but is not actionable. What is injurious in one way to all, may be supposed to be good in another way for all, and the common injury may be counterbalanced by the common benefit. But it is established law in a case to which, I think, reference has already been made in the very learned note of Mr. Smith to the case of *Ashby* v. *White* (3), in *Smith's Leading Cases*, that "If a person has sustained a particular damage beyond that of his fellow citizens he may maintain an action in respect of that particular damage." Now, here, the plaintiff seems to me to have been clearly subjected to such a damage. He has a property which is so situated that the Act which may have been necessary or important for the public interest, has damaged it to a large extent, has damaged it permanently, and in such a way that the original value of the property cannot be recovered by any change in the mode of using it. Is not this a particular damage, and not such as the fellow citizens of the claimant generally experience? How is he to be indemnified for his special loss by the infinitesimal advantage which may accrue equally to him and each of them? It seems to me unreasonable and unjust that he should be made involuntarily to suffer for the public benefit, or that he should not be recouped for the real and peculiar loss he has undoubtedly sustained. For such loss I think he might have recovered an action before the statute; and I believe that, if it has not enlarged, it certainly has not diminished his right to make a like recovery in another way.

Further, I confess I should have great

difficulty in holding that, to entitle him to compensation, the injury affecting the plaintiff's interest in his premises must have been, as was very powerfully urged at the bar, an injury to the structure or substance of his property. From the access to the river by the dock, the premises had been made more valuable, by the loss of that access their value was permanently lessened. Is not a lessening of value an injury to premises, and an injury to the owners' interest in them? Why should a mere structural injury from infringement on a corner of the premises or the removal of earth in contiguity to the walls entitle to compensation, whilst an injury, not structural but direct and clear, and producing worse results to the unoffending owner, it may be one hundred-fold or one thousand-fold, be wholly remediless? It seems to me that here, again, a narrow qualification has been imported into the statute inconsistent with its policy, and unwarranted by its terms.

I do not see, with great respect to Lord Cranworth's opinion in *Rickett* v. *The Metropolitan Railway Company* (2), that it ought to matter as to the effect and estimate of a real injury to premises and their owner, whether it is accomplished by work done by the side under or upon them, or done at a distance from them, but so as directly and unmistakeably to have been the cause of that injury which equally damnifies the owner in either case.

Therefore, in my judgment, whilst an injury common in kind and in degree to the claimant and all the public, or merely personal to him, and not arising from the deterioration of his premises, or so remote as to be difficult or impossible of reasonable appreciation, may properly be held to form no claim to compensation, yet, where the injury is particular, consists in the diminution of the value of a holding, is perfectly appreciable, and in the particular case has actually been appreciated to a considerable amount, I am strongly of opinion that it gives a clear title to compensation under the statute.

In the case of *Chamberlain* v. *The London and Crystal Palace Railway Company* (1), Chief Justice Erle, in pronouncing the judgment of the Exchequer Chamber, says—"The umpire has found that the plaintiff has suffered a particular damnification, he has found that the high road has been stopped up in close proximity to the plaintiff's houses, and that the thoroughfare of the passengers past the houses, has been put an end to, and that the plaintiff's houses have been injuriously affected thereby. We are of opinion, therefore, that a particular damnification to the plaintiff has been made out." Now, in this particular, *Chamberlain's Case* (1) appears to me to be wholly undistinguishable from the case before us. In neither was there any structural damage to the claimant's premises, in neither was there any actual disturbance of any portion of them by material impact or proximate disturbance of the soil. In *Chamberlain's Case* (1) the highway stopped was about seventy yards from his house. In this case the drawdock filled up was twenty-one feet from the plaintiff's house. In the one case the obstruction of the road not nearly abutting on the house of Chamberlain, prevented persons from passing along and diminished its value, and so, in the judgment of the Court of Exchequer Chamber, injuriously affected it. In the other (the case before us) the filling up of the dock, still nearer to the house of the plaintiff, has been the effect of permanently lessening its value. If there was an injury to be compensated under the statute in the one case, I am unable to come to the conclusion that it does not exist in the other. Indeed it seems to me that the circumstances of this case make it rather *a fortiori* for the application of the statutable remedy. Of course that decision to which I have been referring, does not bind your Lordships' House; but I think it is sound in principle, in advancement of the policy of the Railways Clauses Act, and quite in accordance with its actual provisions.

That case was cited in both the Courts below, and in both of them it appeared to the majority of the Judges to be a conclusive authority. The only question really raised was, whether *Rickett's Case* (2) might be taken to have overruled it.

It appears to me that, looking only to *Rickett's Case* (2) and *Chamberlain's Case* (1), the distinction is perfectly plain that the injury in the one case was personal, and in the other case to the premises. There were other distinguishing circumstances to which my noble and learned friend has already referred, but I am very glad that we have now his authoritative declaration, sitting as he did as president of this House at the time, that *Rickett's Case* (2), was not decided upon any principle inconsistent with *Chamberlain's Case* (1).

I am therefore very clearly of (that in this case the judgment Court below ought to be affirmed.

Judgment of the Court of Ex Chamber affirmed with co

Attorneys—W. Wyke Smith, for appe A. S. Edmunds, for respondent.

NOTE.—*Fowler* v. *Lock* (reported 41 Law J. Rep. (N.S.) C.P., 99), came, on to the Court of Exchequer Chamber, where it was argued on the 5th of Fe 1874, and that Court, after taking time to consider, on the 15th of June ordered a new trial, Bramwell, B., stating that some of the Judges thou Willes, J., did, in the Court below, that the plaintiff was a mere servant, whils of the Judges did not think that he was a mere servant, but that, though the took the horse as a bailee, it did not necessarily follow that he did so with a w that the horse was reasonably fit, and that it might be that he took it with attaching to an unknown horse. The cause was accordingly tried a secor before Denman, J., at the London sittings after Trinity Term, when the jury *inter alia*, secondly, that the defendant did not take reasonable precaution to su plaintiff with a reasonably fit horse on the occasion. A verdict having been r generally for the plaintiff, *Francis*, for the defendant, applied, in Michaelmas 1874, for a new trial, but the Court considered that the second finding of t put an end to the case, as, whether the plaintiff was servant or bailee, the de was liable for negligence, which was the result of such second finding, and t no rule was granted.

Ebsworth v. *The Alliance Marine Insurance Company* (reported 42 Law (N.S.) C.P., 305), was argued, on appeal, in the Court of Exchequer Chamber on the 8th of July, 1874, by arrangement between the parties, that Court orde decision of the Court of Common Pleas to be reversed, and the damages ent the plaintiffs to be reduced to a sum representing the personal pecuniary int the plaintiffs, and not including the interest of any other person.

END OF TRINITY TERM, 1874.

CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer,

AND IN THE

Exchequer Chamber

ON ERROR AND ON APPEAL FROM THE EXCHEQUER,

REPORTED BY

JAMES M. MOORSOM, Esq., AND JOHN ROSE, Esq.,

BARRISTERS-AT-LAW;

AND ON APPEAL TO

The House of Lords,

REPORTED BY

EDMUND STORY MASKELYNE, Esq., Barrister-at-Law.

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37 & 38 Victoriæ.

ASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

chequer Chamber and House of Lords

RROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER,

MICHAELMAS TERM, 37 VICTORIÆ.

LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* GIDLOW.

*—Interest on—Appeal—*1 *&* 2 *Vict.* . 17—*Reg. Gen. T.T.* 1867.

on appeal a judgment of one of ior Courts is affirmed, such Court power to allow interest upon the he appeal.

*lict for the plaintiffs was set aside rdict entered for the defendant by ent of this Court. The defendant n signed judgment for his costs, plaintiff appealed to the Exchequer , and afterwards to the House of Both Courts affirmed the judgment ith costs :—*Held, *that this Court ower, either by stat.* 1 *&* 2 *Vict. c.* 17, *or Reg. Gen. Trinity Term, allow to the defendant interest sts of the appeal to the Exchequer or House of Lords.*

n for a rule *nisi* to vary an order man, J.

dict obtained by the plaintiffs een set aside and a verdict en- favour of the defendant, by a t of the Court of Exchequer, ument of a rule, the defendant signed judgment for his costs, and the plaintiffs appealed to the Exchequer Chamber, where the judgment of the Exchequer was affirmed with costs. The plaintiffs further appealed to the House of Lords; the result of that appeal was that both judgments below were affirmed, and the appellants ordered to pay to the respondent "the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk of the Parliament," who certified accordingly. The defendant now sought to recover interest on the costs in each Court, under Reg. Gen. T.T. 1867, whereby "It is ordered that on appeal from one of the superior Courts such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in appeal, for the delaying thereof; and the master, on taxing the costs, may compute such interest without any rule of Court or order of a Judge for that purpose." The question as to the right to interest being submitted to Honyman, J., at Chambers, the learned Judge refused interest on the costs of the proceedings in the Courts of appeal and allowed it only on the costs of the cause, by the following order, viz., "that the master do compute the amount of interest due from the plaintiffs to the defendant

the date of the judgment in the Ex-
uer until the payment of costs, at
rate of 4*l.* per cent. per annum."
Volker, in support of the motion.—The
er should be varied so that interest
y be computed and awarded to the de-
ndant upon his costs in both the appel-
te tribunals. The 2 Vict. c. 110, s. 17,
ives interest on every judgment debt.
and by Reg. Gen. T.T. 1867, "on appeal
from one of the superior Courts such
Court shall have power to allow interest
for such time as execution has been de-
layed by the proceedings in appeal."

[KELLY, C.B.—That is on the original judgment, but not on costs incurred by reason of the appeal.]

The defendant has obtained in each Court judgment for his costs, therefore the costs become equivalent to a judgment debt, and, as execution for the same has been delayed, he is also entitled to interest thereon.

[KELLY, C.B.—By the Common Law Procedure Act, 1854, s. 42, the Court of appeal has power to adjudge payment of costs, but there is no provision as to interest. MARTIN, B.—Nor does the 3 & 4 Will. 4. c. 42. s. 30, directing Courts of error to allow interest, aid the present application. And the 1 & 2 Vict. c. 110. s. 17, relates to a judgment debt proper, not to a judgment for the defendant with costs.]

The 69th of Reg. Gen. H.T. 1853, directs that "The costs of proceedings in error shall be taxed and allowed as costs in the cause." So, likewise, the 25th of Reg. Gen. T.T. 1853. Therefore the judgment debt here consists of the costs of the cause, which include the costs of the appeal. Then, in the case of a defendant, upon what is interest to be allowed under Reg. Gen. T.T. 1867, unless upon those costs? The judgment in the House of Lords orders the costs as certified by the Clerk of Parliament to be paid.

[MARTIN, B.—That is under Ordo Dom. Proc. 3 Ap. 1853, 9 Leg. Obs. 470, referred to in 1 *Chitty's Archibald* (12th edit.), 586. KELLY, C.B.—But no interest was given.]

Execution for the costs has been delayed by the appeal, and the successful party has a right to interest, at least, upon the costs in this Court and the Exchequer Chamber.

[The Court referred to *Fisher* v. *Bridges* (1), and to the form of a judgment of the Exchequer Chamber as prescribed by Reg. Gen. T.T. 1867.]

KELLY, C.B.—I am of opinion that no rule should be granted in this case. The Act of Parliament gives to either a plaintiff or defendant who obtains judgment in this Court, interest on such judgment debt during the time execution has been delayed by reason of an appeal; and such interest is expressly given for the whole time during which execution is delayed. Then if, upon the judgment of the Exchequer Chamber affirming that below being pronounced, an appeal is made to the House of Lords, and the judgment is there likewise affirmed, it is competent to the House to affirm with costs or without them. If the judgment be affirmed without costs, the party succeeding is entitled to no more than the amount of the judgment as finally affirmed in the Exchequer Chamber; but supposing the House of Lords to go further and give costs, then formerly a specific sum was awarded, as, for example 100*l.* or 150*l.* That sum may have been less or more than the costs incurred, or indeed, sufficiently large to cover interest also during the time execution had been delayed, or not. The giving of it, and the amount, was entirely in the discretion of the House. But now, under an order made by that tribunal, the practice is different, and an order is made for such costs as an officer of the House, appointed for the purpose, shall determine. If the officer thought proper, in acting upon the order of the House, that in addition to the costs actually incurred, the party should be entitled to interest for the period between the decision of the Exchequer Chamber and that pronounced by the House of Lords, he might, aught I know, have given it. But if he does not do so, whatever he may think fit to award for costs of appeal, it is for

(1) 4 E. & B. 666; s. c. 24 Law J. Rep. (N.S.) Q.B. 165.

hat, and that only, that the House of ords have made any order, and if that oes not expressly or impliedly give intest on the costs of the appeal for the time he execution is delayed no such interest an be allowed.

MARTIN, B.—I understand that the mount of interest sought to be recovered s upon the costs of the proceedings in he Exchequer Chamber and House of ords, and I am very clearly of opinion hat *this Court* has no power to give such nterest, except under statute; but the hree Acts cited do not confer any such ower.

PIGOTT, B.—The power to allow intest on taxation is derived from the rule T.T. 1867, which does not extend to nterest on costs of the Exchequer hamber and House of Lords.

Rule refused.

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torneys—Clarke, Woodcock & Ryland, agents for Grundy & Co., Manchester, for plaintiffs; Chester, Urquhart & Co., agents for Richardson & Dowling, Bolton-le-Moors, for defendant.

1873. Nov. 25. } PRETTY *v.* NAUSCAWEN AND ANOTHER.

Practice—Short Notice of Trial if necesary.

A defendant under terms to take "short otice of trial if necessary" is not entitled full notice if the plaintiff, using reasonble diligence, is unable to give it.

The declaration, consisting of a count in over for a yacht and gear, was delivered n the 10th of June. After thrice obaining further time to plead, on July 5th the defendants obtained an order hat they should have till noon on the 7th of July to plead "pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, for the next assizes." Venue, Kent. The pleas, first, not guilty; and second, not possessed, were delivered on the afternoon of the 7th. An affidavit of one of the plaintiff's attorneys alleged that within four hours of the receipt of the pleas he sent them to his pleader, with all the facts, which were extremely intricate; that the 11th was the last day for giving full notice of trial, and that since he did not receive the replication from his pleader until too late to deliver it on the 11th he was unable to give full notice of trial; that as soon as he received the replication (which was merely a joinder of issue) from his pleader, he had the issue engrossed, and that on Monday, the 14th, before two p.m., he delivered the issue and gave notice of trial for the Maidstone Assizes. The defendants' attorneys informed the plaintiff's attorneys that the notice was irregular, and they should not accept it, and that they should not defend the action if the plaintiff tried it at Maidstone. The cause was tried there on the 22nd of July as undefended, before Martin, B., who directed a verdict for the plaintiff for 300*l.*

A rule *nisi* having been obtained to set aside the verdict and for a new trial, on the ground that the notice of trial was insufficient, and also on the matters contained in the affidavits—

Willis, for the plaintiff, shewed cause, and referred to *Flowers* v. *Welch* (1).

Day and *W. G. Harrison*, for the defendants, in support of the rule.—The words, "if necessary," mean if, after allowing the proper time for replying or surrejoining or whatever the form of joining issue may be, the plaintiff is brought to a time too late to give full notice. For example, if the four days which the plaintiff was at liberty to take for replying had expired on the 14th the notice of trial would have been good, but since the four days expired on the 11th, on which day full notice could have been given, the notice was insufficient. If the rule be so, a defendant's attorney can always know when he must take short notice. Any other rule must leave him in ignorance up to the last moment, a most inconvenient system. Here the plaintiff ought to have replied within four days.

[BRAMWELL, B.—He was not under notice to do so.]

(1) 9 Exch. Rep. 272; s. c. 23 Law J. Rep. (N.S.) Exch. 7.

Acts become part of the defendants' railway. The lands now claimed were likewise so acquired and adjoined the line and station at Diss. At this part the line runs nearly due north towards Norwich, the Diss station being east of the line. The lands claimed lay also on the east side, and (except a triangular plot of 0a. 1r. 3p.) formed a continuous irregular strip, running along the line, in length about 960 yards, in width varying from a few feet to about eighty yards. This strip was acquired by the company with the intention of using it for approach roads, sidings, cattle pens, coalsheds and warehouses, and generally for convenience in working the traffic, but owing to want of funds only a small portion of this intention had been carried out, and the strip was now divided into five plots occupied by various tenants of the company and consisting respectively of 0a. 3r. 13p., 0a. 2r. 1p., 0a. 3r. 21p., 0a. 0r. 14p., and 1a. 3r. 14p., all of which were fenced off from the railway, from one another, and from the adjoining lands of which the plaintiff was the owner. The plot of 0a. 3r. 13p. was used as pasture, and had been in the possession of various persons under arrangements with the company the nature of which did not clearly appear. The plot of 0a. 2r. 1p., had been used by the company as a "lair" for cattle travelling by the line, and for pasturing the company's horses used at the station. On the plot of 0a. 3r. 21p. were now coal sheds, granaries, stables and a public-house. A coal merchant had been allowed by the company since 1861 to occupy part of this plot, with the understanding that he should have a conveyance at a certain price as soon as the company could give him one, but with power to the company to resume possession and obtain a reconveyance on payment of compensation. No conveyance was given by the company and no purchase money was paid, but the coal merchant paid a yearly sum either as rent or as interest on the purchase money. By arrangement with the company, to whom it was a convenience to have coal sheds and granaries so close, he built the shed to receive his coals which they carried. Under somewhat similar arrangements the granaries had been built, some in 1850 and some since 1863, by other tenants of the company, for storing goods carried by the railway. The stables had been put up by the company and were partly used by them for their horses employed at the station, and partly let to other persons. The public-house had been built by one of the tenants of the granaries as a house for the head railway porter who then had charge of the granaries, but had of late years been used by the tenant contrary to his agreement with the company as a place of refreshment for drovers, carters and others, attending on cattle and goods carried by the railway, there being no refreshment room at the station. Sidings and an approach road to these buildings had been made by the company. The plots of 0a. 0r. 14p. and 1a. 3r. 14p., had been occupied by yearly tenants and were now occupied respectively as a garden, and as arable land by persons who paid a yearly rent and were under terms to quit when required by the company. The triangular plot of 0a. 1r. 3p. lay about 150 yards down the line further north, and consisted partly of the site of an old road which the company had diverted without legal authority, and partly of land which they had acquired to effect this diversion. It had lain waste ever since and was retained by the company to provide against the contingency of their having to restore the old road. These six plots were the lands claimed.

Evidence was given that the traffic at Diss had increased greatly during the last few years, that the present accommodation was insufficient and that the lands claimed were now much wanted for improving the access, for sidings and for accommodation, but that pecuniary embarrassments had hitherto prevented the company from so using them.

In answer to questions by Channell, B., the jury found "that the whole of the lands in question were taken solely for the purposes of the Act, that they were and are duly fenced off from the adjoining lands, and that they have ever since been and are still retained *bona fide* for the purposes of the Act." A verdict was

entered for the defendants with leave to the plaintiff to move to enter it for him for the whole or any part of the lands.

A rule *nisi* was obtained, on Nov. 4, 1870, to enter judgment for the plaintiff *non obstante veredicto*, or to enter a verdict for him pursuant to leave reserved, or for a new trial as to each and all the parcels of land on the grounds, first, That the lands not having been dealt with nor used by the company within the five years limited by their Act became superfluous lands, and that the finding of the jury that they had been nevertheless *bona fide* retained by the company was immaterial. Secondly, That the company cannot, after having parted with the possession of lands acquired for the purposes of their undertaking, resume it or retain such lands in the occupation of tenants beyond the period of ten years from the completion of their works. Thirdly, That the learned Judge ought to have directed the jury that the lands were severally superfluous lands within the meaning of the Lands Clauses Act, 1845, upon the evidence. Fourthly, That the verdict was against the weight of evidence.

Section 127 of the Lands Clauses Consolidation Act, 1845, enacts—

"And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act or any Act incorporated therewith but which shall not be required for the purposes thereof, be it enacted as follows:

"Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands and apply the purchase money arising from such sales to the purposes of the special Act: and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

O'Malley, *W. J. Metcalfe* and *A. Metcalfe* (on June 5, 6, 1873) appeared for the defendants, to shew cause, Court called on

Bulwer and *Merewether*, for the —The company not having ap lands claimed to the purposes o within five years after the passi Act of 1846, had no power so them after the five years, for the of those large words in section 8 i company shall not lay a stick or make roads or sidings, or ex accommodation, after the five ye any land not previously applie purposes of the Act.

[POLLOCK, B.—The expressi powers shall cease to be exercise be read by the light of the Clauses Act, 1845, s. 16, and of s. defines "the railway."]

The Acts of 1845 and 18 be read as meant then, when contemplated the present develo railways. According to the true tion of section 127 of the Lands Act, 1845, the mere non-user of for the purposes of the Act du five years, or at all events du fifteen years limited by the Sp and the Lands Clauses Act taken is conclusive evidence that the la not "required for the purpose Act," and were therefore "su lands;" and even if the jury had f fact that the lands were "require purposes of the Act," the plainti be entitled to the verdict. But ing does not amount to that, " &c.," not being equivalent to "r Belief that the lands will be "r and intention so to apply them future time, do not affect the Plot 1a. 3r. 14p. was occupied land by yearly tenants of the who made a profit as landlords, thing the Lands Clauses Act int prevent. This plot, at least, is w decision of *May* v. *The Great Railway Company* (1).

KELLY, C.B.—The real questic case is whether these pieces of la expiration of the five years from

(1) 41 Law J. Rep. (N.S.) Q.B. 10 Error 42 Ibid. 6.

are the lands eminently adapted
urposes I have mentioned, and
such purposes, but all along
very beginning, as we may in-
the finding of the jury, the com-
ave contemplated that at some
perhaps no very distant time, these
of land should be actually applied
se purposes and for their benefit;
I think that the jury would have
justified in finding, if the question
been left to them, that these lands
e "required for the purposes of the
t."

May v. *The Great Western Railway*
ompany (1) does not assist the plaintiff,
or there the company had long ceased to
pply the land to any of the purposes of
the Act, and there was not the slightest
evidence of an intention on their part to
apply it to any such purpose in future;
but for many years portions had been
let as gardens, and other portions as arable
ground, just as if the company were only
landlords.

It only remains to be considered whether
the 8th section of the Special Act prevented
the company from exercising any of the
powers of the Act, or from erecting any
building, or applying the lands to any pur-
pose connected with the railway, after the
expiration of the five years. That section
follows immediately on sections 6 and 7.
Section 6 limits the land to be taken for
extraordinary purposes to fifty acres.
Section 7 enacts that the powers of the
company for the compulsory purchase of
lands shall not be exercised after the
expiration of three years. It is clear,
independently of the exception, that sec-
tion 8 applies only to powers of the com-
pany to be exercised as against strangers,
such as the doing of any act that may
interfere with the possession or enjoyment
of the lands of strangers, and that it can
have no application to the mere erection
of a building or the making of a road in
addition to the works originally con-
structed. But the words "except as to
so much of the railway as shall then be
completed," put an end to any doubt.
That means, that anything necessary to
the more complete or profitable enjoyment
of that railway, an additional station,
additional buildings or roads, a new
access, anything of that description
which would add to the value and useful-
ness and assist in the fuller or more
profitable enjoyment of the railway, would
come within this exception. This case
therefore, clearly comes within the ex-
ception. Upon these grounds I am o
opinion that the verdict ought not to b
disturbed.

MARTIN, B.—I am of the same opinio
Although the question was not left to
jury in the form in which I should h
left it, I think it was left substantiall
a correct form, and the finding is co
sive upon it. (After reading sectio
of the Lands Clauses Act the le
Judge proceeded.)

This is an enactment of forfeit
takes from the owners of the la
which they have bought, and giv
a man who has paid nothing for it
fore it seems to me it ought to
strict, though a fair, constructio

From the introductory part o
tion it appears that "superflu
are lands which have been
and which shall not be requi
purposes of the Act. There
opinion, in the application o
the question, which is not o
for the jury, is, whether th
quired for the purposes of

Now, in this case, the
termination of the power
Act was the 27th of J
not agree with the con
the plaintiff on the 8th
the powers determined
of those five years are
against third parties,
to cross on the leve
mentioned in the
is nothing in the
vent the company
tinuing the rail
years. The questi
words of the Lan
these lands requ
of the Act?"
there is any
is an embarras
rally known.
take these land
apply them.

tiffs," the defendant could not have sued upon it at law, and as there had not then been any part performance of it entitling him to a decree in equity for specific performance, the contract was void for want of mutuality.

This was an action upon an agreement with the plaintiffs, a local board of health possessed of a market and entitled to tolls, whereby the defendant, as the highest bidder at an auction, agreed to take the premises on lease at a yearly rent, and fulfil certain conditions of letting, one of which was that the lessee of the tolls on the fall of the hammer should produce two sureties for the due payment of the rent or performance of the covenants to be reserved and contained in the lease, and who should forthwith sign the conditions and lease. The breach alleged in the declaration was that the defendant neglected and refused to produce two sureties, and to take the premises on lease.

The cause was tried at the Worcester Spring Assizes, before Honyman, J., when the following facts were proved—

The plaintiffs were a corporation, and as the Local Board of Health of the borough of Kidderminster acting by the Town Council under 5 & 6 Will. 4. c. 76 (The Municipal Corporation Act, 1835) and 11 & 12 Vict. c. 63 (The Public Health Act, 1848), 21 & 22 Vict. c. 98 (The Local Government Act, 1858) and 10 Vict. c. 14 (The Markets and Fairs Clauses Act, 1847), were possessed of a market place, and entitled to tolls in respect thereof. At a meeting of the Town Council, held on the 17th of July, 1872, a resolution was passed adopting the report of a committee which stated that "they have decided to instruct Messrs. Downton & Sons to offer for sale the tolls of the cattle and vegetable market and weighing machine on Thursday, the 18th instant." This resolution was signed by the chairman and sealed with the corporate seal. On the 18th of July the market and tolls were accordingly put up by Messrs. Downton & Sons, auctioneers, for letting by auction. The defendant being the highest bidder, the tolls were knocked down to him, and he thereupon signed conditions of sale whereby it was declared *inter alia*, "1. That the highest bidder shall be the purchaser or renter of the tolls, which shall be let from the 18th day of July instant up to and including the 18th day of July, 1873, but the lessee shall have the option of extending the term for two years. . . . . 2. That on or before the 17th of August next the mayor, &c., shall grant and execute a lease of the said premises to the farmer or renter . . . to be prepared at the expense of the lessee, who shall thereupon be let into possession and receipt of the rents, dues and profits thereof from that time. 3. That the rent which shall be reserved and made payable by the said lease shall be paid by equal monthly payments, the first payment thereof to be paid to the clerk of the lessors or the auctioneer, in advance, immediately on fall of the hammer, and the lessee must always be one month' rent in advance, and enter into a covenant to that effect. And if the lessee shall at any time neglect to pay any or either of such monthly payments when and as the same shall become due, or fail to perform these conditions, the rent then already paid to be absolutely forfeited to the lessors, and the lease so to be granted, or this present letting, as the case may be, shall henceforth at the option only of the lessors to all intents and purposes be null and void, and the lessors, in either case, shall be at liberty without suit at law or in equity to enter into immediate receipt of the rents then happening to be due or to grow due, or re-let the said premises or any part thereof to any other tenant as the case may be, and all losses, costs, damages and expenses whatsoever attending the non-performance of the conditions, or otherwise in relation thereto, or any such second letting, to be made good by the defaulter. 10. That the lessee of the said tolls, on the fall of the hammer, shall produce two sureties to be approved of by the lessors or the clerk) for the due payment of the rent and performance of the covenants to be reserved and contained in the lease, who shall forthwith sign these conditions and the lease, a draft of which has been prepared by the town clerk and approved by the lessors."

[PIGOTT, B.—In *The Fishmongers' Company* v. *Robertson* (2), Tindal, C.J., says that the fact of the corporation "suing upon the contract would amount to an admission on the record by them that such contract was duly entered into on their part, so as to be obligatory on themselves," p. 192.]

And the proposition laid down in that case seems to be recognized as law in *Doe d. Pennington* v. *Taniere* (3), where a dean and chapter had received rent under a lease which was either voidable or void, and it was held that if voidable it was made good, and if void a demise from year to year might be presumed against them.

[KELLY, C.B.—But what was there in the present case enabling the corporation to call on the defendant at the fall of the hammer to produce his sureties?]

No act had in fact been done by them.

[POLLOCK, B., referred to a passage in the judgment of Tindal, C.J., at p. 194, of the judgment in *The Fishmongers' Company* v. *Robertson* (2). The learned Judge speaks of the adoption of the contract by the corporation by part performance on their part, but here my difficulty is to see what part had been performed by the corporation. They never accepted the defendant as tenant.]

A part performance by them is equally an adoption of the contract as if they had fully performed their share of it. They having a right of re-entry on failure by the defendant to perform the conditions, he did fail in respect of producing sureties, yet after that the corporation accept a month's rent; he has the key and possession of the market, and they keep writing to him to produce his sureties within certain extended time. Moreover, the contract was varied by the extension of time.

[KELLY, C.B.—What was the consideration for varying it?]

The rent, the retention thereof, and the possession of the keys.

[PER CURIAM.—The rent was forfeited on non-performance of the conditions of sale by the defendant.]

The corporation, with a full knowledge of that breach, not only accept the rent, but pass a formal resolution adopting the contract, and give the defendant a limited time within which to produce his sureties. "Although a written contract cannot be varied by parol, a Court of Equity, when there have been acts of part performance of the parol variation, will decree a specific performance of the contract with the variation"—Notes to *Lester* v. *Foxcroft* (4). Mere payment of consideration money is not sufficient to bring the case within the exceptions there stated, but payment of *rent* is enough, *Nunn* v. *Fabian* (5). Thirdly, assuming there was only a parol agreement, it was ratified under seal by the resolution of the 7th of August, and so the requisites of the Statute of Frauds have been fulfilled. Whether treated as a contract of the 17th of July or 7th of August, the statute is satisfied by the ratification of the 7th of August after knowledge of the breach of the conditions. Fourthly, the case is one of the class deciding that a corporation created for particular purpose may do the very ac for which they were created witho using the common seal.

[POLLOCK, B.—That rule applies trading companies.]

But need not be limited to them. is said by Cockburn, C.J., to be a "relic barbarous antiquity"—*The South of land Colliery Company* v. *Waddle* (The rule is not confined to trivial matt Managing the market and tolls was on the purposes for which the local bo existed.

Anstie (*Mackay* with him), was called on to support the rule.

KELLY, C.B. (after stating the fa said — Under these circumstances, plaintiff corporation now bring action to recover damages against defendant for non-performance of contract, by the conditions of whic

(2) 5 M. & G. 131; s. c. 12 Law J. Rep. (N.S.) C.P. 185.

(3) 12 Q.B. Rep. 998; s. c. 18 Law J. Rep. (N.S.) Q.B. 49.

(4) 1 White & T. L.C. (4th Ed.) 768 at p

(5) 35 Law J. Rep. (N.S.) Chanc. 140; s. c Rep. 1 Ch. Ap. 35.

(6) 38 Law J. Rep. (N.S.) C.P. 338; s. c. Rep. 4 C.P. 617 at 618.

ought to have been under seal, there had been a part performance because the tenant had been let into possession, had remained there some time, had paid rent, and the action was brought for a distress on the premises in order to recover rent. The Court held, and properly, that there was a part performance of the contract of which the corporation had themselves taken the benefit by allowing the plaintiff to remain in possession, and for which they had received rent, and so rendered themselves liable to a decree for specific performance in equity. Therefore Mansfield, C.J., who had practised in equity many years, and was familiar with the doctrine, said that the plaintiffs would have been bound in equity, and were consequently entitled to take the benefit of the contract, and sue upon it at law. But there is another case which requires some more explanation on this point—*The Fishmongers' Company* v. *Robertson* (2). In that case, as in this, an action was brought by a corporation against the defendant to recover a sum of money payable under a contract which was not under the seal of the plaintiffs, but which had been acted upon, and of which the corporation had taken the benefit. They were therefore rightly held entitled to recover upon it, and in a very elaborate judgment Tindal, C.J., entered into the law with reference to all the authorities, and said, "Upon the general ground of reason and justice, no such answer, viz., want of mutuality, can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they have entered, have received the consideration for their own promise; such promise by them is, therefore, not *nudum pactum;* they never can want to sue the corporation upon the contract in order to enforce the performance of those stipulations which have already been voluntarily performed; and, therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of inability to sue the corporation, which suit they can never want to sustain. It may possibly be the case, that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract, and that the defendants might, during that interval, have the power to retract, and insist that this undertaking amounted to a *nudum pactum* only" (p. 194). Now that was exactly the case here. When this right of action was said to have arisen, namely, at the time of the breach of contract by the defendant, at that time, to use the language of Tindal, C.J., the corporation had *not* performed the stipulations of the contract, and they had not put their seal to any instrument, and consequently the defendant, when called on to pay a deposit, might have said—"I am not bound to do so; there is no mutuality; you have not executed a contract under seal; and there has been no part performance on your part. Had the case rested there, the judgment I have referred to would have perfectly applied. But on reading a preceding page, we find that the Chief Justice did use language which, although a mere *obiter dictum*, from the high authority of the learned Judge, induced me to pause and hear the present case argued out. He says—"Even if the contract put in suit by the corporation had been on their part executory only, not executed" (that is, by part permance on one side or the other), "we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up an objection in a cross-action, that it was not sealed with their common seal" (p. 192), referring to the *Mayor of Thetford's Case* (8) for the principle on which he founded his observations. Now, when we look to the *Mayor of Thetford's Case* (8), we find that it does not support the principle. That was the case of a mandamus to a corporation, who returned certain facts, and the objection was made that the return ought to have been sealed. The

(8) 1 Salk. 192: s. c. 3 Salk. 103; 2 Ld. Raym. 848; 1 Ld. Holt 171.

Court held that to be quite unnecessary as the return was matter of record. And certainly there is a difference in principle between the return to a mandamus, which is a matter of record, and therefore requires no seal, and the mere allegation in a declaration that this corporation had entered into a contract. Otherwise there would be the difficulty arising from a declaration containing two counts, in one of which the plaintiffs said they had entered into a contract under seal, and in the other that they had entered into the very same contract, not under seal but, by writing and mere signature only. In truth, there is really no authority but this for saying that any mere allegation by a corporation in a declaration, unless affirmed by plea, and so made matter of record against the plaintiffs by reason of judgment pronounced by the whole Court, is matter of record binding on them; and I am glad indeed to find, with the assistance of my brother Pigott, who, like myself, was a good deal startled by the sentence above referred to in the judgment of Tindal, C.J., that an authority of greater weight, perhaps than my brother Pigott's, and certainly than my own, has been expressly and directly overruled in the case of *The Copper Miners Company* v. *Fox* (9). There the action was, as here, brought by a corporation on an agreement entered into between them and the defendant, for the purchase and sale of a quantity of iron, and the contract was in writing only, not under seal. The objection was made that the agreement, not being under seal, did not bind the corporation, and it was held that there was no mutuality in the contract as the corporation were not bound, and that the defendant might set up that objection. But Lord Campbell, C.J., on this judgment of Tindal, C.J., being cited, and, of course, very strongly relied on by the learned counsel for the defendants, says—"These observations are entitled to very great respect, but they were not part of the decision in that case. Tindal, C.J., adds, 'But it is unnecessary to determine this point on the present occasion'" (p. 233); and, indeed, the observations were entirely without foundation. I need only say further on this point, that it has been argued there has been part performance of the contract by reason of the defendant having got possession. The contention is, however, entirely unsupported by the facts. All that we find is that, while the matter was *in fieri*, namely, while the defendant was taking advantage of the indulgence of the plaintiffs of a few days to bring forward the sureties, although the officers of the corporation had forbidden the keys of the market to be delivered to the defendant, they were delivered and he had them some days. It is said that is a part performance by letting him into possession through deliberate act of the corporation. But the truth is, that it was by mere mistake that he obtained the keys, and they were handed to him without any authority, and although he may have had possession of the keys he had thereby only constructive possession of the market which, moreover, he never accepted for his own advantage, and he never received a single shilling in respect of tolls. Therefore in no respect was there a part-performance, and there was no benefit to him or to the corporation. On all these grounds, therefore, and on the authorities cited to shew that the defendant was entitled to maintain a suit for specific performance in equity, and consequently there would be mutuality in the agreement, I am of opinion that the plaintiffs are not bound by the contract which they are said to have entered into, but to which their seal is not, affixed and, therefore, that this action is not maintainable.

Then, finally, the argument was submitted to us that there was a ratification or adoption of that contract under seal by the subsequent proceedings of the 7th of August. It is very true that on that day the corporation did, by resolution under seal, so far adopt this contract as to recite it under seal in the same terms as if made by their authority. But this ratification, if it were such, was *too late*. If it had been before breach, it would have been competent for the plaintiffs to have insisted, and said, "We have adoptd this contract; you can enforce specific

(9) 16 Q.B. Rep. 229; s. c. 20 Law J. Rep. (N.S.) Q.B. 174.

When, however, we find that Lord Campbell, C.J., in *The Copper Mining Company* v. *Fox* (9), refused to be bound by it, and made observations tending to shew it is not accurate and cannot be carried out in practice, we are no longer troubled by it. On the whole, although I look on this objection to the maintenance of the action as technical, and am sorry to give the defendant the benefit of our judgment we must nevertheless give effect to the law as we find it.

POLLOCK, B.—I am of the same opinion. This action is brought by the plaintiffs, who are a corporation, for breach of an executory contract, and it was, under these circumstances, open to the defendant to shew that, although the contract was signed, as he admitted it was, by himself, there was no mutuality, by reason of the plaintiffs not being bound. That proposition is very clearly stated in *The Mayor of Stafford* v. *Till* (10), by Best, C.J., who, at p. 77, says, "In an executory contract the plaintiff must rest his case upon an express promise; and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract. We do not decide, therefore, that a corporation could sue in *assumpsit* on every express promise, because if the contract were executory there might be no mutuality of benefit, and consequently no consideration." I would only further remark on that, that it is quite clear it did not enter into the mind of the Court in giving their considered judgment that the proposition suggested by Tindal, C.J., was a correct one. These parties are, as I have said, a corporation, and it has been always laid down, not merely that such a body must act under seal, but that there are cases in which they must of necessity appoint an agent to act for them; "an aggregate corporation being a mere artificial being, cannot act, except through the instrumentality of an agent or attorney, either specially pointed out by the act of incorporation, or specially authorised by the corporation to act in [illegible] behalf"—*Story on Agency*, par. 16, citi[illegible] *Co. Litt.* 66 *b*.

It is open, therefore, to a corporat[illegible] to get rid of the difficulty by appoint[illegible] an agent (to act either generally or sp[illegible]ally) under seal. That seems more t[illegible] a mere technical requirement. I sho[illegible]ld be inclined to adopt the observations [illegible] Rolfe, B., in *The Mayor of Ludlow* [illegible] *Charlton* (11), "We feel ourselves call[illegible] upon to say, that the rule of law requiri[illegible] contracts entered into by corporations [illegible] be generally entered into under seal, a[illegible] not by parol, appears to us to be one [illegible] no means of a merely technical natur[illegible] or which it would be at all safe to rela[illegible] except in cases warranted by the principle[illegible] to which we have already adverted. Th[illegible] seal is required, as authenticating the co[illegible]currence of the whole body corporate."

I cannot imagine a case in which would seem more clear that that rule oug[illegible] to be upheld than in the present, whe[illegible] we are asked, and forcibly asked, by t[illegible] learned counsel for the plaintiffs to assu[illegible] a great deal from the conduct of office[illegible] of the corporation. I am disposed to f[illegible] back on the old rule, and say, that wh[illegible] a man is dealing with a corporate bo[illegible]y, he must look to see that the officers [illegible] authorised under the common seal. [illegible] it said that this contract is brought wit[illegible] two exceptions to the rule. First, that t[illegible] letting of the tolls was an ordinary act [illegible] the part of the plaintiffs, just as an act [illegible] buying or selling goods by a trading com[illegible]pany—an every day affair which it would [illegible] be impossible or inconvenient to negotiate [illegible] under seal. I cannot, however, think the case is one of that kind, and upon this point the learned counsel very properly did not much rely. The second and more maintainable point is that where there has been anything like an enjoyment by the defendant which would estop him from saying there was any bargain at all, that is equivalent to a part performance which would entitle him to maintain a bill in equity for specific performance on the other side. But here that point fails on the facts, for the defendant never did occupy or enjoy

(10) 4 Bing. 75; s. c. 5 Law J. Rep. (N.S.) C.P. 77.

(11) 6 Mee. & W. 815, at p. 823; s. c. 10 Law J. Rep. (N.S.) Exch. 77.

the premises, and moreover I see no circumstances which would entitle him to file a bill in equity against the plaintiffs to enforce the contract on which they are now suing. I do see grounds for thinking that if he had sought to recover back his deposit or file his bill in equity for it, he might have succeeded on the ground only that the contract had failed and fallen through. On all these grounds therefore it seems to me that, in deciding according to the past authorities, we are adhering to a very safe rule for the guidance of corporations and individuals in matters of this kind.

Rule absolute (12).

Attorneys—Robinson & Preston, agents for Morton, Kidderminster, for plaintiffs; Prior, Bigg & Co., agents for Knott, Worcester, for defendant.

1873. Nov. 21. } DAWSON AND OTHERS *v.* LORD OTHO FITZGERALD.

Contract — Arbitration Clause — Indivisible Agreement — Reference, a Condition Precedent—Landlord and Tenant—Damage by Hares and Rabbits.

Declaration, that the defendant became tenant to the plaintiffs of lands upon the terms that the defendant would keep such number only of hares and rabbits as would do no injury to the trees, &c., belonging to the plaintiffs, or to the growing crops of any of their tenants, and that in case the defendant should keep such a number of hares and rabbits as should injure the trees, &c., the defendant should and would pay to the plaintiffs or their tenants a fair and reasonable compensation for such injury. Breach, that the defendant kept such a number of hares and rabbits as did injury to such trees, &c., and had not paid a fair and reasonable or any compensation. Plea, that one of the terms of the said tenancy was that, in case any such injury should be done by the defendant, he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs, and the other by the defendant, &c. Averment, that a difference arose, no arbitrators had been appointed, nor had an award ever been made deciding the amount of such compensation, according to the terms of the said tenancy. On demurrer, — Held (BRAMWELL, B., *dubitante*), *that the plea was good; for that the stipulation therein stated did not consist of two separate agreements, viz., one to pay compensation, the other to refer the amount, but was an indivisible agreement to pay such compensation as should be assessed by arbitration, and not otherwise.*

Declaration, that the defendant became and was tenant to the plaintiffs of a messuage and lands, with a right of shooting over certain manors of the plaintiffs, and upon the terms, *inter alia*, that the defendant "would at all times during his said tenancy keep or cause to be kept or encouraged such number only of hares and rabbits upon the said manors, or any part thereof, as would do no injury to the trees, woods, underwoods and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers, and that in case the defendant should keep or encourage such a number of hares and rabbits upon the said manors, or any part thereof, as should injure the trees," &c., "the defendant should and would pay to the plaintiffs, or their tenants or farmers, a fair and reasonable compensation for such injury. Breach, *inter alia*, that the defendant kept such a number of hares and rabbits "as did great injury to such trees," &c., "respectively, and although frequently requested so to do, the defendant would not pay nor has he paid to the plaintiffs, or to their tenants or farmers or any of them, a fair and reasonable or any compensation for such injury or any part thereof."

Third plea, as to the breach aforesaid, "that one of the terms of the said tenancy was that in case any such injury should be done by the defendant, he, the defen-

(12) Bramwell, B., left the Court during the argument.

dant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs, and the other by the defendant, the said arbitrators when chosen to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant, and that a difference arose between the plaintiffs and the defendant as to the amount of the said compensation in the said count claimed, and that no arbitrators have ever been appointed, nor has the defendant been requested by the plaintiffs to appoint an arbitrator, nor has an award ever been made deciding the amount of the said compensation, according to the terms of the said tenancy."

Demurrer and joinder.

Kingdon (with him *Charles*), for the plaintiffs.—The broad distinction running through the many apparently irreconcileable cases upon separate covenants is that stated by Bramwell, B., in *Tredwen* v. *Holman* (1)—"If a tenant covenants that he will cultivate the demised lands in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be awarded by an arbitrator, no action will lie until he has ascertained them" (2). *Elliott* v. *The Royal Exchange Assurance Company* (3) was an action upon a fire policy. The instrument contained an arbitration clause which was pleaded, and Kelly, C.B., says (p. 241), "The form of the policy is a covenant by the defendants that their capital, stock, &c., shall be subject to make good the plaintiff's loss, not exceeding the sum of 2,200*l.*, 'according to the exact tenour of the

(1) 1 Hurl. & C. 72; s.c. 31 Law J. Rep. (N.S.) Exch. 398.

(2) 1 Hurl. & C. at p. 289.

(3) 36 Law J. Rep. (N.S.) Exch. 129; s. c. Law Rep. 2 Exch. 237.

articles thereunto subjoined.'
tence had stopped at the figu
and in a subsequent part of the
there had been independent
which might be supposed to
fied these words, it might h
question of greater doubt, wh
provisions were to be held
precedent, or a collateral
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itself, in its very terms, qualifi
conditional by the subsequ
referring to the articles, whic
without any interval, form an
substantial part of the coven
the majority of the Court hel
rer, that the covenant was onl
to pay 'the adjusted loss, an
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fore, if one part of a deed
covenant to pay compensatio
other an agreement to refer
covenant to pay a fair and
compensation, and a distinct a
dent covenant to refer that
ascertained by arbitration. T
covenants. Prior to *Scott* v
it was never disputed that a
to refer is a separate covenan

[BRAMWELL, B.—Nor was
in that case. I expressly
and gave the illustration of
one deed to pay money, an
in another to refer all dispu
instance, if a breach occur
second deed, of course the
reference. And test the
Suppose an action on the
refer, for not nominating
the damages would be no
the damages arising fro
covenant to pay.]

Turner (*Sir J. Karslak*
the defendant.—The p
good. As Coleridge, J
v. *Avery* (4), "there is
to the principle. Both
it is not unlawful for
to impose a condition
respect to the mode
amount of damages, or

(4) 5 H. L. Cas. 811; s. c
Exch. 308.

ing it or any other matters of that kind which do not go to the root of the action." Here there is one covenant only, just as in a builder's agreement to abide by the certificate of the surveyor. The meaning of it is, "I will pay such damage done as, in case we cannot agree, an arbitrator shall award." The object of the parties was to avoid the expense of trial by jury with a view of the *locus in quo*. There is no difference in principle between the contract in *Elliott* v. *The Royal Exchange Assurance Company* (3) and the present one.

Kingdon replied.

Our. adv. vult.

On the 21st of November the following judgments were delivered—

KELLY, C.B.—The declaration states that the defendant became and was tenant to the plaintiffs of a messuage and lands, with a right of shooting over certain manors of the plaintiffs, and upon the terms that the defendant would at all times during his said tenancy keep or cause to be kept or encouraged such number only of hares and rabbits upon the said manors, or any part thereof, as would do no injury to the trees, woods, underwoods and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers, and that in case the defendant should keep or encourage such a number of hares and rabbits upon the said manors, or any part thereof, as should injure the trees, &c., the defendant should and would pay to the plaintiffs, or their tenants or farmers, a fair and reasonable compensation for such injury. The breach alleged is that the defendant did keep such a number of hares and rabbits as did great injury to such trees, &c.; and, no doubt, if the covenant had stopped there, and the breach had been committed, the action could have been maintained; but the defendant pleads a plea on which the present question arises, namely, whether the plea is an answer to the action. That plea is, that one of the terms of the said tenancy was that in case any such injury should be done by the defendant, he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs, and the other by the defendant, the said arbitrators when chosen to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant, and that a difference arose between the plaintiffs and the defendant as to the amount of the said compensation in the said count claimed, and that no arbitrators have ever been appointed, nor has the defendant been requested by the plaintiffs to appoint an arbitrator, nor has an award ever been made deciding the amount of the said compensation, according to the terms of the said tenancy.

I am of opinion that this plea is an answer to the declaration; and, but for what has fallen from various learned Judges in decided cases, and for the inclination of opinion hinted at by my brother Bramwell in this case, I should have said that I was clearly of opinion that in order to give effect to the undoubted intention of the parties this must be taken to be one covenant. It is expressed in one sentence, and the meaning, according to my idea of the intention of the parties, was that in case of any damage being done for which compensation should be paid, the amount of such compensation should be determined—not by a jury or any other tribunal or body of persons than those described in the same sentence without even a comma interposed, namely, two arbitrators. The ground on which the argument for the plaintiff proceeded rests on something supposed to have fallen from Lord Coke, which therefore comes before us as supported by the highest authority, namely, that the effect of the proviso as to arbitration is to oust the jurisdiction of the Courts of Law, and that the proviso is therefore inoperative. I can only say that I regret that such should be considered the law of this country, because it would be absurd and unjust. It is obviously absurd that in cases where persons have agreed for payment of a sum of money the amount of which in case of difference shall be determined by an arbitrator named between them,

a Court of law is to be called on to hold that the agreement shall not stand good, but that an action shall be brought, and a jury, and not an arbitrator, settle the amount.

Now here, if it be, as has been held in some cases, that the parties must proceed on independent covenants, and that to give effect to the covenant as to arbitration is to oust the jurisdiction of the Court, and that cannot be done—suppose they do so. Well, they go to trial on the breach as to the keeping of the hares and rabbits, and the jury find a verdict for 500*l.* There is judgment for that amount, and the defendant must pay it with costs. But then it is *his* turn, the defendant becomes plaintiff, and sues on the refusal to submit the matter to arbitration, and *he* recovers damages; and it may be the opinion of the jury that, if the first claim had been submitted to arbitration, the arbitrator would have found less than one-half the damages which were given in the previous action. Could it be conceived in a country where law prevailed, and the maxim *lex est summa ratio*, that for one and the same cause of action one tribunal had decided upon 500*l.* as the amount of damages, and another, acting upon the same instrument and agreement, had given damages which might only be one-half that sum! I read the agreement as one for payment of compensation to be, in case of difference, determined by an arbitrator, and in no other way. It is in effect one covenant, and under these circumstances it is quite unnecessary to refer to the cases bearing on the subject.

Bramwell, B.—There is, or ought to be, no doubt or difficulty as to the principle on which this case should be decided. The learned counsel on both sides are agreed on this principle, and I think there is no difficulty with regard to it in the mind of the Court. It may be concisely stated, as it has been several times by me, to be this, namely, if there is a covenant to do a particular thing (for example, to pay a sum of money) and an addition to that, or something further, or collateral, that in event of difference between the parties as to what shall be done under the first cove-

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going to be entangled in a long arbitration for 5*l.*, I abandon that." The reason for holding that the construction put by the Courts on these instruments is rational is, that such is not an unreasonable bargain for persons to enter into; and when we bear in mind the provisions of the Common Law Procedure Act, which enable a defendant to stay the proceedings if unreasonable, and appoint a single arbitrator if the other refuses, and to stay the award if necessary, this covenant does not appear unreasonable, and in considering the plea we ought not to have any predisposition against it. For once, I think, the ancients were right, and we should follow their footsteps so long as they are so. I incline to think that there are two reasons why this plea is bad. In the first place the covenant by the defendant is this, that he "would at all times during his said tenancy keep or cause to be kept or encouraged such number only of hares and rabbits upon the said manors or any part thereof as would do no injury to the trees, woods, underwoods and plantations belonging to the plaintiffs." I doubt very much whether that is not a separate and independent covenant, and whether there might not be a breach if he did the act covenanted against, without going on to say, "he did not pay compensation." Because, supposing he had done the act wilfully, I am not sure whether vindictive damages might not be recovered against him. But the covenant proceeds, "and that in case the defendant should keep or encourage such a number of hares and rabbits" as should do such injury. Now it may be said the meaning of the covenant is not absolute, that he will not do it, but that if he does do it he will pay a sum of money. The inclination of my opinion is that that is not the meaning of the covenant for the reasons I have given, and also because I am not sure that the tenant would not have an action on the covenant. Then, as to the other part of the covenant, that "the defendant should and would pay to the plaintiffs or their tenants or farmers a fair and reasonable compensation for such injury, the amount of such compensation in case of difference to be fixed by the arbitration of two arbitrators." Now it is said for the defendant by his learned counsel, with his usual conciseness of expression, that the meaning of this covenant is, "I will pay you such a sum of money as shall be fixed by two arbitrators." If it were so, the plea is good. But, according to Mr. Turner, the agreement is not accurately stated in the declaration—it was an ageement to pay such sum as should be fixed by two arbitrators. If he be right, the defendant is entitled to judgment, if otherwise the plaintiffs. What is the meaning? If there were any other *description* of the compensation being paid than that it should be that fixed by two arbitrators, why then it must be fixed by two arbitrators before cause of action. The description is, "*reasonable* compensation." Besides suppose the defendant had gone to the plaintiff and said, "I have kept too many hares and rabbits, here is 50*l.*; what do you think is the damage they have done?" and the plaintiff said, "I will take the 50*l.*; I have not looked into the matter." Now, according to the argument, it would not have been a defence that he had taken that sum, because he had agreed to take what an arbitrator should fix. The answer would be, "But you agreed to take a *reasonable* amount; well, it ought to be fixed, if there is a difference; but in the meantime I have paid a *reasonable* amount, and you agreed to take a reasonable amount." That is the alternative way of putting the matter, and when one comes to see that the defendant is to pay to the plaintiffs *or their tenants*, it may be that he has paid a dozen of their tenants the sums they are content to take, and, as to what he should pay a single tenant, they want to send him to arbitration. Were it not for the different opinion entertained by the rest of the Court, I should have held, first, that there was an absolute agreement not to do mischief, but, secondly, if that were otherwise, and the agreement must be read, "not to do mischief *or* pay a reasonable amount," I should have thought that the agreement for arbitration was a separate covenant, but did not furnish an answer to the action. These *would* have been my opinions; they are not sufficiently so for me to say that I formally differ from my Lord and my brother Pigott.

trustees the sum of 15*l.* towards her funeral expenses. Now this indenture witnesseth that in pursuance of such proposal and agreement on the part of the said Richard Holt, and for effectuating the said arrangement and in consideration of the covenants hereinafter contained, he, the said Richard Holt, doth hereby for himself, his heirs, &c., covenant with the trustees, that he, the said Richard Holt, his heirs, &c., "shall and will henceforth, during the joint lives of the said Richard Holt and Lucy Holt, and during so long time as they shall live separate and apart, well and truly pay or cause to be paid unto the said trustees," &c., "for the separate use of the said Lucy Holt, as hereinafter expressed, an annuity or yearly sum of 63*l.* by four equal quarterly payments" on certain days. And in case the said Richard Holt shall die before the said Lucy Holt his wife, then the trustees shall pay her 63*l.*; "and in case the said Lucy Holt shall die before the said Richard Holt her husband," then that the said Richard Holt, his executors or administrators, shall pay to the trustees 15*l.* towards her funeral expenses. And notwithstanding the marriage "between the said Richard Holt and Lucy Holt, it shall be lawful for the said Lucy Holt, from time to time, and at all times hereafter to live separate and apart from him, the said Richard Holt, in such sort and in manner as if she was sole and unmarried, and that he, the said Richard Holt, shall not nor will compel, nor endeavour to compel her to cohabit or live with him by any proceeding in the Court of Divorce, or otherwise howsoever. . . . And also that it shall be lawful for the said Lucy Holt from henceforth to have, take and enjoy for her own separate and absolute use, notwithstanding her coverture, all such jewels, furniture," &c., "as have been or shall be bequeathed or given to her," &c. There was also a covenant by the trustees that Lucy Holt should not molest the defendant.

Averment, that the deed was executed, and after the marriage of the defendant and the said Lucy Holt, and after the execution of the said deed, the said Lucy Holt committed adultery with Samuel Oxley, and thereupon the defendant duly commenced a suit for dissolution said marriage in her Majesty's Co Divorce and Matrimonial Causes a the said Lucy Holt and Samuel and such proceedings were duly l the Court in the said suit, that c 26th day of November, 1872, by the absolute of the said Court, the said riage was absolutely dissolved, whi cree still remains in force. And th payments sued for accrued after th solution.

Demurrer and joinder.

Herschell (*T. Atkinson* with him the plaintiffs.—The authorities go to that neither of the allegations in th are an answer to the action.

[KELLY, C.B.—There is no condit the covenant. It is absolute for pa during life.]

Adultery by the wife would affo defence. In *Baynon* v. *Batley* (1), tery of a wife after separation wa to be a bad plea to a covenant to trustee a separate maintenance for th So, where a marriage settlement wn when executed the wife does not, by tery, lose any benefit which it con upon her; and the Court of Chance no power to set aside the settle although the marriage has been dis by the Divorce Court—*Evans* v. *Co ton* (2). Then is dissolution of the riage an answer? *Jee* v. *Thurlo* shews that a divorce *a mensa et t* not sufficient. Nor is a divorce *a t matrimonii* either—*Goslin* v. *Clarl* There a decree of dissolution of ma by the Divorce Court, on the grou adultery, was held to be no answer action by the wife's trustees upon a nant by the husband to pay her an a contained in a deed of separation recited the wife's acknowledgment adultery, which was afterwards ma foundation of the suit in the D Court. Possibly the recital of the

(1) 8 Bing. 256; s. c. 1 Law J. Rep. (N. 75.

(2) 1 J. & H. 598; s. c. 30 Law J. Re Chanc. 364.

(3) 2 B. & C. 546.

(4) 12 Com. B. Rep. N.S. 681; s. c. 31 Rep. (N.S.) C.P. 330.

tery may be said to distinguish that case from the present, yet the decision shews that the mere fact of a dissolution of marriage does not *per se* put an end to the covenant.

[KELLY, C.B.—Is there not power in the Divorce Court to deal with the deed?]

Yes. "The Court after a final decree of nullity of marriage or dissolution of marriage, may enquire into the existence of ante-nuptial or post-nuptial settlements . . . . and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."—22 & 23 Vict. c. 61. s. 5. But there are many cases in which the Divorce Court would refuse to interfere with such a deed as the present; for example, where the wife had brought a large fortune to the husband on marriage. Nevertheless, all deeds whereby property is settled upon a woman in her character as wife, and to be paid to her whilst she continues a wife, come within the scope of 22 & 23 Vict. c. 61. s. 5, and the Court has power to deal with them—*Worsley* v. *Worsley* (5). Then if it be held that on divorce an obligation like this is at an end, why should the jurisdiction over it be given to the Divorce Court?

Holker (*Digby* with him), for the defendant.—The case depends on the construction of the deed. The covenant is to pay the annuity while the woman has the status of wife. The instrument is expressed to be made between Richard Holt and the trustees and "Lucy his wife," and the payment is to be made during so long time as they shall live separate and apart, *i.e.* while either of them has power to insist at law on living with the other. "And in case the said Richard Holt shall die before Lucy Holt, his wife," there is a provision as to funeral expenses.

[BRAMWELL, B.—The covenant is to pay "during the joint lives of them, *and* so long as they shall live separate." If the word "or" stood in place of the word "and," it would have been more favourable to your argument.]

The intention must be regarded; the covenant by the trustees is the consideration for the husband's covenant. Throughout the whole deed it appears that the parties intended the provision for the wife to apply only while the relations of the husband and wife existed. It is hard that a man should have to maintain an adulterous wife after she has lost her common law rights. And, to construe the covenant strictly, it is an undertaking by the defendant to pay to "*Lucy Holt his wife.*" She is no longer Lucy Holt, and has ceased to be his wife. As to *Baynon* v. *Batley* (1) and *Evans* v. *Carrington* (2), there is a wide difference between the mere commission of adultery and a divorce by a legal tribunal. The covenant in *Goslin* v. *Clark* (4) had nothing to qualify it; whereas here are expressions throughout the deed limiting it to married life.

[KELLY, C.B.—Suppose the *husband* had committed adultery, and had been separated from his wife by the Divorce Court? BRAMWELL, B.—The answer might be, "Why the wife chose to divorce herself from him, and need not have done so." Which was first in date, the Divorce Act or the deed?]

The one was passed in 1859, the other executed in 1858.

Herschell in reply.

KELLY, C.B.—All the authorities bearing on the question are, as far as they go, one way, and there is no authority for the common law introducing words into a covenant which would totally alter the effect of it. In this case the parties might, if they liked, have easily used words, *e.g.* "as long as she conducted herself properly," which would have had the effect of restricting the obligation. But if we were to insert such words, and impose on the trustees any such condition as that of shewing her to be of good conduct, it would be necessary to do so just as much where there was adultery without divorce as where there was a divorce for adultery. Mr. Holker contended that where a wife has forfeited all just rights, it is hard that the husband should have to maintain her.

(5) 38 Law J. Rep. (N.S.) Prob. & M. 43; s. c. Law Rep. 1 P. & D. 648.

Possibly so; but we have in truth no authority to warrant us in altering the terms of a covenant of this nature, and introducing others more reasonable, just and proper. Now the words used are that the husband "shall and will henceforth during the joint lives of the said Richard Holt and Lucy Holt, and during so long time as they shall live separate and apart" pay the annuity. The expediency of the provision is done away with by the Divorce Act, but that must not affect our decision, unless we are to say that the words used are to have one construction before the date of the Act, and another after it. I may observe, moreover, that if it were proper and just, under all the cirumstances, as, for instance, if there were children of the marriage, to increase or diminish the amount of the allowance, the Divorce Court has not done so on this occasion.

Bramwell, B.—I am of the same opinion. Mr. Holker does not contend that we ought to imply in this deed a stipulation that if the marriage were dissolved, the annuity should cease. He could not do so. Remember how these deeds come into existence. A husband and wife are continually differing, and, at last, they make arrangements for a separation. Some deeds may contemplate the parties coming together again; if the husband chooses to limit the payment to the wife during good behaviour, he can do so decently enough by saying, "if anything happens which may cause the marriage to be dissolved," and unless the parties themselves put into their agreement some terms of this sort, we ought not to insert them without cogent reasons for so doing. There are clearly none here. The woman may, on the occasion when the provision was made for her, have given up considerable rights. Surely, therefore, we ought not to import such a condition as the one suggested into a deed which is written in express words. But, for the defendant, it is contended that the construction is that the annuity is to be paid "only so long as the marriage tie is subsisting." I think not. When a deed of this kind is executed there is always a possibility of the husband and wife coming together again, and unless a proviso is inserted that the annuity shall be paid only while they are apart, it would continue even although they come together again. By the terms of this covenant Richard Holt agrees to pay the annuity "during the joint lives of the said Richard Holt and Lucy Holt;" if it stopped there, even although the husband and wife lived together again, he would be liable to pay this annuity; so to guard against that contingency he adds in effect, "but not if we come together again," which he expresses in an inaccurate way thus, "*and* during so long time as they shall live separate and apart." That, I say, is inaccurate, because, if the payment is to be made during the joint lives of the two, it is inevitably to be paid while they live apart, and while they live together. The meaning really is, "but *only* while they should live apart." They have used the word "and" improperly, but that is no qualification of the general condition which is, "provided that if they come together again he shall not pay." The clause in question follows many other expressions, as to "pay up to his or her death," and so on, and then a general covenant on the part of the trustees that the wife shall not molest him at any future time. Suppose she did molest him, and the plaintiffs could reasonably prevent there being a quarrel, they would be liable to an action. In the result, I am of opinion that this is an absolute covenant for the payment of this annuity, subject only to this, namely, that if the parties should live together again, then the defendant is not to pay. That being so, the question is whether, on the construction of the plea, this action can be maintained. I think the Lord Chief Baron's test is a very good one, though not conclusive. We cannot help feeling that this is rather an impudent claim, but suppose the *husband* had committed adultery, and the marriage had been dissolved? I do not say that is a conclusive test, because the husband might say to the wife, "You have voluntarily dissolved the marriage tie; I am under no obligation as your husband, nor any obligation, because, but for your act, the relations of husband and wife could have subsisted."

to her, "I shall merely give you sufficient to bring up the children properly; I will give you 300*l.* a year to keep the children," and that she had maintained them and provided for their education ever since. The plaintiff's brother testified that the defendant told him he would "allow the plaintiff 300*l.* a year for the education and support of the children until he could afford to put down a sum of money." In an unsigned letter, dated the 18th of February, 1866, the defendant wrote to the plaintiff, "I have always told you I would give you 300*l.* per annum, whilst I have it in my power, until I can give you a fixed sum, which I am working hard to get matters settled so as to put it in my power to accomplish." The defendant having paid the annuity for some years discontinued it, alleging that the children were not brought up properly.

The defendant's counsel claimed a nonsuit, objecting that all this evidence of the promise was inadmissible by reason of the Statute of Frauds, section 4, which enacts, "That no action shall be brought whereby . . . to charge any person . . . upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Kelly, C.B., overruled the objection, and on its appearing that instalments for two years and a half were due and unpaid before suit, amended the claim in the declaration to 750*l.*, and directed a verdict for that amount, reserving leave to the defendants to move to enter a nonsuit if the Court should hold that there was no evidence for the jury, and also to reduce the verdict to 600*l.* if in the opinion of the Court there was no power to amend the declaration.

Cole (*Charles* with him) now moved accordingly.—The present case falls within the rule laid down in *Peter* v. *Compton* (2) that, "where it *appears* by the whole tenour of the agreement that it is to be performed after the year there a note is necessary, otherwise not." In the notes to that case the editors say that the statute applies to "a contract for payment of an annuity, though it may determine within the year by the death of the annuitant—*Sweet* v. *Lee*" (3).

[Bramwell, B.—There, as Maule, J., said, "The dictionary might be published within the year, but the annuity could not be paid within that time." In *Souch* v. *Strawbridge* (4) the rule was stated to be "that where the agreement distinctly shews upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year the case is within the statute; but that where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary the statute does not apply. . . . A contract to serve another for two years would be within the statute; but a contract to serve for an indefinite period, subject to be put an end to at any time upon a reasonable notice, is not within the statute, though it may extend beyond the year."]

That is no longer the rule since *Dobson* v. *Collis* (5), where a contract for more than a year's service, though determinable by notice within the year, was held within the statute. In *Farrington* v. *Donohoe* (6) an agreement to maintain a child aged about five until she could maintain herself was held within the statute. Then, the Common Law Procedure Act gives no power to amend the claim for damages, and there is no precedent for such an amendment.

Bramwell, B.—We are of opinion that this rule should be refused. We take entirely the same view as my Lord did at the trial. The first question is, what really is the effect of the promise? I think it is this—"I wish you to maintain these children, and so long as you do I will pay you for it at the rate of 300*l.* a

(2) 1 Smith's L. Cas. 6th edit. 296–7.

(3) 3 Man. & Gr. 452.

(4) 2 Com. B. Rep. 808; s.c. 15 Law J. Rep. (N.S.) C.P. 170.

(5) 1 Hurl. & N. 81; s.c. 25 Law J. Rep. (N.S.) Exch. 267.

(6) Irish Law Rep. 1 C.L. 675.

year, payable quarterly." It is called an annuity, an annual sum, because no doubt the parties thought most probably it would last over a considerable period of time, and they thought of what sum yearly would be coming to the plaintiff. But really it is rather—"Maintain the children, and you shall be paid at that rate so long as you do that." Now when that is stated it seems to me to be an engagement which is not binding on either party for any space of time at all; indeed I feel satisfied that at the end of any quarter the defendant might have said—not perhaps without giving a reasonable notice—"I shall no longer contribute to or provide for the maintenance of these children in the way I have hitherto done. I shall maintain them no longer on those terms." It seems to me impossible to hold that this was binding for all time upon the defendant. I do not see what limit there is to be put upon it. But it is not to be supposed that he undertook to be liable for the maintenance of the children for as long as they or the mother might live, or until they came of age or married, or became able to maintain themselves. I cannot think that if he had been a poor man or the children had been able to maintain themselves, he would not have been at liberty in law, if he wished, to back out of this engagement. If it was binding on him it must have been binding on her for the same time. If the promise were, "so long as you maintain them I will pay you," then it follows he has a right to say, "I will not maintain them any longer;" just as though a man said, "so long as you supply goods to so and so, I will pay;" that does not mean without power of revocation. Then was she bound? I cannot conceive for a moment that the plaintiff was bound for any definite time, or for the lives of the children. In the result, therefore, dealing with the case no doubt partly as a juryman, I think the contract was this—"So long as you, by my request and with my consent, maintain these children in a certain way and provide for their education, I will pay you at the rate of 300*l.* a year, I will make you quarterly payments of 75*l.* each." If that is the right view of the promise it is manifest that it is not within the Statute of Frauds, that is to say, though it is a promise which has not been performed within the year, and though the parties no doubt had expected that it would last longer than a year, yet it is perfectly consistent with that that it might be performed within the year. Upon that ground alone I think the rule ought to be refused.

But I think it should be refused also upon another ground. In *Souch* v. *Strawbridge* (4), Tindal, C.J., expressed an opinion that the Statute of Frauds did not apply to actions upon an executed consideration. The other Judges neither dissented from nor assented to that; I am not going to start a question as to which there may be some difficulty, but if the declaration had been amended by introducing a count stating that in consideration that the plaintiff had at the defendant's request undertaken, upon the terms that he should pay her so much, to maintain these children for a certain time, it is manifest to me that that count would have been supported, and she would have been entitled to recover. Mr. Cole said his client wanted to know what his rights were. I have intimated an opinion to this effect: that he may withdraw from the obligation if he thinks fit, but certainly so far as this action is concerned I think it is a question of pleading.

As to the other point about amending the declaration, I think my Lord was quite right in amending it, because it is admitted the plaintiff intended bringing her action for all she was entitled to. [After reading the Common Law Procedure Act, 1852, s. 222, the learned Judge proceeded]—This was a "defect," and the amendment was one "necessary for the purpose of determining in the existing suit the real question in controversy between the parties." It was in controversy between the parties whether he was not indebted to her in 750*l.* Is not that a "defect?" I do hope those words are comprehensive enough. The Act was prepared by the late Mr. Justice Willes and myself, and we endeavoured to use words that would be comprehensive.

PIGOTT, B.—I am of the same opinion. I think my Lord was right in his ruling

that this was not a contract within the Statute of Frauds. I think the effect of this contract has been rightly stated by my brother Bramwell. It is an undertaking to pay a sum of money per annum, quarterly, in consideration of the plaintiff maintaining and educating the children. But it is quite indefinite as to the time during which that shall continue. Then what is the meaning of the Statute of Frauds? I agree with the language of Best, C.J., in *Wells* v. *Horton* (7), where, in consideration of the plaintiff forbearing to sue, a debtor promised that his executors should pay the plaintiff 10,000*l.*, and the question was whether that was within the Statute of Frauds, and Best, C.J., says, "The plain meaning of the words is confined to contracts which by agreement are not to be carried into execution within a year, and does not extend to such as may by circumstances be postponed beyond that period, otherwise there is no contract which might not fall within the statute." I agree with that reading of the statute, and also with the view taken by my brother Bramwell, of the effect of this promise. That being so it seems to me the necessary consequence is—as he has stated—that it is competent to either party to put an end to this agreement under any change of circumstances. For instance, if the defendant had become bankrupt, or much straitened in circumstances, and no longer able to maintain the children, or was desirous of maintaining them himself in a different way—then it would be competent for him to say, "We can no longer go on on the same footing."

As to the amendment, I never heard it doubted before that a Judge could amend the declaration in the amount of damages. If I have not done it I have offered to do it more than once. The words of the statute are large enough. No injustice would be done, and I cannot help thinking it almost as clear a case as has ever been brought before us.

KELLY, C.B.—I also think that there should be no rule. I forbear to pronounce any opinion as to whether it was competent to either party to determine this contract at his or her pleasure, and I refrain from saying anything that can affect any question that may arise in some future action. But with regard to the contract itself we have only to consider whether it is expressed in plain language. It is true the defendant engaged to pay an "annuity." In one sense it is an annuity, but it is not necessarily to continue for even one entire year, for the children might all die within the year; still less for a number of years. The engagement is, to pay her at the rate of 300*l.* a year as long as the plaintiff shall perform the condition upon which that sum is to be paid. Under these circumstances I cannot but think that the opinion of Best, C.J., in *Wells* v. *Horton* (7), and the case of *Souch* v. *Strawbridge* (4) are authorities upon the point, and I am clearly of opinion that this is not a case within the Statute of Frauds.

The amendment, I think, is strictly within the words of the Common Law Procedure Act, s. 222.

Rule refused.

(7) 4 Bing. 40.

Attorneys—Le Riche & Son, agents for Carter & Son, Torquay, for plaintiff; Wedlake & Letts, agents for Edmonds & Son, Plymouth, for defendant.

1873. Nov. 20. } THE ATTORNEY-GENERAL *v.* LOMAS.

Probate Duty—Conversion of Realty into Personalty—Resulting Trust in Favour of Heir.

One seised in fee of realty devised and bequeathed by will all his realty and personalty to trustees in trust to sell, and to stand possessed of the proceeds after making certain payments, and to invest the moneys, and to hold the investments and the income thereof in trust to pay an annuity to his widow for life, and as to the residue in trust for all his children who should attain twenty-one; in default of such children the testator bequeathed the investments, as to certain portions thereof, to certain legatees, and as to the residue on certain trusts which failed. On the testator's death his only child, Margaret, was his heiress at law and one of his next of kin. She died afterwards

under twenty-one and unmarried. The realty at her death was unsold and uncontracted to be sold, but was subsequently sold under the trusts of the will for a sum which was its value, and which was paid to her legal personal representative as such:— **Held,** *that probate duty was payable at Margaret's death upon the value of the realty as being part of her estate and effects.*

Information by the Attorney-General, containing the following allegations.

C. J. Buckley, by his will, dated the 22nd of September, 1863, after bequeathing certain specific and pecuniary legacies, devised all his real estate to trustees upon trust to sell at such time or times as the trustees should in their discretion deem prudent or expedient; and bequeathed the residue of his personal estate to the trustees upon trust to sell, call in and convert into money such part of the residuary personal estate as might not consist of money, and to stand possessed of the proceeds arising from the sale and conversion of the said real and residuary personal estates, or otherwise constituting the same, after payment of his debts, funeral and testamentary expenses, costs of proving his will, and the payment of the several legacies therein bequeathed, or to be thereafter bequeathed by any codicil, and to invest the moneys in certain securities; to hold the trust moneys and securities and the income thereof in trust to pay thereout to his wife an annuity of 100*l.* for her life, and as to the residue of the said trust moneys and securities, and the income thereof, and also as to the same (if any) set apart to secure the annuity to his niece, from and after the ceasing of the annuity, in trust for all his children living at his decease, who being males should attain twenty-one, or being females should attain twenty-one or marry, the shares of his daughters to be held during their lives for their separate use without power of anticipation, and after their deaths on certain trusts for their children. And if there should be no child of the testator's who should attain twenty-one, from and after such default or failure of children the testator bequeathed the said trust moneys and securities, as to 3,000*l.*, part thereof, to W.; and as to 1,000*l.*, other part thereof, to M.; and as to 1,000*l.*, other part thereof, to C.; and as to all the rest, residue and remainder thereof, and generally of all his estate and effects whatsoever not otherwise disposed of, the testator gave, devised and bequeathed the same to the trustees in trust for the children of the testator's brother Richard, then living, who should attain twenty-one or marry. Provided that the testator's unsold real estate and outstanding personal estate should be subject to the trusts thereinbefore contained concerning the moneys and securities aforesaid, and that the rents and yearly produce thereof should be deemed annual produce for the purposes of such trusts, and that such real estate should be transmissible as personal estate under the trusts thereinbefore contained. With power (*inter alia*) to the trustees, with the consent in writing of all his children then living and of the age of twenty-one years, instead of selling any part of his estate to appropriate such part in or towards satisfaction of any share or legacy thereby given to or in favour of any of his children.

The testator died the 6th of May, 1865, and his will was proved shortly after. He had one child only, Margaret, who died in 1871 unmarried and under twenty-one. The testator's brother Richard had one child only, who died in 1860 an infant unmarried. Margaret was the testator's heiress-at law, and one of his next of kin. At his death the testator was seised in fee in possession of real estate to the amount in value of 3,825*l.*, which was still unsold and uncontracted to be sold at Margaret's death, but has since been sold under the trusts of the will. And the Attorney-General contends that on the true construction of the will the testator's real estate devolved upon Margaret as his heiress-at-law in the quality of personal estate and not of real estate, and that such real estate was at the time of the death of Margaret to be treated in equity as absolutely converted into personalty; and that probate duty ought to be paid by the defendant as the legal personal representative of Margaret, as well on the value of the real estate as

on the pure personal estate, and prays that it may be so declared and decreed.

On the 7th of July, 1871, letters of administration of the personal estate and effects of Margaret were granted to the defendant, and on such grant the defendant swore her personal estate as being under the value of 20,000*l.*, and paid probate duty on that footing, but in assessing the value of her personal estate the defendant advisedly excluded the value of the real estate to which, or to the proceeds of sale of which Margaret became entitled as her father's heiress-at-law, and which real estate has been sold since her death for the net sum of 3,825*l.* This sum was paid to the defendant as her legal personal representative, and was included by him in his account of her residuary personal estate, and he has paid the legacy duty payable thereon upon the division of such sum amongst her next of kin; but he refused to pay the probate duty demanded on the value of the real estate, on the ground that in the events which have happened the real estate was, at Margaret's death, to be treated as realty and not as personalty.

H. James (*Attorney-General*) and *W. W. Karslake*, for the Crown.—Real estate directed by will to be sold is treated in equity as personalty, and is descendible as such — *Fletcher* v. *Ashburner* (1). Where realty is directed by will to be sold for the purpose of a disposition, and the disposition partly fails, the heir is entitled by a resulting trust to as much of the realty or the proceeds thereof as is not disposed of, whether the real estate has actually been converted into money or not—*Ackroyd* v. *Smithson* (2), but the heir takes it as personalty; and though not converted in his lifetime it descends (upon his death intestate) to his personal representative, not his heir—*Jessopp* v. *Watson* (3) and *Bective* v. *Hodgson* (4), per Lord Westbury. In the present case the testator directed that the realty be converted out-and-out, and that the proceeds thereof form a mixed fund with the personalty. The trustees had no dis-

(1) 1 White & T. L. C. 826 (4th edition).
(2) Ibid. 872, 890.
(3) 1 Myl. & K. 665; s. c. 2 Law J. Rep. (N.S.) Chanc. 197.
(4) 10 H. L. Cas. 656, 667; s. c. 33 Law J. Rep. (N.S.) Chanc. 601, 603.

cretion except as to the time
Upon the death of his only chil
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trusts. After payment of the t
debts and legacies, and subject
widow's annuity, the three leg
3,000*l.*, 1,000*l.* and 1,000*l.* were to
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to sell, and the real estate is not s
the will is satisfied without touch
realty, the heir takes the realty
and not as money. But here
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money, that it might bear its pr
of the debts and legacies, and
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those payments or whether the
actually paid out of the perso
immaterial. The testator's nex
of whom (as it must be taken) M
was not the only one, were ent
demand the sale as relief *pro*
the personalty, and until the re
sold it was impossible to say wh
portion of the debts and legacie
fall on it. The question then is,
the unconverted realty taken by M
in her character of heiress, but t
money, was liable to probate duty
death. That question is decided
affirmative in *The Attorney-Ge*
Brunning (5), where a testator co
to sell realty, and received part
purchase money while living. Th
of Lords, reversing the decision
Court of Exchequer (6), held t
property was liable to probate
the principle that all property is l
that duty, which is recovered by
cutor *virtute officii*—"*whether it*
or equitable assets," says Lord C
True, Margaret in the present
not contracted to sell, but she c

(5) 8 H. L. Cas. 243; s. c. 30 Law J. E
Exch. 379, 382.
(6) 4 Hurl. & N. 94; s. c. 28 Law J. E
Exch. 125.

have got at the property except subject to a sale; she could not have elected to take it as realty, because of the rights of the other next-of-kin of the testator. The position is therefore precisely similar. *The Attorney-General* v. *Holford* (7) and *Williamson* v. *The Advocate-General* (8) establish that where a testator directs realty to be sold absolutely, and bequeaths the proceeds, legacy duty must be paid, though the realty is not in fact sold. *Matson* v. *Swift* (9) and *Custance* v. *Bradshaw* (10), on which the defendant will rely, are distinguishable. In *Matson* v. *Swift* (9) the testator had by deed conveyed realty to trustees on trust in their discretion to sell, and out of the proceeds to pay his debts, and to pay the residue to the testator, his executors, &c., and that without any claim or equity thereon in favour of the testator's heir. The testator died leaving a will, the estate being unsold. The trustees afterwards sold the realty, and the Crown having claimed probate duty on the purchase money, Lord Langdale, M.R., held that the duty was not payable, on the ground that the deed was voluntary and revocable, and that the testator had the absolute dominion over the property, which remained realty till his death. In *Custance* v. *Bradshaw* (10) it was held that the Crown was not entitled to probate duty on the testator's share in real property, of which the testator and two others were tenants in common in fee as partners of a trading firm, and which had been bought by them for partnership purposes. These two decisions were put in their true light by Lord Cranworth in *The Attorney-General* v. *Brunning* (5); and by James, V.C., in *Forbes* v. *Steven* (11), where it was pointed out that, in *Matson* v. *Swift* (9), the deed being voluntary and revocable, it was the same as if the testator had by will directed his land to be sold; and that, in *Custance* v. *Bradshaw* (10), the ordinary principle that real estate purchased by partners merely for the purpose of trade is thereby converted out-and-out into personalty, did not apply, because the partners agreed that the real estate was not to be deemed to be converted, but that each partner was to have, as his own separate real estate, a share in the specific thing itself. Recognising and upholding these two decisions, James, V.C., in *Forbes* v. *Steven* (11), held that legacy duty was payable on the testator's share in the proceeds of the sale of real property in Bombay which was bought by the testator and his partners in a trading firm for partnership purposes, and sold after testator's death.

Philbrick (*Arbuthnot* with him), for the defendant.—The will does not direct a conversion of the realty out-and-out. In the events which happened the testator did not intend the realty to be sold, as appears from the proviso. According to the true construction, the legacies were to be paid first out of the personalty, and only to fall on the realty if the personalty was insufficient. The personalty, being nearly 20,000*l.*, must have been sufficient, and it was therefore not necessary to sell the realty. That being so, and the realty being in fact unsold, the case falls within *Davenport* v. *Coltman* (12) and *Chitty* v. *Parker* (13); the realty is not impressed with the character of personalty for fiscal purposes, and probate duty is not payable.

[BRAMWELL, B.—Besides the three legacies, the widow's annuity of 100*l.* was to be paid out of the joint fund.

Had Margaret lived to attain twenty-one, she might have elected to take the realty as such. The principle of the present case is governed by *Matson* v. *Swift* (9) and *Custance* v. *Bradshaw* (10), which, as was pointed out in *De Lancey* v. *The Commissioners of Inland Revenue* (14), were upheld by the House of Lords in *The Attorney-General* v. *Brunning* (5).

The Attorney-General was not heard in reply.

KELLY, C.B.—I am of opinion that the Attorney-General is entitled to judgment.

(7) 1 Price 426.
(8) 10 Cl. & F. 1.
(9) 8 Beav. 368; s. c. 14 Law J. Rep. (N.S.) Chanc. 354.
(10) 4 Hare 315; s. c. 14 Law J. Rep. (N.S.) Chanc. 358.
(11) 39 Law J. Rep. (N.S.) Chanc. 485, 489; s. c. Law Rep. 10 Eq. 178.
(12) 12 Sim. 588; s. c. 11 Law J. Rep. (N.S.) Chanc. 262.
(13) 2 Ves. jun. 271.
(14) 39 Law J. Rep. (N.S.) Exch. 76; s. c. Law Rep. 5 Exch. 102.

It is established by the cases cited for the Crown that where real property is absolutely directed by will to be sold, and the produce of the realty and the personalty are to constitute one conjoint fund applicable to all the purposes of the will, and some of those purposes fail so as to cause an intestacy—in such a case, though, for the purposes of devolution, the realty descends to the heir, yet even though unconverted into money it descends as money, and upon the death of the heir intestate it descends to his personal representative, and is liable to legacy duty.

The defendant's counsel has cited a distinction made by James, V.C., in *Forbes* v. *Steven* (11), "probate duty is payable or not payable according to the character of the property at the time, whereas legacy duty is payable according to what the legatee gets." But where the character of the property is changed in equity from land to money, by reason of a positive direction to sell and to apply the proceeds to the purposes of the will, the Crown is entitled—by reason of that character being impressed upon the property in the hands of the heir—to probate duty on the value of that property on the death of the heir.

When we look to the effect of this will no reasonable doubt can be entertained upon the subject. The testator positively and absolutely directs his real and personal estate to be converted into money, and to form one entire conjoint fund, which the trustees are to hold upon certain trusts. Whatever might have been the case if the testator's daughter had lived to attain twenty-one, she having died unmarried and within that age, the question is, what was the state of things which then arose? In the event which happened the testator bequeathed the whole of this mixed fund, subject to the annuity to his widow, first, to be applied in the payment of three legacies, 3,000*l.* to one person, 1,000*l.* to another and 1,000*l.* to a third; and then there was an ultimate bequest which never took effect. The question, therefore, is not what it would have been if there had been any division expressly directed by the will, making the real estate applicable only in case the personal estate turned out to be insufficient, but the whole estate is to be converted into money, constituting one entire fund. There was nothing to relieve the trustees from the absolute necessity and obligation to sell. Under these circumstances the cases cited are conclusive to shew that in equity the whole fund, both real estate and personal estate, must be stamped with the character of personal estate; consequently it is liable both to legacy duty and to probate duty on the death of Margaret.

With regard to *Matson* v. *Swift* (9) and *Custance* v. *Bradshaw* (10), the distinction is quite obvious, and was pointed out during the argument. In *Matson* v. *Swift* (9) there was authority, but no obligation, to sell. In *Custance* v. *Bradshaw* (10) there was nothing that rendered it obligatory upon the persons who had to administer the estate to convert the land into money. These circumstances distinguish those cases from the present case, in which there is an absolute and positive obligation and direction to sell the realty and personalty, so as to create one common fund applicable alike to all the purposes of the will.

Chitty v. *Parker* (13) is so obscurely reported that it is very difficult to collect what were the real terms of the will. Looking at the judgment of the Lord Chancellor, who had the whole will before him, it is obvious that there was no obligation whatever imposed upon the trustees under that will to convert the real estate into money, but that taking the whole will together, it was only in the event of the personal estate being found insufficient that it might have been necessary, under the particular terms of the will, to convert the real estate into money. There is nothing inconsistent in that decision with the decision we are called upon to pronounce.

BRAMWELL, B., PIGOTT, B., and POLLOCK, B., concurred.

Judgment for the Crown.

Attorneys—Solicitor to the Inland Revenue, for the Crown; Dunster, for defendant.

END OF MICHAELMAS TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

HILARY TERM, 37 VICTORIÆ.

1874. Jan. 20. } DICKESON *v.* HILLIARD AND HARE.

Libel—Election Agents—Rival Committees—Correspondence between—Privileged Communication.

Shortly before a Parliamentary election the two respective agents of F. and B., the rival candidates, mutually undertook that there should be no corrupt practices by either party during the contest. On the day of polling the defendant H., one of the agents, wrote to the other complaining that bribery was going on, and, at an interview sought by the latter, gave the name of the plaintiff as a briber. The day after the election, which resulted in the return of B., the following letter was written by H. in conjunction with the other defendant, who was chairman of B.'s committee, and signed by both of them—"We certify that we have discovered that Mr. D. (the plaintiff) and Mr. R., two of the prominent members of Mr. F.'s committee, have been personally guilty of offering 1*l.* 10*s.* *to a voter for his vote, and* 1*l.* 10*s.* *for every vote he could procure for Mr. F. The elector referred to has been personally examined by one of us, and the evidence which he is prepared to give is clear and distinct." This letter was sent to F.'s agent, and by him handed to the chairman of F.'s committee, and the plaintiff brought an action for libel in respect of its contents:*—Held, *that no such relations existed between the parties as made the letter a privileged communication.*

Declaration—That before, &c., one J. S. Forbes was a candidate for the representation in Parliament of the borough of Dover, and the defendants falsely and maliciously wrote and published of the plaintiff the words following—

"Dover Election, 1873.

"We certify that we have discovered that Mr. Dickeson (meaning thereby the plaintiff) and Mr. Robinson, two of the prominent members of Mr. Forbes' committee, have been personally guilty of offering 1*l.* 10*s.* to a voter for his vote, and 1*l.* 10*s.* for every vote he could procure for Mr. Forbes.

"The elector referred to has been personally examined by one of us, and the evidence which he is prepared to give is clear and distinct. Dated 24th of September, 1873.

"Wm. Edward Hilliard,
"Chairman,
"Evan Hare,
"Mr. Barnett's Agent."

Plea—Not guilty. Issue thereon.

The cause was tried in the sittings after last Term before the Lord Chief Baron at Guildhall, when the following facts appeared. The plaintiff was an ex-Mayor of Dover and a prominent member of an election committee formed to support Mr. Forbes, a candidate at a recent contest for the representation of the borough. The defendant, Mr. Hilliard, a gentleman of position, was chairman of a committee organised to promote the return to Parliament of Mr. Barnett, the rival candidate; and the other defendant, Mr. Hare, was the election agent of the latter. On the 17th of September, Mr. Hare entered into a formal engagement with Mr. Hall, the election agent of Mr. Forbes, whereby they mutually undertook, on behalf of their respective principals, that there should be no corrupt practices by either party at the election. On the 22nd of September, the election took place, and during the day Hare, in consequence of some information given to him by one Fraser, wrote, from Mr. Barnett's committee room, to Hall—"Evidence having come to the knowledge of the committee of offers having been made by two prominent members of Mr. Forbes' committee, of money to voters in consideration of their votes for Mr. Forbes, I give you notice thereof on behalf of Mr. Barnett, who will take what steps he may be advised under any circumstances." Thereupon Hall called upon Hare, and said he did not countenance any such acts as those complained of.

Mr. Barnett was elected member of Parliament for the borough. Next day Hall wrote to Hare asking the latter to call upon him; an interview took place between them, whereat Hare gave the names of the plaintiffs as those of the persons alluded to in his letter of the previous day; and Hare visited the house of the defendant Hilliard, imparted to him the information he had received, and wrote the letter set forth in the declaration. This letter was signed by both defendants, and sent to Hall who shewed it to the chairman of Mr. Forbes's committee, Mr. Finnis, by whom it was taken to the plaintiff.

The learned Judge ruled that the communication was not privileged, but being pressed, took the opinion of the jury upon that question amongst others left to them, and they found a verdict for the plaintiff. Damages 225*l.*

Edward Clarke, for the defendant Hare, now moved to set aside the verdict, and for a new trial on the ground, *inter alia*, of misdirection.—Applying the test in *Toogood* v. *Spyring* (1), the communication was privileged—*Harrison* v. *Bush* (2). And if privileged on the 22nd of September, it was so equally on the 24th—*Beatson* v. *Skene* (3); for, as Pollock, C.B., there said, "When once a confidential relation is established between two persons with regard to an enquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview." It was to the interest of both parties that bribery should be stopped. In *Whiteley* v. *Adams* (4), Erle, C.J., said (p. 94), "The rule has been laid down in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of a moral or social duty, or on the ground of an interest in the party making it with a corresponding interest in the party receiving it, so that the words which passed were delivered in an honest belief that the party was performing his duty in making the communication, the Judge is to say that the action fails." Hare was no mere volunteer. He was interested in the purity of the election, the non-disfranchisement of the town, and the fulfilment of his undertaking with Hall.

KELLY, C.B.—In this case I must observe at the outset that I did leave the question of privilege to the jury, al-

(1) 1 Cr. M. & R. 181; s.c. 3 Law J. Rep. (N.S.) Exch. 347.

(2) 5 E. & B. 344; s.c. 25 Law J. Rep. (N.S.) Q.B. 25.

(3) 5 Hurl. & N. 838; s.c. 29 Law J. Rep. (N.S.) Exch. 430.

(4) 15 Com. B. Rep. N.S. 392; s.c. 33 Law J. Rep. (N.S.) C.P. 89.

altogether untrue. There may be other cases, where members of certain societies or bodies recognized by law, communicating among themselves, their communications are privileged, or where statements are made in discussions of matters of a general public interest; but no case exists like the one before us, and I am of opinion that there is nothing in the position or character occupied by Mr. Hall or Mr. Hare to clothe this communication with privilege. There will be no rule.

PIGOTT, B.—I am clearly of opinion that there was no misdirection. It is for the Judge at the trial to decide whether the occasion is one of privilege. The Chief Baron decided that question, and also, *ex abundante cautela*, left it to the jury, so whether the point was for my Lord or for them, it was decided by both. Then, in point of law, was the occasion one of privilege, which justified the defendants in publishing this libel? I am of opinion that it was not. The legal canon on which I proceed is to be found in the case of *Harrison* v. *Bush* (2), viz., that "a communication made *bona fide* upon any subject matter in which the party communicating it has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable" (*per* Lord Campbell, 25 Law J. Rep. (N.S.) Q.B., 29). And, in the same case, the meaning of "duty" is there explained and said to involve, not merely a legal duty, but also a moral or social duty of imperfect obligation. We must see if that rule of law is applicable to the facts of this case. [His Lordship having narrated the facts, then read the letter of the 24th of September, and proceeded]—That, if not true, is certainly a very gross libel. Such is the defamatory statement, and such are the circumstances under which it was published. Do they make the occasion privileged? In my opinion they do not. First, what was the duty at that time of Hare and Hilliard, or what was their interest in certifying and signing this s tement to Hall? The election was at an end, and could be no further a by anything done by either party. could do nothing to prevent any: bribery. He had no legal contr the persons mentioned, or any au to prosecute them. In fact the: nothing which he could do—wh was authorised to do by law or parties to whom the libel pointe had no interest or duty with res them. I think there should be no

POLLOCK, B.—The first point ma that the Lord Chief Baron ought t treated this libel as a privileged con cation. No doubt the rule as to pri communications is now somewh larged But it is important to s parties do not, by their own acts, con circumstances which shall give t right to an action for libel which not justly possess by the natural, s legal position in which they stand other. Now here no doubt the had an interest in communicating other what they respectively knew as there was not a legal or cons authority, the learned counsel was to argue that there was a moral communicate the matter. I do any such relation between the perso made it and the plaintiff to justif a course as the publication of this There was no invitation to m and the defendants were mere volu —that would not, of course, take the privilege if the statement were wise justified. But the only r between the parties was to be in the fact that the person to wh defamatory communication was was an election agent, and so int in the conduct of the candidate. are, however, many cases where p are interested in the conduct of where no privilege exists. I thin libel was not a privileged communi

Rule ref

Attorneys—Bower & Cotton, agents for J. Dover, for plaintiffs; Defendant Hare, son; C. B. Dryden, for defendant Hilli

term; also to paint two coats, and grain and twice varnish the interior in the last year of the said term with best materials and workmanship; also whitewash and colour; and the defendant pursuant to the agreement entered upon the house and premises, and occupied as tenant from year to year, subject to the aforesaid terms (or such of them as were applicable to the said tenancy) during the whole term or period of seven years aforesaid, which expired before suit, to wit, March 25, 1873, and all conditions entitling the plaintiff to recover in respect of the matters herein stated have been fulfilled, yet the defendant did not during the tenancy maintain the house and premises, together with all drains, &c., nor leave them in repair at the end of the tenancy; and, secondly, did not paint two coats, grain and twice varnish the interior in the last year of the tenancy with best materials and workmanship, nor did the defendant whitewash and colour as aforesaid.

Demurrer to the second breach.

English Harrison, for the defendant.—The agreement being unsealed was void by 8 & 9 Vict. c. 106. s. 3, which enacts that "a lease, required by law to be in writing" (which this is by the Statute of Frauds, s. 1, 2) "of any tenements or hereditaments shall be void at law unless made by deed." The defendant was, therefore, tenant from year to year, but subject to such stipulations of the agreement as are not inconsistent with a tenancy from year to year, e.g. the repairing clause—*Beale* v. *Sanders* (1). The test is are they applicable to each year of the term? By this test the painting clause, being applicable to the seventh year only, which might never have been reached, is inconsistent with a tenancy from year to year, of which it is an essential quality that it is determinable by a six months' notice. The stipulations must be ascertained at the commencement of the tenancy not the end, for they are not altered during the tenancy.

Edward Clarke for the plaintiff.—The declaration must be construed to mean that the agreement was in writing—*Young* v. *Austin* (2). The defendant having occupied for the whole of the term agreed upon, and having had the full benefit which he could have enjoyed under a valid lease, cannot now say that the stipulations are not binding—*Beale* v. *Sanders* (1), and per Lord Abinger in *Pistor* v. *Cator* (3). Though void at law as a lease, the agreement might have been enforced at any time in equity by a bill for specific performance—*Parker* v. *Taswell* (4), and per Lord Denman in *Doe d. Thompson* v. *Amey* (5). [He also referred to *Tress* v. *Savage* (6), *Digby* v. *Atkinson* (7), *Bowes* v. *Croll* (8), and *Tooker* v. *Smith* (9).]

Harrison, in reply, contended that in the cases relied on by the plaintiff the stipulations held binding were equally applicable to every year of the tenancy.

[KELLY, C.B.—Why are we not to construe the agreement to mean that the defendant should paint in the last year if the tenancy lasted seven years?]

KELLY, C.B.—I think the plaintiff is entitled to judgment. It is clearly settled that when a person has entered upon premises, and occupied and paid rent under an agreement like the present, which is void at law as a lease, he is tenant from year to year, and liable to all those stipulations of the agreement which are applicable to such a tenancy. If it be said that the agreement being void there is no consideration for the promise by the defendant, the answer is furnished by *Parker* v *Taswell* (4), which decided that such an agreement though void at law

(1) 3 Bing. N.C. 850; s. c. 6 Law J. Rep. (N.S.) C.P. 233.

(2) 38 Law J. Rep. (N.S.) C.P. 233; s. c. Law Rep. 4 C.P. 553.

(3) 9 Mee. & W. 315, 320; s. c. 12 Law J. Rep. (N.S.) Exch. 129, 131.

(4) De Gex & J. 559; s. c. 27 Law J. Rep. (N.S.) Chanc. 812.

(5) 12 Ad. & E. 476, 479.

(6) 4 E. & B. 36; s. c. 23 Law J. Rep. (N.S.) Q.B. 339.

(7) 4 Campb. 275.

(8) 6 E. & B. 255, 265.

(9) 1 Hurl. & N. 732.

of 300l. per annum, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly for some years, until the defendants—who had meanwhile been substituted by statute for the trustees, with all their powers, and subject to all their liabilities, —duly passed a resolution to reduce the pension to 150l. per annum, to be paid during their pleasure, and made the first quarterly payment on the reduced scale.

The plaintiff having brought an action to recover the difference for that quarter, —Held (*reversing the decision of the Court below*), *that the resolution of* 1865 *was revocable, and that the plaintiff could not recover.*

Error by the defendants on a special case on which the Court of Exchequer (Kelly, C.B., and Martin, B.) had given judgment for the plaintiff. The facts are fully stated in the report of that decision in the Court below (1).

J. Brown (*W. Barnard* with him), for the defendants.—The plaintiff was appointed clerk by the trustees under 7 Geo. 3. c. 51. s. 76, which enacts that all the officers so appointed "shall be from time to time removable at the will and pleasure of the said trustees, or any seven or more of them." By section 84, all moneys to be raised or paid by virtue of that Act are to be applied for the purposes specified (which do not include any payment or allowance to a retiring officer), "and to no other use or purpose whatsoever." There was no power to compensate servants except under section 76 of 13 & 14 Vict. c. cix., the words of which, "from time to time," mean that the trustees shall reserve power to alter allowances. The section gives no power to bind successors, and the grant would not have been binding even if it had been by deed. The declaration does not allege contract, and there was none in fact.

The Court then desired to hear

Benjamin (*Hayman* with him), for the plaintiff.—The resolution of 1865 was binding on the trustees and their successors, either as a Parliamentary grant or as a contract. First. As a grant. The object of section 76 of 13 & 14 Vict. c. cix. was to encourage diligent and faithful service in public servants, and instead of increasing their salaries to hold out a prospect of compensation at the end of long service. Provided their service was diligent and faithful, Parliament gave these servants a *right* to compensation, the only things left to the discretion of the trustees being the question of merit and of the amount of compensation. The trustees having once exercised their "judgment" on the matter, the grant was as irrevocable as if the statute had fixed the amount and enacted that the plaintiff should enjoy it for the rest of his life. The "judgment" is to be exercised by the trustees; and it is inconsistent with that to hold that their successors, who might know nothing of the clerk's services and merits, should reconsider a *judgment* pronounced by the only persons who knew the circumstances and could form a right decision. The statute gives the trustees the alternative, either to pay a sum down, or to grant an annuity. It is indisputable that, if they had paid the clerk a sum sufficient to buy him an annuity of 300*l.* for life, they could not have recalled it. Can it make any difference that there was, perhaps, a discussion, some trustees urging that it was a better bargain for the corporation to pay a sum down, and some that it was better to take the chance of the clerk dying soon, and to pay him the annuity themselves, and that the latter proposal was adopted? Had the trustees of 1865 for a moment supposed that their resolution would or could be revoked, they would certainly have given him a sum down or a larger annual grant, since they expressly state their intention that the annuity shall be "during the remainder of his life." The expression, "may from time to time pay or allow," &c., gives power, not to revoke or diminish, but to increase the grant from time to time, if the funds increased. If any power of revocation existed, it would be in the same trustees, not in their successors. Second. As a contract. As soon as 13 & 14 Vict. c. cix. s. 76 was passed, the plaintiff became the trustees' clerk on the terms that, if he

(1) 42 Law J. Rep. (N.S.) Exch. 141.

conducted himself well, they would, when his services were no longer required, exercise their judgment and fix the amount of compensation. This was a valid contract, and, when the judgment had been exercised and the amount fixed, it was a contract for the breach of which the plaintiff could sue. The consideration was the plaintiff's services, executed at the request of the trustees, upon the basis of the statute. Such a consideration is good—*Eastwood* v. *Kenyon* (2). True, the trustees had the power to remove him at any moment; but they would be unwilling to use that power, and his resignation, under those circumstances, would be a good consideration. In *Gibson* v. *The East India Company* (3), and *Innes* v. *The East India Company* (4), which were relied on by the plaintiff in the Court below, the resolutions were held not binding on the technical ground that they were not under seal. A seal was required to bind the shareholders. In the present case there are no shareholders; the corporation consisted only of the trustees, to every one of whom notice was duly sent of the intended resolution, and it was passed unanimously by the trustees present. By section 56 of the Commissioners Clauses Act, 1847 (which is incorporated in the 13 & 14 Vict. c. cix.), power is given to enter into "contracts" for certain purposes, which would include the present case; and it is enacted that, "any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, the commissioners may make in writing," signed in the manner specified.

J. Brown replied.

KEATING, J.—I think the judgment of the Court below must be reversed. The plaintiff was hired as a clerk to and appointed by certain persons who were incorporated under the name of "the Trustees of the River Lee," and was removable at their will and pleasure. Under the original constitution of the corporation, it was not competent for the trustees to make a retiring allowance or payment of any sort to any servant leaving their service under any circumstances, because section 84 of 7 Geo. 3. c. 51 provided for the appropriation of all sums raised by the trustees to certain purposes, and excluded all such payments. The 13 & 14 Vict. c. cix. s. 76, was therefore necessary, for the purpose of giving power to the trustees, if they were disposed to bestow anything in the shape of an annuity or an allowance to a retiring servant. [The learned Judge read section 76, which is set out in the head note.] In 1865, the plaintiff having been for forty years clerk to the trustees, and being no longer able from age and ill-health to continue to perform his duties, applied to the trustees to appoint his son in his place, and solicited their favourable consideration for his past services. The trustees complied with both requests, and passed a resolution, "that his resignation be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him"—and they added, "during the remainder of his life." No doubt their intention was that he should receive the annuity during the remainder of his life. He did receive it for several years until, the funds falling away, it became necessary, in the judgment of the defendants, to reconsider the amount, and accordingly the former resolution was varied and the amount reduced to 150*l.*

Now, in the interval there had been a transfer from the trustees to "The Lee Conservancy Board," but I do not think that makes the slightest difference. The board stood in the shoes of the trustees with exactly the same powers and obligations.

The question then is, whether the board had power to vary the previous resolution. I think they clearly had, for the simple reason that, having power to pay the annuity "from time to time," they did not bind themselves to pay it by a grant or contract, or otherwise.

It is unnecessary to consider what would have been the case if the trustees had made a grant of an annuity under

(2) 11 Ad. & E. 438; s. c. 9 Law J. Rep. (N.S.) Q.B. 409.

(3) 5 Bing. N.C. 262; s. c. 8 Law J. Rep. (N.S.) C.P. 193.

(4) 17 Com. B. Rep. 351; s. c. 25 Law J. Rep. (N.S.) C.P. 154.

(In the Second Division of the Court.)

1874. Jan. 30. } LORD *v.* PRICE.

Trover by Purchaser of Goods subject to Vendor's Lien—Right of Possession against Wrongdoer.

A purchaser of goods, of which the vendor retains possession with a lien for unpaid purchase-money, cannot maintain trover against a person who tortiously removes the goods.

Quære, whether he can, if after the conversion he pays or tenders the purchase-money to the vendor.

This was an action of trover tried on the 8th of November, 1873, in the Court of Passage, Liverpool.

The pleas were not guilty and not possessed.

On the 15th of August the plaintiff bought at an auction two lots of damaged cotton, part of the salvage from a fire, under conditions, the material parts of which are as follows—"2. All the cotton as allotted is to be at purchaser's risk as to fire, theft, disarrangement of lots, or loss in any respect, from the falling of the broker's hammer, and to be taken away before Saturday next, the 16th inst., at four o'clock P.M., and if any should remain after that time, the cotton remaining will be sold without notice, the deposit forfeited, and the loss (if any) to be made good by the defaulter. 3. A deposit of 50*l.* per heap and 10*l.* per lot to be paid at the time of sale of each lot, and payment of the balance in cash, less 1½ per cent. discount, to be made immediately after at the broker's office, and before delivery of the cotton."

The plaintiff paid the deposit on the two lots, but not the balance of the purchase-money, and did not take delivery of the cotton. The same day he removed one of the lots, but going on the 18th of August for the other he could not find it. The defendant, also a purchaser at the sale, had taken it, as he said, by mistake for a lot bought by himself; and for this act he was now sued, the plaintiff having still omitted to pay the balance of his purchase-money. The assessor nonsuited the plaintiff on the ground that the vendor's lien for unpaid purchase-money prevented the plaintiff from maintaining trover, and gave the plaintiff leave to move this Court for a new trial. A rule *nisi* having been obtained accordingly—

Gully shewed cause.—The property in the cotton passed to the plaintiff, but he had no right of possession till he paid the balance of the purchase-money, and he cannot therefore maintain this action, which requires the right of present possession to support it—*Bloxam* v. *Sanders* (1), *Bradley* v. *Copley* (2), *Gordon* v. *Harper* (3). If the plaintiff can bring an action at all it must be on the case as in *Mears* v. *The London and South Western Railway Company* (4). The vendor having the right of possession can bring trover, and the plaintiff therefore cannot, for the defendant cannot be liable to both. Perhaps, by now paying or tendering the price to the vendor the plaintiff might maintain trover, but if he recovered in the present action the vendor's lien would be gone. He is not without remedy, for by giving the vendor an indemnity he may sue in his name.

Myburgh, for the plaintiff, in support of the rule.—The vendor's right of possession is for his own protection as between him and the plaintiff, and the defendant, a mere wrongdoer, cannot take advantage of it. The plaintiff has no other remedy than this action.

BRAMWELL, B.—I am of opinion that this rule must be discharged, on the ground that the action cannot be maintained without a right of present possession in the plaintiff. Here, there is no evidence that the plaintiff had any right of possession; that right was in the vendor, who was entitled to retain possession of the goods until the balance of the purchase-money was paid, and on non-payment to resell the goods and recoup himself for any loss sustained on the re-

(1) 4 B. & C. 941.
(2) 1 Com. B. Rep. 685; s. c. 14 Law J. Rep. (N.S.) C.P. 222.
(3) 7 Term Rep. 9.
(4) 11 Com. B. Rep. N.S. 850; s. c. 31 Law J. Rep. (N.S.) C.P. 220.

re, if the goods were tor-
ed (and there is no evidence
r assented to their removal)
that the vendor could have
n action. But it cannot be
nen can be entitled at the
maintain an action of trover
e goods (5). It is therefore
manifest that the vendor
that the plaintiff cannot, main-
ction.

er by paying the balance of the
v, or tendering it, the buyer can,
trover, or by a special action on
, have any remedy at common
his own name, or whether he is
to an action in the name of the
, it is not necessary to decide. It
cient to say that on the facts shewn
he plaintiff cannot recover.

PHLETT, B., concurred.

Rule discharged.

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rneys — Field, Roscoe & Co., agents for Lowndes & Co., Liverpool, for plaintiff; W. W. Wynne, agent for Lupton, Liverpool, for defendant.

1874. Feb. 13. } BLANCHET *v.* POWELL'S LLANTIVIT COLLIERY COMPANY.

Ship and Shipping—Bill of Lading—Misdescription of Weight—Lump Freight—Law of France—Pleading.

Declaration for lump freight payable under a bill of lading in respect of a cargo of pit-wood carried from L'Orient to Cardiff.

First plea (except as to 217 tons, portion of the cargo), setting out a bill of lading made by the plaintiff, master of the ship, at the port of L'Orient, whereby he acknowledged to have received of the shipper a specified weight of wood, to be carried and delivered to the bearer or his order on payment for freight of the sum of 172l. 1s.

(5) See per Parke, B., in *Nicholls* v. *Bastard*, 2 Cr. M. & R 659, and in *Manders* v. *Williams*, 4 Exch. Rep. 339; s. c 18 Law J. Rep. (N.S.) Exch. 437. See also note i. to *Wilbraham* v. *Snow*, 2 Wms. Saund. ed. 1871, p. 94.

Averment, that the plaintiff did not carry and deliver the goods in the bill of lading, but a portion of the same only, to wit, 217 tons. Second plea, payment into Court in respect of those 217 tons.

Replication—third, that the plaintiff carried the whole delivered to him, and that the goods described in the bill of lading as weighing more than 217 tons, in fact weighed 217 tons and no more, and that the weight mentioned in the bill of lading was a mere misdescription without fraud or default on the part of the plaintiff; fourth, that the bill of lading was made in France, and that according to the law of France the whole of the freight was payable, notwithstanding that the said part only of the goods was carried and delivered; fifth (repeating the third, and adding), that the bill of lading was made in France, and that according to the law of France the whole of the freight was payable.

On demurrer to the first plea and to the replications,—Held, that even if the plea, which was ambiguous, were treated as good, the replications, being good also, sufficiently answered it.

The first count of the declaration stated that one Madame A. Paranque, in parts beyond the seas, at L'Orient in the republic of France, delivered to the plaintiff certain goods, that is to say, a cargo of pit-wood, to be, by the plaintiff carried and conveyed in a certain ship of the plaintiff from L'Orient to Cardiff, under a certain bill of lading, dated the 2nd of January, 1873, signed for the same by the plaintiff, and there delivered (accidents and dangers of the sea excepted) to the holder of the said bill of lading or his order, he or his assigns paying the plaintiffs for freight the sum of 172*l.* 1*s.* and 4*l.* gratuity to the plaintiff, amounting together to 176*l.* 1*s.* And after the said 2nd of January, 1873, the said Madame A. Paranque endorsed the said bill of lading to the defendants, in order to pass the property in such goods to the defendants, and thereupon and by reason of such endorsement the property in the said goods passed to the defendants, and all conditions were fulfilled, &c., necessary to enable the plaintiff to have the said freight and gratuity paid according to the said

bill of lading, and to sue the defendants for the non-payment thereof. Breach—that the defendants had made default in paying the said freight and gratuity.

First plea as to the first count, except as to so much as related to the carrying and delivery by the plaintiff to the defendants of 217 tons of pit-wood, being a portion of the cargo in the said count mentioned, that the bill of lading in the said count mentioned was in the words and figures following. [The bill of lading was set out in the French language and then translated thus] "I, Blanchèt, master of the ship *Christopher Columbus* of Granville, being at present at the port of L'Orient in order at the first opportunity to go in the direct road to Cardiff, acknowledge to have received, and stowed on board my ship, under the free deck thereof, of you, Madame A. Paranque, 256,782 kilos., the whole safe and in good condition, marked and numbered as in the margin [253,782], which I bind myself to carry and convey in my said ship, perils and wrecks of the sea excepted, to the said place of Cardiff, and to deliver to the bearer or his order on his paying me for my freight the sum of 172*l.* 1*s.* sterling, plus 4*l.* gratuity to the captain, according to the uses and customs of the sea, and to hold and accomplish this, I bind myself, body and goods, with my said ship, freight and tackle thereof. In faith of which I have signed three bills of lading of the same tenor, one of which being accomplished, the others of no value.

"Signed at L'Orient the 2nd Jan. 1873.

"pp. Me. A. Paranque,

"E. Paranque.

"A. E. Blanchèt.

"Indorsed,

"Received of Me. A. Paranque the sum of 24*l.* sterling on account of my freight, including insurance.

["Signed as above."]

And that the plaintiff did not carry and deliver to the defendants the goods in the said bill of lading mentioned, but a portion of the same only, to wit, the quantity of 217 tons, and except the said quantity of 217 tons, that the plaintiff did not carry the said goods and deliver the same to the defendants.

Second plea, as to so much of the first count as related to the carrying and delivery by the plaintiff to the defendants of the said 217 tons, payment into Court of 125*l.* 17*s.* 10*d.*

Replication. Third, as to the first plea, that the plaintiff did carry and deliver to the defendants the whole of the said goods which were delivered to him under the said bill of lading, and which were intended to be thereby described, and that the said goods so delivered, and which were in the said bill of lading described as weighing 256,782 kilos., a weight exceeding 217 tons, in fact weighed 217 tons and no more, and that the said weight mentioned in the said bill of lading was a mere misdescription of the goods to be carried inserted in the said bill of lading, without fraud or default on the part of the plaintiff.

Fourth, as to the first plea, that the bill of lading was made at L'Orient, in the Republic of France, and that, according to the law of France, the whole of the said freight was and is payable, notwithstanding that the said part only of the said goods was carried and delivered as in the first plea mentioned.

Fifth, as to the first plea, repeating the third replication, and in addition thereto, alleging that the said bill of lading was made at L'Orient, in the Republic of France, and that, according to the law of France, the whole of the said freight was and is payable.

Sixth. Demurrer to the first plea (1).

Rejoinder—Demurrer to the third, fourth, and fifth replications (2).

Joinder in demurrer.

(1) On the ground that the plea did not set out the French law on the subject and afforded no answer even by English law.

(2) To the third and fifth replications, on the ground that the said replications did not allege that the misrepresentation was caused wholly by the fraud of the shipper or of the defendants, or of some person under whom the defendants claimed. To the fourth and fifth, that the contract set out in the defendants' first plea was to be performed in England, and that the French law was inapplicable thereto.

R. E. Webster, for the plaintiff.—The question raised by these demurrers is, whether the defendant is to be allowed to deduct any sum from the freight agreed upon, or is left to his cross-action. The plea is clearly bad; for the freight payable by the bill of lading is a lump sum, and there is no means of apportioning it on this record—*Robinson* v. *Knights* (3); *The Merchant Shipping Company* v. *Armitage* (4).

The Court then called on

Edward Clarke, for the defendants.—In the two cases cited the question arose upon a charter-party. Here there is a bill of lading only, and although a lump sum was named, yet the indorsee is not bound to pay the full amount if the quantity specified in it was never really shipped nor carried.

[BRAMWELL, B.—Do you say that the original freighter would only be liable for the actual cargo put on board?]

Yes. In fact the quantity shipped was not that specified in the bill of lading.

[BRAMWELL, B.—But the third replication alleges that the plaintiff carried the whole of the goods delivered to him. So you must argue upon the assumption that the plaintiff carried all which he received, but that it did not amount to the weight in the bill of lading.]

Then the freight is proportionable, and the plaintiff is entitled to part only of the sum stated in the bill of lading. He is precluded from saying that the goods specified by the bill of lading were not actually shipped. The 18 & 19 Vict. c. 111. s. 3, enacts that "Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have actual notice, at the time of receiving the same, that the goods had not been in fact laden on board. . . ."

(3) 42 Law J. Rep. (N.S.) C.P. 211; s. c. Law Rep. 8 C.P. 465.

(4) Law Rep. 8 C.P. 469 *in nota*.

[BRAMWELL, B.—But that Act applies to British subjects, and not to a Frenchman making a contract in France.]

In *Ritchie* v. *Atkinson* (5), where there was an agreement, by charter, to carry and deliver a *complete* cargo of hemp and iron on being paid freight for hemp 5*l.* per ton, for iron 5*s.* per ton, &c., it was held that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. And in *Dakin* v. *Oxley* (6), Willes, J., says, "If the shipowner fails to carry the goods for the merchant to the destined port the freight is not earned. If he carry part but not the whole, no freight is payable in respect of the part not carried, unless the charter-party make the carriage of the whole a condition precedent to the earnings of any freight—a case which has not within our experience arisen in practice." He referred to *Meyer* v. *Dresser* (7), per Willes, J., and cited also *The Norway* (8).

[BRAMWELL, B.—That decision has no bearing on the present case. The *pro rata* doctrine does not apply here. The plaintiff is entitled to the *whole freight*, or the defendants to judgment.]

Then judgment should be for the defendants, as a condition precedent to the plaintiff's right of action has not been performed, there having been a failure to deliver the wood mentioned in the bill of lading.

R. E. Webster was not heard in reply.

BRAMWELL, B.—The plaintiff is clearly entitled to our judgment in this case. The plea is ambiguous, but its ambiguity is cleared up by the third replication, which says in express terms that the plaintiff delivered all the pit-wood he had received on board the vessel. I suppose if there

(5) 10 East, 295.

(6) 15 Com. B. Rep. N.S. 646; s. c. 33 Law J. Rep. (N.S.) C.P. 115.

(7) 16 Com. B. Rep. N.S. 646; s. c. 33 Law J. Rep. (N.S.) C.P. 289.

(8) Brown & Lush. 226.

was an estoppel it appears, for the plaintiff has stated that the bill of lading was for a certain number of kilogrammes.

Several points might arise on that, the first of which would be, whether here the plaintiff had acknowledged a certain *weight*, and I think a great deal might be said upon that, because I quite agree if a man said, "I received twenty pipes of wine, weight forty tons," the weight might be immaterial. But if the cargo were of *coals*, a statement of weight might perhaps be material. I do not see that here the master might not have bound himself to deliver such a weight as he could. It may be that the statute, 18 & 19 Vict. c. 111. s. 3 (but for what I am about to say) bound him to deliver the stated weight *of pit-wood*. But I doubt extremely whether the Act was meant to be conclusive in such a case as this. It might have been conclusive if the action had been against the master for non-delivery of such a quantity, but I am not sure whether it can be applied against him when he is seeking to recover freight. And for two reasons; first, if the goods were not actually received and he made a mistake, he would be liable for the whole freight; and secondly, this action is brought by the master, and might have been brought by the shipowner, against whom the Act would not be conclusive, which would lead to this absurd consequence, that the bill of lading would be conclusive as against the one and not as against the other. So I doubt whether the statute has any bearing on the case. Then there is another consideration. It is clear that, but for this statute, the third replication would be good, for it says that the whole of the goods were actually delivered, and there is a mere misdescription as to the weight. Now, if my doubts as to the application of the statute are well founded, then that replication is good. But perhaps they are not, and if this were an English captain it might apply, and he would lose the whole of his lump freight. If I were to say whether the third replication is good I should say it was so. The fourth replication is clearly good, for it says that this was a contract "made at L'Orient, in the Republic of France, and that, according to the law of France, the whole of the said freight was and is payable, notwithstanding that the said part only of the said goods was carried and delivered." If that is so, and it is admitted by the demurrer, the 18 & 19 Vict. c. 111 transfers the contract to the defendants, and the obligation of it in the same manner as between the original parties, and clearly these parties are bound by the French and not the English law, as the contract was made in France, and although it was to be performed in England, and the mode of the performance must be governed by the law of England, yet the contract is to be construed according to the law of France. The fifth replication is better still, for, after repeating the averments of the third, it says in addition, that the contract was made in France, and that by the law of France tha whole of the freight was payable. The plaintiff shews, therefore, in that replication that he has done that which would entitle him—*but* for the statute—to the lump freight, and shews that the statute does not preclude him from recovering it, and that consequently there is no estoppel. Very clearly the fifth, clearly the fourth, and I think, the third replications are good, and consequently that the plaintiff is entitled to our judgment.

PIGOTT, B.—I agree; but I do not wish to say anything upon the construction of the statute, ambiguity of the plea, or effect of the replication. Possibly, when the facts are ascertained at the trial, our judgment may become immaterial.

CLEASBY, B.—I am of the same opinion. It is not very easy to understand the proper meaning of the plea, but we must rather read it by what it does *not* state, and the effect of it *so* read is merely that the *quantity* of pit-wood specified in the bill of lading was not delivered. And I am satisfied that interpreting it by the ordinary rule that where there is an ambiguity it must be taken against the person creating it, it appears that all the wood shipped was delivered. The plaintiff sues on a contract whereby he was to receive a lump sum for carrying from one port to another. He has done it, and is therefore clearly entitled to the lump sum; and the only answer to this clear right is a statute

which is said to preclude him from shewing the real facts of the case. But I do not think the Act applies. If the bill of lading were for the delivery of ten horses and ten cows—the numbers and kind of animals being specified—and it appeared that all of them had not been delivered, possibly the answer to an action for freight would be, "You cannot sue, for the bill of lading says that ten horses and ten cows were shipped." But I do not think that applies where the statement in the bill of lading is of a *mere measurement*, done perhaps in haste, and when, moreover, differences of opinion are known to exist as to what really is the exact measurement, and the weight of many cargoes varies much in the interval between shipment and delivery. Therefore, it would be most unreasonable to say that there was an estoppel, and the question would be whether the delivery had applied itself to all actually shipped. I can well understand that if it could be shewn that the statement of weight had been exaggerated fraudulently by the captain in order to obtain a larger sum than the lump freight, that he then, having got that lump freight, the contract would be voidable, but there is nothing of that kind here. I apprehend the meaning of the bill of lading to be merely "Received a cargo of wood *fairly weighed*," so and so, and that is all he undertakes to deliver.

Judgment for the plaintiff.

Attorneys—Ingledew, Ince & Greening, for plaintiff; Gosling, for defendants.

1873. Nov. 19. } LANGTON *v.* CARLETON.

Contract—Service for "Twelve Months certain, after which Time" Notice or Payment—Continuing Agreement.

By an agreement between brewers and their traveller, the latter was engaged at a salary of 200l. a year, payable fortnightly, and it was, inter alia, stipulated "that the agreement between the aforesaid parties shall be for twelve months certain, after which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice in writing." But if the said employers "shall be desirous of terminating this agreement without notice, after twelve months, or before any notice shall have expired, they may do so on paying 50l." :—Held, *per* BRAMWELL, B., *and* PIGOTT, B. (KELLY, C.B., *dissentiente*) *that the agreement ceased at the end of the first twelve months unless the parties allowed the engagement to continue beyond that time, in which event only did notice, or payment in lieu thereof, become necessary to determine it.*

SPECIAL CASE stated under a Judge's order.

1. By an agreement made the 23rd of January, 1871, between Philip Sidney Langton (the present plaintiff), and Henry Parker Burrows (since deceased) brewers, wine and spirit merchants, and maltsters, carrying on business as co-partners of the one part, and Robert Wood Carleton (the present defendant) brewers' agent of the other part; it was agreed between the parties, amongst other terms as follows, that is to say—First, the said P. S. Langton and H. P. Burrows agree with the said R. W. Carleton, that the said R. W. Carleton shall, so long as this agreement is in force, faithfully, honestly and diligently serve the said P. S. Langton and H. P. Burrows by travelling and obtaining orders for their ale, beer, and porter, and receiving, and collecting money due to them in and around London, and otherwise acting for them as their agent and traveller. Secondly, that the said R. W. Carleton will not, during the continuance of this agreement, receive any order for any other person or firm excepting for wines and spirits; and for the services hereby agreed to be rendered the said P. S. Langton and H. P. Burrows agree to pay the said R. W. Carleton a salary of 200l. per annum, and a commission of 10l. per cent. on all cash paid to the said P. S. Langton and H. P. Burrows, such salary and commission to be paid every fortnight, and such salary and commission is to cover every expense, &c.;

irdly, that the said R. W. Carleton e charged with 5*l.* per cent. on all ebts not collected within twelve s from date of invoice. And it is agreed, that the agreement m the aforesaid parties shall be relve months certain, after which either party shall be at liberty to ate this agreement by giving to the a three months' notice in writing desire to do so, addressed to his or last known place of abode in Eng- But if the said R. W. Carleton shall nd to act dishonestly, he shall be t to instant dismissal and forfeit ary and commission due to him. the said P. S. Langton and H. P. ws shall be desirous of terminating agreement without notice, after months, or before any notice shall expired, they may do so on paying id R. W. Carleton the sum of 50*l.* it is hereby agreed that the above shall not be paid and payable any period exceeding fourteen utive days during which the said Carleton may be incapacitated by from attending to his duties.

The said R. W. Carleton thereupon d into the service of the said P. S. on and H. P. Burrows upon the and conditions of the agreement nbefore set forth.

On the 7th December, 1871, the said Langton and H. P. Burrows sent said R. W. Carleton a letter, of the following is a copy—

"7th December, 1871.
"The Brewery, Maidenhead.

"Mr. R. W. Carleton,
ailway Approach, London Bridge,
"S.E.

ear Sir,—We hereby give you notice ve shall not require your services as gent after the 23rd January, 1872.

"Yours faithfully,
"Langton, Burrows & Co."

Afterwards, on the 5th February, the said P. S. Langton, surviving er of the said firm of Langton, Bur- & Co., commenced this action for a of 41*l.* 18*s.* 7*d.* alleged to be due the defendant to the plaintiff under ove agreement.

The said debt was admitted.

The defendant pleaded by way of set-off a sum of 50*l.* which he alleged to be due to him as liquidated damages in lieu of notice to quit the service of the plaintiff as provided by the clause last but one of the agreement hereinbefore set forth.

The question for the opinion of the Court was, whether, under the circumstances of such his dismissal, the said R. W. Carleton was entitled to set off the sum of 50*l.* to be paid to him by the plaintiff by way of liquidated damages? If the Court should be of opinion that the defendant was entitled to set off the said sum of 50*l.*, then the judgment was to be entered for the defendant, otherwise for the plaintiff for 41*l.* 18*s.* 7*d.*, costs of suit.

Holl, for the plaintiff.—The agreement was for twelve months certain, and if after that time it was continued the defendant was to be entitled to notice or 50*l.* in lieu thereof. It ended, however, at the expiration of the year—*Thompson* v. *Maberley* (1); *Brown* v. *Symons* (2). The notice here given was a mere act of courtesy, and the engagement terminated without it. If the agreement had gone on after the year, then, and then only, notice became necessary and the proviso as to the 50*l.* took effect.

Jelf (*Bulley* with him), for the defendant.—Both on the reasonable construction of the agreement and on the two cases cited, the defendant was entitled to three months' notice. It is admitted that the possibility of the engagement lasting beyond the first year was in the contemplation of the parties, and the agreement would necessarily go on until put an end to by three months' notice. "After" means, "after or at the expiration of" the year; and the use of the term, "this agreement," shews that *prima facie* it continued beyond the first twelve months. The intention was to give the defendant three months' notice in *any case*, whenever the contract was to cease after the year certain. The inference to be

(1) 2 Campb. 573.

(2) 8 Com. B. Rep. N.S. 212; s. c. 29 Law J. Rep. (N.S.) C.P. 251.

drawn from the cases cited is in favour of this view.

Holl in reply.—The argument *contra* would make this an agreement for fifteen months certain.

KELLY, C.B.—The words used in this contract are very loose, but it undoubtedly seems to be an agreement for twelve months certain, *i.e.* that it shall not be put an end to by any notice whatever until twelve months shall have expired—After which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice." It is evidently to continue, and then comes the proviso that if the employers "shall be desirous of terminating this agreement without notice, after twelve months, or before any notice shall have expired," they may do so on paying 50*l.* I think the agreement contemplated the continuance of the services and of the operation of the agreement, unless, after twelve months, either three months' notice should be given or 50*l.* paid. Therefore, I think the defendant is entitled under the circumstances to set off that sum against the claim in respect of which this action was brought.

BRAMWELL, B.—I take a different view, and, but for the opinion of the Lord Chief Baron, should have thought this a plain clause. It turns entirely on the meaning of the words used, and it is no use citing cases. The agreement meant one or other of two things, neither of which is exactly expressed. It may be said to mean that the engagement shall be for twelve months, and for some time afterwards until determined by three months' notice given afterwards, which would make it an agreement for fifteen months at least, and for so much longer time as shall elapse before the expiration of three months notice. But I do not think it does mean that, for otherwise the word "certain" would not have been introduced, because it would have stood for twelve months "certain" and three months certain more.

[KELLY, C.B.—Or pay 50*l.*]

The employers were never bound to pay that except in such cases as they could have given notice in. The parties make this engagement with each other, and say—"We will not ente unless for twelve months cert it may be continued between us to happen then, shall any notice Yes, if it is continued betwee shall be three months' notice." that is the obvious meaning of used. Therefore, notice could given until after the twelve mo if the employers "shall be de terminating this agreement with after twelve months, or before a shall have expired, they may paying 50*l.*" That is, they ma with giving any notice by pa but that pre-supposes that the e *is subsisting*, otherwise it wou that they could not terminate t ment on the twelve months. says, very ingeniously, that "after" must be construed "on but I cannot agree with him opinion the plaintiff is entitl verdict.

PIGOTT, B.—I come to the san sion. This is not an ordina from year to year, but a special and we have to determine wh true construction of the terms th have used? It is not easy I think, however, that the agree only for a year certain, and wou absence of any thing to the expire at the end of the year wi notice at all, and that the givi notice here was a mere act of co the part of the plaintiff. But parties contemplated the possibi agreement being continued, be specified twelve months, and if they, "three months' notice shal or 50*l.* paid." I think this notice or to the liquidated da penalty could only attach after year, and consequently the su to be set off by the defendant came due to him.

Attorneys — Dod & Longstaffe, fo
Buckler, Millard & Cayley, for de

1871.
June 7.
Nov. 13, 14, 15.
1874.
Jan. 31.

SPOOR *v.* GREEN.

Mines—Damage by Working—Vendor and Purchaser—Covenants for Title, Quiet Enjoyment, and against Incumbrances—Covenant enuring to Appointee of Covenantee—Statute of Limitations, 3 & 4 Will. 4. c. 42. s. 3—Accruing of Cause of Action.

The defendant being seised in fee of land and coal beneath it, in 1844 let the coal, by a written agreement, to lessees for a term of twenty-five years, with power to enter and work and carry away the coal across the land, and all other powers fit and necessary for the working and carrying. The lessees entered and worked and carried away coal, and after they had ceased, the defendant, in 1845, conveyed by deed a portion of the land to J., a purchaser, who had previously been through the workings, but was not shewn to have any knowledge of the agreement or its terms.

By the deed the defendant covenanted with J., his appointees, heirs and assigns for title, for quiet enjoyment, and against incumbrances.

In 1846 J. appointed the portion of land to the plaintiff, a purchaser, who afterwards built houses thereon, and who had no knowledge of the workings until the land and houses subsided, in 1865. The subsidence was caused by the workings which had been carried on before the conveyance to J. In 1848 the lessees entered the mine and took fireclay, which they had no right to take, and also fragments of coal of nominal value, but these acts did not contribute to cause the subsidence.

In 1867 the plaintiff, as appointee of J., sued the defendant on the covenants, the declaration alleging as breaches of the covenants for title and quiet enjoyment, that, after the plaintiff became seised, the lessees entered and worked, whereby the damage was caused:—

Held, *that the benefit of the covenants passed to the plaintiff as appointee.*

Held also, *that the variance between the declaration and the proof as to the time of working was fatal.*

Held also, *per* BRAMWELL, B., *and* CLEASBY, B. (*dissentiente* KELLY, C.B.), *that, as to the covenant for title, there was no breach, since J. had bought with notice of the workings, and the plaintiff must be taken to have bought the land without the coal; but that, even if the agreement constituted a breach, the cause of action was complete in J., and the plaintiff could not sue upon it; that the subsistence of the agreement during the plaintiff's possession was not a breach of the covenant against incumbrances, because, although the agreement gave the lessees the privilege of doing certain things upon the surface of the plaintiff's land necessary for the working the colliery, yet it did not appear that any such thing was or could be necessary to be done; that the covenant for quiet enjoyment was not broken by the acts of the lessees in 1848; and that the action was not maintainable.*

Held also, *per* BRAMWELL, B., *that, assuming the agreement to be a breach of the covenant for title, it was not a continuing breach, and that the action was barred by the Statute of Limitations.*

Contra, per KELLY, C.B., *that the true cause of action was the subsidence, and that the Statute of Limitations was no bar, and that the plaintiff, therefore, would, but for the variance, be entitled to the damages caused by the subsidence; also that, so long as the agreement subsisted, there was a continuing breach, which rendered the land of less value; and that the acts of the lessees in 1848 constituted a breach of the covenant for quiet enjoyment; and that the plaintiff was entitled to nominal damages.*

Special Case stated by an arbitrator, to whom the cause was referred, by order of a Judge.

On the 25th of June, 1842, T. C. Granger being seised in fee of twenty-eight acres of land at Low Bitchburn, in the county of Durham, conveyed the same, without any exception of mines or minerals, to the defendant in fee, by deed purporting to be a deed of sale and conveyance of the land by Granger to the defendant, in consideration of 740*l.* paid by him to Granger; and at the same time it was arranged between the defendant and Granger that the defendant should not have any beneficial interest in the land, but that he should hold the

or Granger's benefit; and in pur-
e of this arrangement, so long as
efendant had any estate in the land,
d hold the same solely for Granger's
fit, and Granger alone enjoyed the
efit, and the defendant, in all his
nsactions relating to the land, acted
and under the direction of Granger.
On the 15th of December, 1842, the
fendant, by deed of that date, mort-
aged the twenty-eight acres to Boyd
nd others in fee, for securing 988*l.* and
nterest.

On the 23rd of July, 1844, a memo-
randum of agreement in writing was
made, purporting that it was that day
agreed between Granger of the one part
and Smith and Sharp of the other, that
Granger should demise to Smith and
Sharp, the lessees, and that the lessees
should accordingly accept a lease of all
the veins or seams of coal within and
under certain lands and grounds of
Granger (being the said twenty-eight
acres), with full power for the lessees,
their executors, &c., to enter upon the
lands and grounds, and to dig for, sink,
win and work the several seams of coal
lying and being within and under the
same, and to draw the coals so gotten
therefrom, or which should be gotten by
the lessees out of certain adjoining lands,
called Thistleflatt, to bank on Granger's
said lands and grounds, and to lead and
convey the coals so to be gotten as well
in, from and out of the said lands and
grounds last mentioned, as in, from and
out of the said adjoining lands called
Thistleflatt, across, over and along
Granger's said lands and grounds, and
all other powers and privileges fit and
necessary for the convenient winning and
working, getting and conveying away,
all the coals so to be gotten as aforesaid,
upon the following terms (*inter alia*):

First. The term to be twenty-five years,
commencing from the 1st of July last
past. Second. The rents to be a certain
yearly rent of 50*l.*, and a further rent of
2*s.* 6*d.* for every twenty-one corves of
coal to be gotten, and to be payable at
the times specified. Seventh. The lessees
to work the seams of coal in a fair and
regular manner, and according to the
usual or most approved mode of working
collieries on the rivers Wear, Tyne and
Tees. Ninth. The lessees to have power
to make pits or shafts, air-courses and
water-courses, railroads and waggon-
ways, and to erect engines, cinder-ovens,
and other buildings necessary for the
working and carrying on the collieries
on Granger's said lands, and to pay the
annual sum of 3*l.* per acre for all such
ground as they should use, cover or in-
jure in their so working. Thirteenth.
The lessees to fence their works properly,
&c. Fourteenth. Not to leave any coal
below, but bring the whole to bank, ex-
cept hitch or foul coal. Fifteenth. At
the determination of the term to leave
the colliery in a fair state and working
condition, &c.; and, Sixteenth. To fill up
all pits or shafts (except such as Granger,
his heirs or assigns, should request to
have left open), and to restore and leave,
fit for ploughing, all land which should
be used, damaged or spoiled, by the win-
ning and working of the coal demised, or
pay the fee simple of such parts as could
not be so restored. This agreement was
signed by Smith and Sharp; also by the
defendant, thus—"For T. C. Granger,
William Green."

At this time the twenty-eight acres
were subject to the mortgage to Boyd and
others.

On the 4th of April, 1845, the defend-
ant and his mortgagees, Boyd and others,
(the mortgage debt of 988*l.* being the
paid off), conveyed the twenty-eight acre
in fee to Pearson, by way of mortgage
for securing 500*l.* and interest, subject t
a proviso that, if the defendant shou
pay Pearson the 500*l.* and interest on th
4th of October next, the mortgaged pr
mises should, at the request and costs
the defendant, be conveyed to the defen
ant free from incumbrances.

In October, 1845, the defendant agre
to sell to Jammison a piece of ground,
extent about one-seventh of an acre, be
parcel of the twenty-eight acres; and
October 27th, by deed of that date m
between, first, the defendant; sec
Pearson; third, Jammison; and fou
Thompson, the defendant, and Pear
at the request and by the direction of
defendant, according to his estate
interest therein granted, bargained

conveyed to Jammison, his heirs and assigns, the said piece of ground, together with the rights, members and appurtenances thereto belonging and appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate right, title, interest, claim or demand whatsoever of the defendant and Pearson therein, to hold to Jammison, his heirs and assigns, to such uses as Jammison should, by any deed or writing, direct or appoint, and in default of such direction or appointment, to the use of Jammison and his assigns for his life, and after the determination of that estate, by any means, in his lifetime, to the use of Thompson and his heirs during the natural life of Jammison in trust for Jammison and his assigns, and after the determination of that estate, to the use of Jammison, his heirs and assigns for ever.

By this deed the defendant, for himself, his heirs, executors and administrators, covenanted with Jammison, his appointees, heirs and assigns, that, notwithstanding any act, deed, matter or thing done or permitted by the defendant or Pearson, or either of them, to the contrary, the defendant and Pearson had, or one of them had, good right to grant, release and convey the hereditaments thereby conveyed, with the appurtenances, unto and to the use of, or in trust for, Jammison, his heirs and assigns, in manner aforesaid, according to the true intent and meaning thereof. And that it should be lawful for Jammison to enter upon and enjoy the said hereditaments thereby conveyed, with the appurtenances, and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption whatsoever from or by the defendant or Pearson, or either of them, or either of their heirs, executors, administrators or assigns, or any person claiming through or in trust for them; and that free and clear, or otherwise, by the defendant, his heirs, executors or administrators, well and sufficiently indemnified from and against all estates, titles, liens, charges and incumbrances whatsoever.

Jammison entered upon the piece of ground so conveyed to him, hereinafter called Jammison's ground, and built one dwelling-house thereon; and in July, 1846, sold to the plaintiff a portion of the ground; and by indenture dated the 30th of July, 1846, and made between, first, Jammison; second, the plaintiff; and third, A. Spoor, Jammison directed, limited and appointed that the said portion and all his estate, title and interest therein, should from thenceforth be and enure to the use of the plaintiff, his heirs and assigns for ever.

In August following the plaintiff purchased of Jammison the remaining portion of Jammison's ground; and by indenture dated the 21st of August, 1846, and made between, first, Jammison; second, the plaintiff; and, third, Brignal, Jammison directed and appointed the said remaining portion, with the dwelling-house so built thereon by him, to the plaintiff, his heirs and assigns, for ever. After the purchases the plaintiff built several dwelling-houses thereon, which were let to divers tenants at an aggregate rental of 130*l.*

Soon after the execution of the agreement of the 23rd of July, 1844, Smith and Sharp, affecting to act by virtue of and under the authority of the same, and in conformity with the terms thereof, began to work the coal therein mentioned by sinking a shaft in the twenty-eight acres, about sixty yards east of Jammison's ground.

On the 24th of December, 1865, the surface of Jammison's ground subsided, and the plaintiff's houses were greatly damaged. After the damage was sustained, and before action, notice of the damage was given to the defendant, and he was requested to indemnify the plaintiff against the same, but he refused. The subsidence of Jammison's ground, and the consequent damage to the plaintiff, were caused by the mining operations of Smith and Sharp, carried on under Jammison's ground before the 1st of July, 1846, by virtue of the agreement of the 23rd of July, 1844.

The mining operations were so carried on as to leave under Jammison's ground underground passages or "workings" and walls or pillars of unwrought coal between the workings. A bed of fira-

clay formed the floor of the workings. Some of the walls and pillars were in existence at the several times in this paragraph hereafter mentioned. Between August 21, 1846, and July 6, 1847, and between July 6, 1847, and August 1, 1848, some of the fire-clay forming the floor of the workings was dug out and taken away by Smith and Sharp or by persons acting under their authority. Before the clay was dug out pieces of coal had from natural causes fallen from the sides of the walls or pillars upon the floor of the workings, and pieces of the coal forming the sides of the walls or pillars had, from natural causes, become broken and partially detached from the walls or pillars. Some of these pieces of coal were carried away at the times when the clay was dug out and carried away together with the clay by the persons engaged to dig out and carry away the clay. The said pieces of coal were taken and carried away in the ordinary course of digging out the clay, and were disposed of by Smith and Sharp in the same way as other coal taken by them under the agreement of July 23, 1844.

None of the operations carried on between August 21, 1846, and August 1, 1848, in any way contributed to cause the subsidence.

Except as before stated there is no evidence to shew that the defendant authorised any of the operations carried on at any time under Jammison's ground, or had notice of any operations carried on thereunder.

The writ was issued July 6, 1867.

The first count of the declaration alleged the conveyance of the 27th of October, 1845, by the defendant and Pearson to Jammison, setting out the covenants for title, quiet enjoyment, and indemnity against incumbrances, that Jammison entered and built a dwelling-house, and by the two deeds of the 30th of July and the 21st of August 1846, appointed the two pieces of ground and the house to the plaintiff, that the plaintiff entered and built houses and let them, that all conditions, &c., happened. Breach 1. That neither the defendant nor Pearson, notwithstanding any act, deed, matter or thing done or permitted by the defendant or Pearson to the contrary, had good right to grant, release and convey the said hereditaments in manner aforesaid conveyed with the appurtenances, but on the contrary, Smith and Sharp,—who at the time of the making of the deed of October 27, 1845, and thence continually until the doing what is hereinafter mentioned, by reason of acts, matters and things, done and permitted by the defendant, had lawful right and title to do what is hereinafter alleged to have been done by them, and having such lawful right and title as aforesaid, — afterwards and whilst the plaintiff remained and continued seised of the two pieces of ground conveyed to him entered upon the mines and the seams of coal within and under the said pieces, and worked and carried away the coal whereby the plaintiff lost the coal so worked and gotten, and the surface of the two pieces subsided, gave way and were let down with the said houses then built thereon, whereby the two pieces and houses were damaged and lessened in value, and the plaintiff's tenants have been obliged to quit the houses, and the plaintiff has been unable to let the same for a long time, and has been put to expense in propping them up, and in endeavouring to remedy the injuries, and the premises are of much less value to the plaintiff than they otherwise would be, and he hath been prevented from selling the same for so large a price, so beneficially as he otherwise might have done.

Breach 2. That the plaintiff had not enjoyed the said hereditaments with interruption from the defendant or persons claiming through him, but on the contrary Smith and Sharp—to whom the defendant had before the execution of the deed of the 27th of October, 1845, demised all the veins and seams of coal within and under the said two pieces of ground (setting out the lessees' powers of the memorandum of July 23, 1844) for a certain interest and tenancy which at the times of the execution of the said deed and of the doing by them of the acts thereinafter mentioned had not expired,—afterwards and after the said two pieces of ground were so conveyed to the plaintiff as aforesaid, and whilst the plaintiff

ınd continued seised of the said
ı of ground the said tenants
h interest and tenancy right-
ɔy the procurement of the de-
ıtered upon the said seams of
ı and under the said two pieces
and got and carried away the
vhereby the plaintiff was dam-
ı breach 1.

3. was similar to breach 2, ex-
ıt it omitted all mention of
d Sharp or the demise to
ılleged that "the defendant and
ts and other persons then claim-
gh the defendant by the pro-
of the defendant entered upon
of coal and also certain clay
d under the said two pieces of
nd got and carried away the
and clay whereby the plaintiff
aid coal and clay" and was
as in breach 1.

4. was similar to breach 2,
t instead of the allegation that
Sharp worked under the plain-
pieces, it alleged that after the
e to the plaintiff and whilst he
seised of the ground and houses
d to have the same supported by
ng lands, Smith and Sharp by
their tenancy rightfully, &c.,
pon the lands adjoining the
two pieces and worked and
ay the coal under the said ad-
ıds, and deprived the plaintiff's
ı of support from the said ad-
ıds whereby, &c.

5. was similar to breach 4, ex-
t omitted all mention of Smith
p or the demise to them, and al-
; "the defendant and his ser-
. other persons then claiming
he defendant by the procure-
ıe defendant" entered and car-
the coal, &c.

6. alleged that the plaintiff had
ɔd free and clear, &c., but that
lant had notice of breaches 2
d was requested to indemnify
iff against the said estates, titles,
ges and incumbrances so created
fendant and in breaches 2 and
ed, but refused.

ond count alleged the convey-
October 27, 1845, July 30 and
August 21, 1846, and the building, as in the first count, and averred that the defendant knowingly sold and conveyed, and procured to be conveyed to Jammison, his appointees, &c., the pieces of ground for the purpose of houses and buildings being built thereon; that all conditions, &c., were performed, yet the defendant broke his covenant in manner and form, and the plaintiff sustained damage of which the defendant has had notice, and refused to indemnify the plaintiff as in the first count mentioned.

The question for the Court was whether on the facts in the case the plaintiff was entitled to maintain the action in respect of all or any of the causes of action alleged in the declaration.

If the judgment of the Court should be in favour of the defendant on that question the verdict was to be entered for him; if in favour of the plaintiff it was to be referred to an arbitrator to assess the damages which the plaintiff might be entitled to recover, and the verdict was to be entered according to the arbitrator's award on terms agreed on.

The case was argued on June 7, 1871, before Kelly, C.B.; Martin, B.; Bramwell, B.; and Cleasby, B., by *Heath* (*Manisty* with him), for the plaintiff, and by *Quain* (*Kemplay* with him) for the defendant, but the arguments not having been concluded it was again argued, on Nov. 13, 14, 15, 1871, by the same counsel, before Kelly, C.B.; Bramwell, B.; Channell, B. (1); and Cleasby, B. The arguments sufficiently appear from the judgments. Besides the cases there referred to—*Bassett* v. *Nosworthy* (2) and *Nicklin* v. *Williams* (3) were cited.

Cur. adv. vult.

The case having been afterwards by order of the Court and by consent referred back to the arbitrator that he might find certain facts specifically, he found the following facts in November, 1872, which were submitted to the Court:—

The mining operations which are found

(1) Channell, B., died before judgment was delivered.

(2) 2 Tudor's L. Cas. Eq. 1.

(3) 10 Exch. Rep. 259; s. c. 23 Law J. Rep. (N.S.) Exch. 335.

to have been carried on before July 1, 1846, were so carried on before the conveyance to Jammison and the date of the covenants, and they ceased in September, 1845.

Jammison, before the agreement of sale to him made in October, 1845, was shewn and went into the workings where the operations had been carried on under Jammison's ground, and knew that they had been carried on by Smith and Sharp, but there is no evidence to shew that he at any time knew anything about the right of Smith and Sharp to carry on the operations, or about their title to the coal removed by the operations, or that he had at any time any knowledge or notice of the lease to them.

The plaintiff heard of the mining operations and of the lease to Smith and Sharp for the first time after the subsidence, and before such subsidence he had no notice or knowledge of the operations or lease.

By the mortgage to Pearson of April 4, 1845, the defendant covenanted with Pearson, his executors, administrators and assigns for quiet enjoyment, and freedom from incumbrances, and for further assurance.

The price of 12*l.* would not have been an adequate price for Jammison's ground if the coal below the surface had remained unworked, and had been included in the purchase.

A portion of the walls and pillars of coal mentioned in the case still remain under Jammison's ground.

Save as aforesaid there existed no facts either in respect of the state of the property or the title thereto or otherwise, to make it the duty of Jammison or the plaintiff to enquire whether any authority to work the mines had been created by the owners of the land, or to enquire what, if anything, had been done under such authority.

On January 31, 1874, the following judgments were read:—

Cleasby, B.—The question in this case is, whether the defendant is liable to the plaintiff upon a covenant given by him to one Jammison and his appointees for title, for quiet enjoyment, and for indemnity.

The plaintiff had bought two pieces of land of one Jammison in 1846. Jammison had bought the land of the defendant, and the defendant had entered into the usual covenants for title and quiet enjoyment, and there was also a covenant to indemnify. The plaintiff sued the defendant upon these covenants, and we disposed, in the course of the argument, of the objection that the plaintiff could not sue on these covenants by reason of his being only an appointee of Jammison, and not an assignee, holding that in this case the plaintiff could sue upon the covenant, if there was a breach of which he could take advantage.

The declaration sets forth a good cause of action. It alleges that the plaintiff became the purchaser of certain land (which would of course include any coal or other mineral underneath it), and that the defendant had made covenants with the plaintiff's vendor and his appointees for title, quiet enjoyment, and to indemnify from certain damages; and it further alleges that after the plaintiff purchased, certain persons, lawfully entitled under a lease derived from the defendant, entered upon the mines and worked them, and took the plaintiff's coal, and that by reason of the coal being so taken and removed, the land of the plaintiff subsided, and a house built upon it was greatly damaged.

But the facts as found by the arbitrator entirely displace this cause of action in my opinion. It appears that all the coal under the plaintiff's land had been worked out before Jammison sold to the plaintiff, and not only before Jammison sold but before he bought, and before the covenant sued on was entered into. It also appears that Jammison when he bought, had been through the workings and knew that the coal had been worked out. The plaintiff bought of Jammison the land, and all his right, title and interest in it; he therefore never purchased any of the coal, but only the land without the coal, and the covenants apply only to what was the subject-matter of purchase; and therefore there was no breach of covenant for title, by reason that the coals had been removed.

Nor is there any breach of the cov-

vant for quiet enjoyment by reason of the taking the coals at the time when they were taken. And it also seems to me impossible to say that there is a breach of the covenant for quiet enjoyment by reason of the subsidence of the house in consequence of the previous removal of the coal. This subsidence of the house is a necessary consequence of the condition of the property bought by the plaintiff, and may have been partly caused by the additional pressure caused by building on the ground. It is not any interference by any person with the plaintiff's enjoyment, nor the consequence of any such interference.

Nor is there any breach of the covenant to indemnify, because there is no damage to the plaintiff's interest in the land caused by any estate existing in the land at the time of the purchase. This is not an action for wrongfully depriving the plaintiff's land of the support of the subjacent minerals. If it was, questions of law might arise as to which the case of *Backhouse* v. *Bonomi* (5), referred to upon the argument of this case, might be an important authority; but it has no bearing upon the case as it stands. Questions of fact would also arise which the case leaves undecided, for example, whether the removal of the support can be said to be the act of the defendant, who only signed the agreement for Granger.

There are breaches connected with the working of the adjoining mine, but these it was admitted are out of the case. The subsidence was caused wholly by the coal being removed under the plaintiff's land.

It was contended that the subsistence of the lease, or, more properly speaking, the fact that the twenty-five years mentioned in the agreement had not expired, made the agreement of itself an incumbrance, and that the plaintiff is entitled at all events to nominal damages. Independent of the objection of the variance between the statement of the breach and the proof, I cannot think that if such lease or agreement was at an end as far as regards the coals under the plaintiff's land, it can make any difference that under the same document the lessees are winning coal under different land. It might be a mile off, and how can the accidental circumstance of all the coal under distant land being worked out or not being worked out determine whether the plaintiff has a cause of action? It is true the agreement gives the lessees the privilege of doing certain things upon the surface necessary for the working the colliery, and if it appeared that any such thing was or could be necessary to be done upon the land of the plaintiff, there might be some ground for regarding the pendency of the agreement as an incumbrance. The same remark applies to anything which the lessees were authorised to do under ground besides taking the coal. The seams of coal, and not the space occupied by the coal, form the subject-matter of the agreement; and although as long as any portion of the seams of coal are unworked, the agreement or lease is, properly speaking, subsisting, yet, in the absence of any such statement as I have mentioned, it certainly appears to me that it would be an unreasonable conclusion that it subsisted as to the plaintiff's land in any sense to make it an incumbrance upon it in respect of which even nominal damages could, upon the facts stated, be recovered.

If the taking of fire-clay in 1848 could be regarded as a breach of the covenant for quiet enjoyment (and in my opinion, it was unlawful and could not be regarded as such breach), the statute of limitations would be an answer. And there was no damage caused by it so as to make it the subject of the covenant to indemnify. In reality, if fire-clay worth working had been found (as the lease already granted was only a lease of the coal mine), it would have been an addition to the value of the plaintiff's property, as a fresh lease from him would have been required to work it.

If the existence of the lease could (contrary to my opinion already expressed), be regarded as a breach of the covenant for title by reason of its being an incumbrance, which diminished the value of the property, then this breach was complete in Jammison's time. A man must be taken to know what the property is which he

(5) 9 H.L. Cas. 503; s. c. 34 Law J. Rep. (N. S.) Q.B. 181.

buys unless some deception is practised upon him, for which here there is no pretence. The condition of the land must have been known, and the cause of action (if any) in respect of this supposed diminution of value complete in Jammison, and the plaintiff cannot enforce it. It should be observed that the claim here is not upon the breach of a covenant for further assurance, as to which the cause of action would arise upon the further assurance lawfully demanded being refused.

In my opinion there is no foundation for this action. I think the plaintiff bought a piece of land, the coal having been previously taken from underneath it. He took no covenant to protect him against its subsiding, and therefore must bear the consequence. Such a covenant would probably have enhanced the price he had to pay.

Bramwell, B.—I entirely concur in the judgment of my brother Cleasby, but wish to add what follows.—There is a variance between the declaration and proof as to the breach of the covenant for quiet enjoyment. That breach is that the plaintiff has not enjoyed, and on the contrary, Smith and Sharpe to whom defendant had demised, *after the conveyance to the plaintiff* rightfully entered and took the coal. This is untrue. The defendant did not demise to Smith and Sharpe, and they did not enter and take coal after the conveyance to the plaintiff. I think this variance ought not to be amended. If the facts were truly stated, the plaintiff would at the outside only be entitled to nominal damages on this breach, supposing the taking of the few loose pieces of coal were a breach. The arbitrator offered to amend on terms which the plaintiff refused, and now after all the expense and trouble of the cause, he asks on the hearing of the argument for an amendment. I think we ought in our discretion to refuse it.

I think there is no variance as to the breach of covenant for title. The *breach* is that the defendant had not title when he entered into the covenant, the incorrect statement is in the alleged consequence, in the *per quod*, viz., that Smith and Sharpe entered and took coal, while the plaintiff was the owner. This is an allegation of special damage, resulting from the breach, which being untruly stated the plaintiff could not prove; the breach, however, remains and is correctly stated. But assuming the breach to be correctly stated and proved, I am of opinion that the statute of limitations is a bar to it. It was completed, if it ever existed, at the time the deed was executed. If Jammison had recovered on it, or released it, no further action on it could have been maintained by him, nor consequently by his assignee. It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken, indeed, but broken once and for all. In the case of a covenant to repair, the breach is continuing, because the covenant is broken afresh every day the premises are out of repair. And where an action is brought for breach of such covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues. Nothing like that exists as to this covenant. If the words of the breach are looked at, it will be seen that they are, that neither the plaintiff nor Pearson had good title, but on the contrary (and this is the breach) Smith and Sharpe *at the time of the making the deed and thence continually* had title &c. It is true that the Court in *Kingdon* v. *Nottle* (6), speak of the breach as a continuing breach. Oddly enough the breach assigned there is express that the defendant *at the time of the execution of indenture* was not seised, &c. But the Court having in the previous case *Kingdon* v. *Nottle* (7), held that the executrix could not maintain an action on this covenant now hold that the real representative can, and it is in reference to this that they use the language I mention.

Backhouse v. *Bonomi* (5), has in my judgment no bearing on this case. I can claim to be well acquainted with the *ratio decidendi* of that case in the Exchequer Chamber. It was an action of tort. There was neither *damnum* nor *injuria*, till the plaintiff's land was affected. The excavations were not tortious at the time they were made, and never would have

(6) 4 M. & S. 53.
(7) 1 M. & S. 355, and see p. 365 per Le Blanc, J

become so, had those who made them prevented their consequences reaching the plaintiff's land.

Of course the statute of limitations would apply to any breach of covenant for quiet enjoyment, which took place twenty years before suit. The sixth breach and last count follow the fate of the second count. Moreover, no damnification from the breach alleged is shewn.

For these reasons as well as for those given by my brother Cleasby, I think our judgment should be for the defendant.

KELLY, C.B.—Several questions arise in this case of which the first in order appears to be, whether the grant of what has been termed the lease or the agreement for a lease by Granger to Smith and Sharpe, on the 23rd of July, 1844, was a breach of the covenant for title by the defendant to the plaintiff, upon which this action is founded. The words of this agreement reserving an annual rent of 50*l*., commencing from the 1st of July then last past, make it to operate as a present demise, and it was so acted on by Smith and Sharpe, who entered upon and began to work the mines shortly after the date of the grant, and this agreement, which I shall hereafter call the lease, continued in force for twenty-five years, that is to say until the 1st of July, 1869. The instrument was signed by the defendant in these terms: "For T. C. Granger, William Green."

The first objection of the defendant is that the granting of this lease (assuming that it constituted an incumbrance on the land conveyed to Jammison and by him to the plaintiff, and in respect of which the covenant for title was entered into), was not the act of the defendant, but that of Granger alone. The position of the defendant in respect of this land was peculiar, for Granger, who was the real and beneficial owner, executed a conveyance of it to the defendant in 1842, purporting to be a deed of sale of the fee simple in consideration of the sum of 740*l*. But it was agreed between the defendant and Granger, that the defendant should have no beneficial interest in the land, but that he should hold it for the benefit of Granger, and accordingly Granger appears to have treated the property as his own, and to have leased the mines to Smith and Sharp, in consideration of rents payable to himself to his own use. It might have been doubtful whether this act of Granger would have been a breach of covenant by the defendant, but the words of the covenant being—"Notwithstanding any act, deed, matter or thing done or permitted by him the said W. Green," I think, looking to the interest he himself possessed, that by signing this instrument for Granger, he permitted, and sanctioned or affirmed the grant of the lease to Smith and Sharp within the meaning of the covenant; and inasmuch as this lease continued in force until and at, and long after the conveyances to Jammison and the plaintiff, and conferred a right upon Smith and Sharp to enter into and work the mines, and which right they exercised, I am of opinion that it may be treated as a lease by the defendant himself, that it constituted a breach of the covenant for title, and an incumbrance upon the land so conveyed, and did not cease so to operate until the expiration of the term in 1869.

The property had been mortgaged to one Boyd, in December, 1842, and the mortgage having been afterwards paid off, it was again mortgaged to George Pearson, who became a party to the conveyance to Jammison, and in July and August, 1846, Jammison conveyed by appointment to the plaintiff, who thereupon, as contended by him, became entitled to the benefit of the covenant as assignee. It was indeed objected by the defendant that the plaintiff having taken the estate by way of appointment only, was not an assignee in law of the covenant, and for this the case of *Roach* v. *Wadham* (8) was cited; but we intimated in the course of the argument, that, looking to the terms of the conveyance to Jammison and the plaintiff, respectively, that case was not applicable to the present, and that the benefit of the covenant passed to the plaintiff as assignee.

Smith and Sharp proceeded to work the mines, and continued their operations until the month of August, 1848; and on the 24th of December, 1865, the surface

(8) 6 East, 289.

of the ground belonging to the plaintiff subsided, and several houses which had been built upon the land and which were let at rents amounting to 130*l.* a year, were subverted and greatly damaged, and this action is brought to recover the amount of the damage sustained by the plaintiff, to be ascertained by an arbitrator. It appears, however, that the working of the mines which occasioned the subversion of the houses in 1865, was complete before the 1st of July, 1846, when the plaintiff became the owner of the land. Certain other operations took place between July, 1846, and August, 1848, but these were substantially confined to the taking of fire-clay to which Smith and Sharp were not entitled under the lease, and in respect of which therefore the defendant would incur no liability. But as late as 1848, the lessees also took away some small fragments of coal which had fallen from the sides or the walls of the mine, and for which and for the entry into the mine, although the coal so taken was of no appreciable value, the plaintiff claims at least nominal damages.

Upon these facts five questions arise:—

1st. Is the plaintiff entitled to recover the amount of the damage arising from the subsidence which has been caused by the working of the mines before he became entitled to the land?

2nd. Is he entitled to recover damages for the entering into the mines, and the taking of the coal between August, 1846, and August, 1848, after his title to the land had commenced?

3rd. Is the statute of limitations a bar, the working of the mines which caused the subsidence having been complete by the 1st of July, 1846, and before the plaintiff was possessed, and the action not having been commenced until the 6th of July, 1867?

4th. And the declaration alleging the working of the mines to have taken place *while the plaintiff was the owner of the land*, whereas the working which caused the subversion of the houses, as before observed, was complete before the date of his conveyance, 1st of July, 1846—is this a fatal variance as far as respects the damages claimed for the subversion of the houses?

5th. Was the lease a continuing breach of covenant until its expiration o 1st of July, 1869, and is the pl therefore entitled at least to no damages by reason of the existence lease, or of the entry into the min the taking of fragments of coal in and so within the twenty years, either the covenant for title or for enjoyment. The first, third, and f questions, and the second and fift be considered together.

Upon the first, third, and fourth tions the plaintiff claims subst damages by reason of the subsiden his land and the falling of his h which took place in the year 1865 withstanding the fact found by arbitrator that the working of the before the plaintiff's title to the accrued in 1846, was the cause o subsidence, and that such working mines was more than twenty years the commencement of this suit. insisted, however, that the plaint precluded even from raising this qu by the terms of his declaration, whi assigning the breach, expressly a that Smith and Sharp, "afterward *whilst the plaintiff remained and cont seised of the said two pieces of grou conveyed to him as aforesaid entered the mines and seams of coal within under the plaintiff's ground*, and wo won, got and carried away the said whereby the plaintiff lost the said and the surface of the said two pie ground subsided with the said h then built thereupon." This averm that the working of the mines, the of the subversion of the houses, took while the plaintiff was seised of the whereas the fact found by the arbit is that it was complete before the pl became entitled to the land. And as setting forth the very cause of a of which the plaintiff complains, material variance, and fatal to thi essential part of the plaintiff's claim application was made to us to amen declaration by striking out the alleg that the working took place whil plaintiff was possessed. But it was by the counsel for the defendant, an mitted, that upon a similar applic during the arbitration the defendan willing to consent to an amendment

payment by the plaintiff of the costs of the action and the arbitration theretofore incurred, and that this was refused by the plaintiff. Upon these grounds my learned brethren are of opinion that we ought not now to allow the amendment. I must say that the refusal during the arbitration and the mistake itself in the pleadings being the acts of the legal advisers of the plaintiff, and not his own, I should have been disposed upon payment by the plaintiff of all costs incurred up to the present time, even now, to permit him to amend; but the majority of the Court being of a contrary opinion, the amendment cannot be made; and I concur with the rest of the Court in thinking that the variance is fatal. Although, therefore, I am of opinion on the ground hereafter stated that the plaintiff is entitled to judgment upon the breach of the covenants for title and for quiet enjoyment, with nominal damages, I agree that there must be judgment for the defendant in respect of all other damages claimed.

It is unnecessary, therefore, to pronounce an opinion on the chief question in the case; but as a Court of Appeal may hold the variance immaterial or may strike out the words which constitute the variance, I think it right to observe that, looking to the case of *Backhouse* v. *Bonomi*, in the Exchequer Chamber (9), and the House of Lords (10), but especially to the judgment pronounced by Willes, J., in the Exchequer Chamber, I think that the true cause of action in this case is the subsidence of the land, and the consequent destruction of the houses in 1865 and that therefore the statute of limitations is no bar; and that such subsidence and its results being caused by acts lawfully done by the lessees under the lease, which lease was a breach of the covenants by the defendant, he is responsible for the damage done, and but for the variance would be liable for that damage in this action.

Upon the second and fifth questions I am of opinion that this action is maintainable upon the covenant for title, in respect of the existence of the lease until 1869, and upon the covenant for quiet enjoyment by reason of the entering into the mine and taking away the fragments of coal between July, 1847, and August, 1848.

There is a distinction between the covenant for title and that for quiet enjoyment. The covenant for title is broken by the existence of an adverse title in another, as in this case by the lease; its mere existence rendering the land of less value. The covenant for quiet enjoyment is broken only when the covenantee is disturbed, as in this case by the entry into the mine and the taking the fragments of coal in 1848. The deed of purchase having conveyed to Jammison, and afterwards to the plaintiff, the mines under the land *usque ad centrum*, as well as the land itself, the covenant of the defendant was that he had good title to the mines; that covenant, I think, was broken as soon as it was made, by reason of his having before become party to a lease of the mines, which lease was then in force. It was a covenant running with the land, and a continuing covenant, and the breach of it by means of the lease was a continuing breach; and although the plaintiff might have sued upon it upon his becoming possessed, and might have recovered the damages he had sustained (if any) by reason of the breach, he was not bound to do so, and I am of opinion that he continued entitled to sue for any damage afterwards sustained whenever any such should have resulted from the breach; and finally, that if the statute of limitations apply at all to covenants for title, the time of limitation does not necessarily begin to run from the making of the covenant, or of a lease which is a breach of the covenant, and that it is no bar as long as the lease continues and any damage, nominal or substantial, is or may be sustained. I do not understand it to be questioned that the conveyance passed the mines as well as the land to the plaintiff, nor that a covenant for title runs with the land, nor, therefore, that the plaintiff is entitled to the benefit of this covenant; nor that it was broken by the making of the lease, and I am of opinion that he is entitled to sue upon it now upon the ground that the existence of the lease, until it expired in 1869, was

(9) E. B. & E. 646; s. c. 28 Law J. Rep. (N.S.) Q. B. 378.

(10) H. L. 503; s. c. 34 Law J. Rep. (N.S.) Q. B. 181.

an incumbrance upon the land and rendered it of less value than if it had not existed, and further that it made the entry of the lessees lawful and so enabled them to take the fire-clay from the mine; and although they themselves, and not the defendant, are liable to the plaintiff for the value of the fire-clay taken, it is a damage to the plaintiff that he is put to his action against them, and may incur extra costs in such action, which he could not have been exposed to but for the right of entry conferred upon them by the defendant. I am also of opinion that the entry into the mine and the taking of the fragments of coal in 1848, by virtue of the lease, which was within the twenty years, was a breach of the covenant for quiet enjoyment.

The cases of *Kingdon* v. *Nottle* (6) and (7) upon a covenant for title, and *King* v. *Jones* (11) upon a covenant for further assurance, are authorities to shew that these covenants are continuing covenants, and the breaches of them continuing breaches, and that a right of action accrues *toties quoties*, when and as often as damage actually arises from the breach of either covenant. *Kingdon* v. *Nottle* (7) was the case of a mortgage in fee, and the mortgagor covenanted with the mortgagee and his heirs and assigns that he had good title to convey and was seized in fee. The mortgagee held during his life and brought no action. After his death his executors sued upon the covenant for title and the further covenant for further assurance, assigning for breach that the defendant had no title, and that he requested him to levy a fine, which he refused. He failed on the ground that the covenants ran with the land, and had passed to the devisee of the covenantee. But in the following year the second case (6) was decided in an action brought by the devisee of the original covenantee, suing as assignee of the covenant, and assigning for breach that the defendant had no title, and for damage that the lands were of less value than if there had been a good title, and that she had been prevented from selling them for so large a price as she would otherwise have obtained. There it was argued that the breach having been in the testator's lifetime it could not be assigned; that the covenant might pass with the land, but not so the breach, for which the testator and he alone could sue. But it was held that there was a breach also in the time of the devisee, which gave him a right of action, upon which he was entitled to sue; Lord Ellenborough observing, "The covenant passes with the land to the devisee, and has been broken in his time, for so long as the defendant has not a good title there is a continuing breach, and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties* as the exigency of the case may require." Here then the damage that the plaintiff was unable to sell at as large a price as she would have obtained if the title had been good, was held to constitute a continuing and substantive cause of action, and if the action had been brought at a long subsequent period, and the statute of limitations had been pleaded, the time could not have run from any earlier period than the accruing of that cause of action.

And so in *King* v. *Jones* (11), where the covenant was for further assurance, the covenantee in his lifetime called upon the covenantor to levy a fine, and afterwards died, and the plaintiff, his heir, to whom the covenant had passed as assignee, entered upon the premises, and was possessed, and afterwards evicted and brought his action. And here was objected that the breach was in the lifetime of the original covenantee, and that he alone was entitled to sue, and that if any action lay after his death it must be by his executor, as the damages belonged to his estate. But after an elaborate argument and time taken to consider it was held by the Court of Common Pleas that the action well lay, that the refusal to him to levy a fine (the further assurance required) was a breach and damage to him; that the ancestor (the original covenantee) had required the defendant to perform his covenant, "He gave him time and did not sue him instantaneously for his neglect, but waited for the event; that it was wise in him to do so until the ultimate damage was s

(11) 5 Taunt. 418.

tained, for otherwise he could not have recovered the whole value; that the ultimate damage not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor as to the land as the executor does in respect of personalty)." These decisions shew that it is the resulting damage, and not merely the breach of covenant, which gives the right of action.

It is true that when these cases were decided there was no statute of limitations expressly taking away the right to sue upon a covenant after a certain number of years from the breach. But the language of the statute (12) is that no action shall be brought but within twenty years after the cause of action has accrued. And we have only to consider the real nature of the covenant for title, and of the various kinds of breaches of it which may be committed, to see that the statute of limitations upon the construction contended for by the defendant in this case is wholly inapplicable to such breaches except where the right of action is upon an eviction of the whole property conveyed, and so that there is no land with which the covenant may run and nothing left upon which the covenant can operate. In such a case the statute may apply, and from such an eviction the time may begin to run, but in the cases cited, as here, the breach being the grant and continued existence of a lease of a part of the property only—as of the mines and minerals under the land, how can the statute apply? The mine never may be worked at all, so that no damage may ever be sustained; and if an action be brought upon the grant of the lease, only nominal damages may be recovered. But the lease may be for forty years. A quantity of minerals may be taken at the end of ten years, a number of houses on the surface subverted and destroyed in twenty years, and a mansion injured in thirty years. If these be not separate and substantive causes of action upon each of which the complainant has at least twenty years to sue, of what use is the covenant in such a case? But suppose another case,—covenant for title in a conveyance in fee of a landed estate in 1840. It turns out that the covenantor a year or two before has sold and conveyed the reversion of half of the property at his death to A. B., provided A.B. is then living. The covenantor lives for twenty-one years, and then dies, and A. B. survives him, and enters. Upon these facts I apprehend it is not to be doubted that the covenant is broken as soon as it is made, for if the purchaser, the covenantee, were minded to sell the property, or he became bankrupt and it was of necessity to be sold, it would sell for much less than if there was an indefeasible title in fee simple. But supposing no action to be brought until the death of the covenantor and the entry of A. B., can it be contended that the statute of limitations would be a bar? If it be, and the covenantee was ignorant of the conveyance until the death of the covenantor, he loses half his land, and has no remedy. And if he hears of it and sues within the twenty years, but in the covenantor's lifetime, how can the jury estimate the damages in the uncertainty whether the covenantor may not survive A. B., so that the covenantee will never be disturbed in his title?

I apprehend, therefore, upon these grounds, and upon all the authorities, that the lease in question was a continuing breach of covenant, and that the plaintiff was entitled to his action at any time within twenty years of any damage, whether nominal or substantial, being sustained by entry into the mine or otherwise, as long as the lease was in force; and consequently from the entry into the mine in 1848 and taking the fragments of coal; and further, that the action lies by reason of the mere existence of the lease, which, as conferring a right to enter into the mine and upon the surface, affected more or less the value of the property until it expired by effluxion of time in 1869.

I think, therefore, that judgment should be entered for the plaintiff with nominal damages.

Judgment for the defendant.

Attorneys—E. H. De Rhe Philipe, agent for Brignal, Durham, for plaintiff; S. R. Hoyle, agent for Thompson & Lisle, Durham, for defendant.

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(12) 3 & 4 Will. 4. c. 42. s. 3.

[IN THE EXCHEQUER CHAMBER.]
(*Appeal from the Court of Exchequer.*)

1874. Feb. 10, 11. } SMITH *v.* FLETCHER AND OTHERS.

Trespass — Water; Escape of — Mine Owners.

There was a hollow upon the surface of the defendants' land, caused by subsidence of the ground from their mining operations underneath. Across the land ran a brook, the course of which had been diverted and improved by the defendants. During an unusual flood, the hollow became filled with water from, first, the direct rainfall; second, the surface of the land; and third, the overflow of the diverted brook, which burst its banks.

The waters thus gathered in the hollow sank, through chinks, and a cut made at the bottom by the defendants for the purpose of quarrying ore, down into their mine, and thence flowed into the adjoining mine of the plaintiff which was on a lower level.

He brought an action for the damage so done, and at the trial, the above facts having been proved, the defendants proposed to give evidence to shew that, but for the diversion of the brook, more water would have escaped from it into the hole, and greater harm would have resulted to the plaintiff. The learned Judge ruled that such evidence would be immaterial, that the case was within Rylands *v.* Fletcher (34 Law J. Rep. (N.S.) Exch. 177; 35 ibid. 154), *and that the defendants, having suffered the water to collect in the hollow, were absolutely liable for the consequences.*

The Court of Exchequer having confirmed this ruling,—Held, *by the Exchequer Chamber, that the learned Judge stopped the case too soon, and, as, if the defendants had adduced their evidence, there might have been a question for the jury, the cause must be tried anew; that at the second trial a distinction should be made between the divers waters which gathered in the hole, viz., the rainfall, surface, and brook waters; and also that the opinion of the jury should be taken as to whether the mining operations of the defendants had been done in the reasonable, ordinary, and proper course of working the mine.*

Appeal from a judgment of the Court of Exchequer—*Smith* v. *Fletcher* (1).

(1) 41 Law J. Rep. (N.S.) Exch. 193; s. c. Law Rep. 7 Exch. 305.

The pleadings and facts are set out in the report of the case below.

Holker (with him *Kay* and *Baylis*), for the appellants.—First, the water came by reason of an extraordinary flood; secondly it came uninvited by the defendants; thirdly, the brook draining the area was in a state of overflow; fourthly, the mining operations of the defendants were carried on in the proper and ordinary way; fifthly, the plaintiff, being the owner of the lower mines, left no barrier to exclude the water, which by gravitation would naturally inundate his mine. These facts distinguish this case from *Fletcher* v. *Rylands* (2), and therefore the judgment below was wrong.

[LORD COLERIDGE, C.J.—You must try to bring your case out of the scope of that passage in the judgment of my brother Blackburn upon *Fletcher* v. *Rylands* (2), which was approved and adopted by the House of Lords.]

In this case the defendants did not bring the water upon their land. It came as an enemy, against their will.

[ARCHIBALD, J.—But in *Fletcher* v. *Rylands* (2), the defendant did not necessarily bring it, he made a reservoir and it came. QUAIN, J.—You dig this hole, which becomes a reservoir, and maintain it in that state.]

Lord Cairns in *Rylands* v. *Fletcher* (3) says, "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving or by interposing some barrier between his close and the close of the

(2) 34 Law J. Rep. (N.S.) Exch. 177, 35 ib. 154; s. c. Law Rep. 1 Exch. 265; Law Rep. 3 E. & I. App. 330.

(3) Law Rep. 3 E. & I. App. 338.

defendants, in order to have prevented that operation of the laws of nature." And Lord Cranworth said the doctrine was well illustrated by *Smith* v. *Kenrick* (4), and *Baird* v. *Williamson* (5). In the first of those cases, the defendant being the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine. It was held that the owner of the lower mine had no ground of complaint. *Aliter* in the second case, but because there the owner of the upper mine *pumped up* water which flooded the lower. Now here, if the defendants had *caused* the water to come they might be liable, but there is nothing to shew that they did so.

[LORD COLERIDGE, C.J.—Does not that depend upon the view we take of the admitted facts?]

The admitted facts are just like those in *Smith* v. *Kenrick* (4), which was treated as an authority by the House of Lords, and in that case Cresswell, J., dealing with the argument that the defendant was of common right bound to prevent the water coming into his own mine from flowing into his neighbours, points out that there was nothing in the special case from which the Court could infer that the working out of the coal by the defendants was an unusual or negligent mode of proceeding, or that it was done with any design to injure his neighbour's mine, and the learned Judge said (p. 562), "The flow of water into the plaintiff's mine cannot be considered a trespass." The defendant in *Baird* v. *Williamson* (5) cut a passage from the upper to the lower stratum of coal, which was much more than was done here. Bramwell, B., in his judgment upon the present case, assumed that there was something active done which damaged the plaintiff. Possibly if one, knowing his land was saturated with water, cut a trough across it and so drained water into his neighbour's land he might be liable, but he cannot be responsible for the mere making of a hole which does not bring the water. It came from natural causes, or from *vis major*, or the act of God, which are the exceptions stated by Blackburn, J., in his judgment in *Fletcher* v. *Rylands* (2). The inundation was caused by an extraordinary flood.

[KEATING, J.—But not an unprecedented one.]

Such flood at least as could not be anticipated in the ordinary course of seasons or events. [He cited also *Carstairs* v. *Taylor* (6); and HONYMAN, J., referred to *Tennant* v. *Lord Glasgow* (7).]

The defendants should have been allowed to shew, as they were prepared to do, that their alteration of the brook had actually diminished the effects of the flood.

Herschell (with him *Crompton*), for the respondents.—The balance of convenience is in favour of holding the defendants liable, for it would be a grievous burthen upon the lower mine owner if he had to bear the flooding of his mine and to pump out from it, not only the water which would naturally flow down upon him, but also any water collected and sent down although wholly unconnected with mining operations. The defendants have created a reservoir just as much as if they had previously *purposed* to do so. The distinction between *Smith* v. *Kendrick* (4) and the present case is, that there the excavation was made and the water came in the ordinary course of working the mine. This was no extraordinary flood. "We call it extraordinary," said Bramwell, B., in *Ruck* v. *Williams* (8), "but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen. There is a French saying, 'that there is nothing so certain as that which is unexpected.' In like manner, there is nothing so certain as that something extraordinary will happen now and then."

[QUAIN, J.—The case is before us upon the ruling below, and the defendants will be liable, if at all, whether the flood were extraordinary or not.]

The defendants, then, having created

(4) 7 Com. B. Rep. 564; s. c. 18 Law J. Rep. (N.S.) C.P. 172.

(5) 15 Com. B. Rep. N.S. 376; s. c. 33 Law J. Rep. (N.S.) C.P. 101.

(6) 40 Law J. Rep. (N.S.) Exch. 129; s. c. Law Rep. 6 Exch. 217.

(7) 1 Sc. Sess. Cas. 133; s. c. 2 ib. H. of L. 22.

(8) 3 Hurl. & N. 318; s. c. 27 Law J. Rep. (N.S) Exch. 357.

a state of things the natural result of which was that the water came upon the plaintiff, in fact, brought it upon him.

Suppose a man put meat on his land so as to attract a wild beast to it, then that man would be bound to keep up the animal and prevent it passing on to damage neighbouring premises. So, if he broke down the fence on one side of his close, whereby a dangerous animal entered it, he would be bound to raise a fence on the other side, to prevent the beast going out upon the adjoining land of a neighbour. And here, by an act of the defendants, this water has come, and must be kept safe from doing harm to others. The case is within *Fletcher* v. *Rylands* (2). The *intention* of the defendants is not material. Their immunity, if any, must depend on the fact of the mining operations, and on *Smith* v. *Kenrick* (4). But that case is confined to water arising in a mine from the natural course of working, and rests upon the principle that a collection of water of such kind as there did damage, is a necessary incident of mining operations, and one of which each mine owner is aware. Without diminishing the authority of *Smith* v. *Kenrick* (4), and *Baird* v. *Williamson* (5), they may be said to be applicable thus far only, viz., to such water as percolated from the land into the hole through the sides of the hole, or to the mere rainfall filling it, but not to drainage water upon the surface of the land—foreign water, not the result of the mining operations.

[ARCHIBALD, J.—But there may be a working which would naturally bring surface water.]

Suppose a hole in my land, and a stream in the defendant's, and the latter works out his minerals, and so causes a subsidence of land whereby the water flows into my hole and thence into my mine, no doubt he would be liable. Then, can it make any distinction that he lets the water into my land through a hole on his own instead of on mine?

[LORD COLERIDGE, C.J.—Is the defendant at any cost to *warrant* his mining against damage? My brother Lush seems to have thought that the case was within *Fletcher* v. *Rylands* (2), and, if it were, he was perfectly right to rule as he did, that the defendants were bound to absolutely warrant the non-escape of the water.]

Admitting that to have been the ruling, the case may still not be within *Smith* v. *Kenrick* (4), and *Baird* v. *Williamson* (5).

[It was agreed that the judgment on the demurrer should stand subject to the costs being costs in the cause.]

LORD COLERIDGE, C.J.—We are of opinion that it is impossible, on this evidence, to enter a verdict for the defendants. So far we completely agree with the Court below. But we think that this case should go to a new trial. It appears to us to have been stopped too soon. The learned Judge who tried it seems to have considered that it was clearly, on all the facts and aspects, within *Fletcher* v. *Rylands* (2), and to have stopped Mr. Holker from giving any evidence. We are, however, not disposed to agree that, in every conceivable aspect, it might have been brought within *Fletcher* v. *Rylands* (2), and that, if there had been evidence given by the defendant, there might not have been a question for the jury. Without having heard the evidence, it is impossible for us to say what that question might have been. Further, the learned Judge seems to have made no distinction between the parts of water which came from the new diversion of the stream and such as came from the natural overflow (springs or otherwise) of the general surface of the land. These two sets of water may (we do not say they do) admit of very different considerations being applied to them; and without going further, which would now be unnecessary, we deem it very desirable that, at the second trial, the opinion of the jury should be taken as to whether whatever was done was not in course of the reasonable, ordinary, and proper mode of working the mine. The rule will be absolute for a new trial.

KEATING, J., GROVE, J., QUAIN, J., HONYMAN, J., and ARCHIBALD, J., concurred.

Rule absolute for a new trial.

Attorneys—Helder & Roberts, agents for Brockbank & Helder, Whitehaven, for the appellants; Gregory, Rowcliffes & Co., agents for Musgrave, Whitehaven, for the respondents.

(In the Second Division of the Court.)

1874. Feb. 7. { RADLEY AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Negligence — Railway — Contributory Negligence—Plaintiffs not foreseeing Defendants' Negligence.

The plaintiffs, colliery owners, possessed a siding on one of the lines of the defendants, a railway company, and a bridge over the siding with a headway of eight feet. The course of business was for the defendants to bring the plaintiffs' empty waggons on to the siding and leave them, and for the plaintiffs then to deal with them as they thought fit, i.e. take them to the pit to be loaded in such order and at such times as they pleased, or to their workshops for repair. On a Saturday, after working hours, when the men were gone, and the plaintiffs could only move the waggons as on a Sunday, i.e. by some special engagement of workmen, the defendants brought and left on the siding some of the plaintiffs' waggons, all empty but one, which, being loaded with a disabled waggon, was eleven feet high, and could not therefore pass under the bridge. This waggon having remained there, on the next Sunday night, after dark, the defendants' servants brought a long train of the plaintiffs' empty waggons on to the same siding (although there was another unoccupied siding), and with this train pushed the loaded waggon up to the bridge, and on the train being stopped by the bridge, without looking to ascertain the cause, gave such momentum to the engine that the waggon with its load knocked the bridge down, and injured some waggons and a pit staging of the plaintiffs. The plaintiffs having sued the defendants for negligence, and the jury having found a verdict for the defendants on the ground that there was contributory negligence on the part of the plaintiffs,—Held, *that, assuming the plaintiffs to have known on the Saturday that the loaded waggon was on the siding, there was no evidence of contributory negligence to go to the jury.*

The declaration was for so negligently driving and managing the defendants' engine and the plaintiffs' waggons at the plaintiffs' colliery that some of the waggons and the staging of a pit of the plaintiffs were injured. Plea, not guilty.

At the trial before Brett, J., at the Liverpool Summer Assizes, 1873, the facts mentioned in the judgment appeared. The jury found a verdict for the defendants on the ground that there was contributory negligence on the part of the plaintiffs.

A rule *nisi* having been obtained for a new trial on the ground of misdirection in that the learned Judge left the question of contributory negligence to the jury, and did not tell them there was no evidence of contributory negligence, and did not sufficiently direct them as to what constituted contributory negligence; and also on the ground that the verdict was against the weight of evidence, on the 30th of January—

Aspinall and *M'Connell*, for the defendants, shewed cause.

Herschell and *Baylis*, for the plaintiffs, in support of the rule, referred to *Davis* v. *Mann* (1) and *Dimes* v. *Petley* (2).

Cur. adv. vult.

BRAMWELL, B. (on Feb. 7), delivered the following judgment of himself and Amphlett, B.

This is a case of great complexity, not so much in the facts as in the considerations to which they give rise. So much so that we have thought it desirable to put our opinion in writing. The material facts are as follows: The plaintiffs are colliery owners, who have sidings out of and on one of the defendants' lines; over these sidings is a bridge belonging to the plaintiffs with a headway of eight feet. It has been the course of business between the plaintiffs and defendants for the defendants to take from these sidings the plaintiffs' waggons loaded with coals and deliver or leave them at their destination; also to collect the plaintiffs' waggons when empty, and bring them to the sidings, and then leave them. When the waggons were so left on the sidings the plaintiffs dealt with

(1) 10 Mee. & W. 546; s. c. 12 Law J. Rep. (N.S.) Exch. 10.

(2) 15 Q.B. Rep. 276; s. c. 19 Law J. Rep. (N.S.) Q.B. 449.

them as they thought fit, *i.e.*, took them to the pit to be loaded in such order and at such times as they pleased, or took them to their workshops if they needed repair. On a certain Saturday, after working hours, when the men were gone and the plaintiffs could only move them as they might on a Sunday, *i.e.* by some special engagement of workmen, the defendants brought and left on one of the plaintiffs' sidings some empty waggons of the plaintiffs, and a waggon empty, except that it had on it a waggon of the plaintiffs which had broken down and could not travel, and had to be brought in this way to the plaintiffs. The waggon so loaded was, with its load, eleven feet high, and therefore could not pass under the bridge. It remained where so left. On the next Sunday night, after dark, the defendants brought in a very long train of the plaintiffs' empty waggons, and pushed it on the siding where this waggon loaded with the disabled waggon was. It was pushed as far as the bridge. Had it been empty it would have passed underneath, and probably the defendants had often pushed waggons in this way under the bridge; though there was evidence to shew they had been requested not to push things on the siding beyond a public highway, which was some distance before getting to the bridge in the direction from which the defendants brought the train of empty waggons. This is, perhaps, of no moment. But the waggon so loaded coming to the bridge, and being unable to pass underneath, the train stopped, and those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an extent that the waggon with its load knocked the bridge down and injured some waggons and a pit staging of the plaintiffs. For this the action was brought. It is needless to say there was evidence of negligence in the defendants. But the learned Judge left it to the jury to say whether, and the jury did say that, there was contributory negligence in the plaintiffs, and found their verdict for the defendants on that ground. We have to say whether the learned Judge was right in the way he dealt with this question of contributory negligence.

The plaintiffs contended, first, that there was no evidence of contributory gence. The way the defendants was as follows: They said the pl knew or ought to have known tl loaded waggon had been brought a at the place where it was so left knew it would not pass under the l they knew the defendants would o bring empty waggons on the S and to make room for what they k would or might push forward w they found on the siding, as tl done before; that therefore the p ought to have removed the loade gon, or taken out the broken warned the defendants it was ther

The plaintiffs said, in answer that assuming they knew the wagg there with the load, so did the defe that the defendants knew also the of the bridge, and that the waggo its load would not pass under i the defendants knew that working were over when they brought that practically the plaintiffs cou move nor unload it till Monday they said they had a right to s that the defendants would not be ligent under these circumstances drive this loaded waggon at the under which it could not pass, and it would knock down if pushed it with sufficient force; the more cially as there was another unoc siding on which the empty w brought on the Saturday night have been put; that in truth the negligence in them was the not for and guarding against the negligen the defendants. That even if they selves had placed the loaded w there they had no right to ant that the defendants would be so gent as to put any waggon on the without seeing what was there, push with such force as they did they found an obstruction.

We think this reasoning corre consequently that there was no ev of contributory negligence for th Suppose the defendants had broug loaded waggon on the Sunday nig pushed as they did then, there clearly have been no contributory gence; but how does that differ fr

present case, unless it is supposed there was some duty in the plaintiffs to remove the loaded waggon on the Saturday, or give some notice?

The plaintiffs further contended, what perhaps is much the same thing differently put, that according to *Davis* v. *Mann* (1), assuming there was negligence on their part, yet if the defendants could have avoided doing the mischief by reasonable care, they were bound to do so; and the plaintiffs objected to the learned Judge's summing up, that this had not been left to the jury. This also seems well founded. There must, therefore, be a new trial.

Should the case be tried again it might be as well to leave the question in this way to the jury, giving leave to the plaintiffs to move, on the ground that there was no evidence of contributory negligence, should the jury find for the defendants.

Rule absolute.

Attorneys—Sharpe, Parker, Pritchard & Co., for plaintiffs; R. F. Roberts, for defendants.

1874. Jan. 22, 27. { VAUGHTON AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Carriers by Railway—Loss of Goods—Felony of Servants — Evidence — Carriers Act, 1 *Will.* 4. *c.* 68. *s.* 1.

In order to support a replication under the Carriers Act (1 *Will.* 4. *c.* 68. *s.* 1) *of loss by the felonious acts of the defendants' servants, it is not necessary to give such an amount of evidence as would be required to justify a Judge in leaving it to the jury upon an indictment for felony, because in the civil action the servants have an opportunity of being witnesses for the defence, and of clearing themselves from imputation; nor is it necessary for the plaintiff to charge any one individual servant with the theft.*

On the 29*th of January the plaintiffs delivered a box of jewellery, worth more than* 10*l., although the nature and value was undeclared, to the defendants, as common carriers, for carriage to the L. Hotel, Liverpool. The box was transmitted by the defendants' railway, reached the Liverpool, Lime Street, station, on their line, next morning, and was entered with other parcels directed to the same hotel, in the delivery book of H., a carman employed by the defendants' agent to deliver goods. H. then went with his cart to the hotel, and there, while allowing the housekeeper to sign a receipt for three parcels, only delivered two; the hotel manager, however, noticed the deficiency, and asked him where the other was. H. said, "Is'nt it there?" and on being answered in the negative, went out to search his van, but came back, saying that he could not find the parcel. This was the plaintiffs' box.*

On Monday, the 10*th of February, some of the jewellery was handed to a detective by a pawnbroker, with whom it had been pledged. Two men were apprehended in consequence. One of them took the detective to a siding of the station, and there, at a place a hundred yards away from the spot near the defendants' parcels delivery office, where the cart was loaded, a small piece of the jewellery and a bit of a broken box were picked up. The men were released, and afterwards the articles found were shewn to the clerks in the office, one of whom, W., said that on the Thursday before, he had found a pin near the same spot, and another man had found two. When told that he ought to have spoken about it, W. answered that he did not think it worth anything.*

In an action against the defendants for the loss of the jewellery, they pleaded the Carriers Act, 1 *Will.* 4. *c.* 68. *s.* 1, *to which the plaintiffs replied that the loss arose from the felonious acts of servants in the employ of the defendants and not otherwise. At the trial the facts above stated were proved, the defendants called no witnesses, and the jury found a verdict for plaintiffs:—*

Held *that, having regard to the fact of the defendants' servants not having been called to rebut by their explanations the prima facie case made out against them, there was evidence to go to the jury in support of the replication.*

This was an action against the defendants as common carriers for negligence in the carriage of goods of the plaintiffs, whereby the said goods were lost.

Fifth Plea—That the goods were of the description in Sect. 1 of the Carriers Act (1 Will. 4. c. 68), and were above the value of 10*l.*, but that the nature and value thereof had not been declared, nor any increased charge paid.

Replication—That the loss arose from the felonious acts of servants in the employ of the defendants, and not otherwise.

The cause was tried at the Warwick Summer Assizes, 1873, before Honyman, J., and a special jury. The facts were these: On the 29th of January, a box of jewellery worth about 50*l.* was delivered by the plaintiffs to the defendants at Birmingham for carriage to the plaintiffs' traveller, Holland, at the Lawrence Hotel, Liverpool. No declaration of the nature or value of the contents of the box was made to the defendants. The box appeared to have been transmitted by the defendants' railway, to have arrived safely at their Lime Street station in Liverpool on the 30th of January, and to have been there entered, with other parcels directed to the same hotel, in the Parcels Delivery book of one Hindley, a carter, employed by a carting agent of the defendants to deliver goods at the houses to which the same were addressed. The book, from an entry in which it would seem that the box was "checked" into his cart, was delivered to Hindley.

The manager of the Lawrence Hotel in his evidence, speaking of the same morning, said: We had a housekeeper in charge of the bar. Parcels are generally delivered by the railway van. I came into the bar and found parcels being delivered about 8.30 a.m. There were several. The van man (Hindley) was outside waiting for his book to be signed. The housekeeper was in the act of signing it. [Receipt book produced.] I found she had signed without checking. I checked the parcels, and found that there was no parcel for Holland. I asked the man where Holland's parcel was. He said, "Is'nt it there?" I said "No." He went to look in his van, but could not find it. It was a covered van, covered all round, with a roof. I did not see whether there was a box there. I saw the man three or four times afterwards calling at our place delivering parcels; he made statements as to the lost parcel. [These were objected to, and the learned Judge ruled that they were inadmissible as evidence.] *Cross-examined.*—I know the Lime Street station. It is a very populous and frequented part of Liverpool. There is a folding gate opening into Lime Street from the place where the vans are loaded. The hotel fronts to Lime Street on one side, and to the station on the other side. *Re-examined.*—There is no thoroughfare where the parcels are placed. It is ten yards from the platform where the parcels are loaded to the nearest place to which the public have access.

A detective of the Liverpool police force said that on the 10th of February he was shewn a ring and a horse-shoe pin, part of the missing jewellery, by a pawnbroker in Liverpool, and, in consequence of what the latter said, apprehended two men, one of whom took the witness to a siding upon the defendants' railway, about one hundred yards from the parcel delivery station, where they found part of a locket and some small bits of wood. The detective, having released the men, went to the parcels office and spoke to Wilson, one of the clerks there, who said that on the Thursday (the 6th of February), he had found a pin head near to the same spot, and that another man had found two. Whereupon some one said he ought to have mentioned it, to which observation Wilson replied that he did not think it had been worth anything. But the detective several times afterwards visited the parcels office, and saw Wilson, and Gibson, the head of the booking department. He had a conversation with the latter, who, however, said nothing about the parcel. The witness shewed Gibson and the clerks in the parcel office the signet ring from the pawnshop. An inspector in the employ of the defendants was also called on behalf of the plaintiffs, who produced three pin heads, which he had received from the chief clerk at the parcels office shortly before the trial, and which had been identified by the plaintiffs, together with the locket found at the siding, as part of the missing jewellery.

Counsel for the defendants objected that there was no evidence to support the re-

plication, and declined to call witnesses. His Lordship, reserving leave to move on the objection, left the case to the jury, who found their verdict for the plaintiffs. A rule having been obtained, pursuant to leave reserved, to set aside the verdict and enter it for the defendants upon the ground that there was no evidence to go to the jury—

Digby Seymour and *Forbes* shewed cause.—There was sufficient evidence to support the replication, and upon which the jury might reasonabln find that a felony had been committed by the defendants' servants, having regard to the fact that the company could have called as witnesses the servants on whom suspicion rested, and yet they were not put into the box to disprove the *prima facie* case made out against them—*Boyce* v. *Chapman* (1); *Keys* v. *The Belfast and Ballymena Railway Company* (2). The servants of the carting agent were the servants of he company, as far as the provisions of he Carriers Act are concerned. [This was admitted.] The entry in the carman's book was evidence against Hindley, and the fact that some of the jewellery was found on the railway premises, and acknowledged to have been found by Wilson, who never reported the circumstance, implicated other servants of the defendants. It was not necessary to fix the charge on any individual servant.

Field and *J. Carter*, in support of the rule.—The onus of proof was on the plaintiffs, who affirmed that a felony had been committed by the defendants' servants. The evidence given raised suspition only against them generally. The plaintiffs should at least have shewn that the goods could not have been stolen by others, whereas it appeared that the public had access to the railway station, and were equally to be suspected of taking the articles. In *The Great Western Railway Company* v. *Rimell* (3), a parcel was placed by a porter in a locked box in the luggage van of a train and entered by him on the way bill, but these facts were not stated to the guard. After stoppages at stations the train reached its destination, when the parcel was missed. The Court of Common Pleas held that there was no evidence for the jury of the parcel having been stolen by a servant of the company. So in *Metcalfe* v. *The London, Brighton, &c., Railway Company* (4), where jewellery in a tin box, which was enclosed in a deal box fastened with a padlock, was delivered to defendants by a servant of the house at which the plaintiff lodged, and after it had been conveyed by the defendants and delivered by their porter, it was found that the outer box had been opened and the inner one abstracted with its contents. Cockburn, C.J., said that the protection of the Act "will be entirely withdrawn if felony is to be assumed without some reasonable foundation for it. It is incumbent on the plaintiffs to prove, not the possibility, but the *fact* of a felony having been committed by a servant of the company;" and Williams, J., said, "the plaintiffs are not entitled to recover unless they shew affirmatively that the goods in question were lost by means of a felony committed by *one of the company's servants.*" Willes, J., also said, "In order to make out a greater degree of likelihood that the act was committed by a servant of the company than by any one else, the plaintiffs might have shewn a *prima facie* case had the defendants only been carriers of goods, or if it had appeared that the box could not have been exposed so that other persons coming to the railway might have had access to it. Everyone knows that that is not so." It would be a great hardship if Hindley and Wilson were to be thus indirectly convicted of felony upon a collateral issue in a civil case, and upon evidence that would not support an indictment for felony. Moreover, the plaintiffs must go further than to merely lead suspicion towards several servants, they should give such evidence as would make it reasonably certain that some particular one was the thief. And here there was no sufficient proof against either Hindley or Wilson. The box might easily

(1) 2 Bing. N.C. 222; s. c. 5 Law J. Rep. (N.S.) C.P. 74.

(2) 8 Ir. C.L. 167.

(3) 18 Com. B. Rep. 575; s. c. 27 Law J. (N.S.) C.P. 201.

(4) 4 Com. B. Rep. N.S. 311; s. c. 27 Law J. Rep. (N.S.) C.P. 333.

have been stolen from the cart of the former as it stood in the street at the hotel or other stopping places, and Wilson gave a fairly satisfactory explanation of the fact of his not having mentioned the circumstance of finding the pin head when he said that he thought it valueless.

KELLY, C.B.—I am not prepared to say that if either Hindley or Wilson had been indicted for stealing the box, there would have been evidence which the learned Judge would have been justified in leaving to the jury. But it appears to me that a case of this nature is not to be dealt with on at all the same principle as any question of evidence upon a Crown prosecution in a Criminal Court. Let me take a supposed state of things, in which it would be perfectly manifest that one of two persons had abstracted and feloniously stolen a chattel, and yet it would be impossible to say which of the two it was. Suppose certain articles came into the possession of a railway company, and were received at a station to be forwarded next day to some other station, and, in the meantime, the porters had locked up the goods in a cupboard to which two servants of the company had each a key, and no one else. And suppose that between the time of the box being there deposited, and the time when the cupboard was re-opened next morning in order to take out the box, no person had been on the spot, or in the building, but those two men, each of whom had a key. It would be perfectly clear that one or other or both of them had taken it out of the cupboard, if, on opening the cupboard in the morning, it were found that the box was gone; and it would be equally and absolutely impossible to say which of the two men had abstracted it. One might have been asleep in bed the whole time, and the other have taken and disposed of the box, the former being quite ignorant of the fact. Yet it would be quite certain that a servant or servants of the company had stolen the articles, and could anyone say the case was not within the intention of the statute? It would be absolutely certain that it was. Therefore it is obvious we must deal with this case on a different principle to that applicable when a person is indicted for felony, where, th evidence given which is circu only that the article had come t pected person's possession, an been some time in his possess disappeared, the mere fact of session might, consistently with of the evidence, lead to no other than that of negligence, and w justify the Judge in leaving the q the jury. In this particular case, there is only circumstantial evide the possession of the book, and t of the van having possession of t contents, yet that would be to go to the jury that the box to his hands, and if he could no account for the non-production jury would be justified in finding had feloniously stolen it. That question whether there is any between this—a civil case—an dictment for felony.

It would be no justification to in leaving to the jury, on such a ment, the mere fact that the was in possession of this box, it had disappeared at the tim his duty to deliver the same a civil case it might be so, the observation applies immedi the accused may go into the wit and prove at once that, alth article had come into his poss had been stolen in some way o he had no control. Is it not ment for the plaintiffs that, if pected person were innocent, h servant of the company, might called as a witness on their be the first place, we have the hig rity of Tindal, C.J., [See *Boyce man* (1),] upon this Act of Pa that the circumstances of its bei power of the company to call nesses to prove that the replicati founded, is of itself evidence for coupled with other evidence, they might find felony committ I see no reason why it should n Mr. Carter naturally and very a the evil effect on a man's cha being indirectly convicted of f the verdict of a jury in a civil ac therefore said that the same a

evidence ought to be required in a case like this, and on an indictment for felony. But the answer is, that there is nothing unreasonable in allowing less evidence to go to the jury in the civil action, for if the company have to answer a *prima facie* case made out, they have power to call the servant or servants in question and to make them witnesses; and the abstention of the defendants from adopting that course is a fact, taken together with the rest of the evidence, on which the jury may find that a felony has been committed by some servant of the defendants. Let me now turn to the evidence. Here is the book in which it is clearly shewn that the parcel was put into the van; and in the first place, there is the evidence of that book, which was in the possession of Hindley, and the fact that he had taken on himself the conduct of this van, and had the book by which he or some one else might examine the entries with the articles put into the van, and, in fact, check the articles out. That was one circumstance shewing that the articles were put into the van and so came into his possession. It is said, that may be so, yet the parcel might have been stolen on the way to the hotel. But that is a mere matter of conjecture, as to which there was no evidence. Then there is the further fact that, when Hindley arrived at the hotel at which he had the responsibility of delivering the three articles, he delivered only two; and instead of at once saying, "There was a third parcel; I will go and see what has become of it," he permitted the housekeeper to sign for three parcels, whereas he knew that he had delivered two only. That also was evidence to go to the jury tending to shew that there was something wrong, that he was endeavouring to practise a deception on her, and that he had got rid of the parcel in an unlawful way, and was endeavouring to shield himself by obtaining her signature for the third. I do not say that was a case which the learned Judge at a criminal trial ought to have left to the jury. But when, as here, the man had nothing to do but to step into the witness-box and account for the disappearance of the parcel, and so justify its non-delivery by him, I think the fact of his not doing so was evidence which might well be left to them in support of this plea. Therefore I think there was evidence as against Hindley; but as for the evidence against Wilson, there is no reasonable doubt. He is found in possession of a part of the stolen articles (stolen, I say, because we find other parts of the contents of the parcel pledged at a pawnbroker's). Here was a servant of the company, who passed the greater portion of his life on the premises, and was found in possession of a part of the missing articles, yet gave no account of it. Surely that alone would be evidence for the jury of his having stolen them. I think, therefore, with respect to Wilson, there can be no doubt there was evidence, although I do not say it might not have been met and answered, and the stigma on his character have been removed by counter evidence, especially as he himself says that he found the articles on the premises, but adds that some one else had found the rest. He might have shewn that the other person had innocently, and without any imputation of felony, taken possession of that part. Although I quite admit that the evidence was extremely slight, yet, on the ground that it might have been met and answered if no felony had been committed by the defendants' servants, but that no attempt was made so to rebut it; and taking all the circumstances together, I am of opinion there was evidence for the jury in support of the replication, and that this rule should be discharged.

PIGOTT, B.—The question is whether there was evidence for the jury in support of the replication of loss from the felonious acts of servants in the employ of the defendants. I take that to be the true construction of 1 Will. 4. c. 68. s. 1, which was put upon it by the Court of Common Pleas in *Metcalfe* v. *The London, Brighton, &c., Railway Company* (4), for there the question was, whether a felony had been committed by some *one*, and I do not understand that any Court has considered that the evidence should point to a particular servant; it is enough if it tends to shew that a felony has been com-

mitted, and that it is more consistent with the facts that such felony was committed by a servant of the company than by some other person. Such is the rule suggested by Willes, J., in his judgment, and I think it a very good test by which to examine the evidence and to determine whether it ought to go to the jury. On that view of the matter, we have to see whether the evidence here is more consistent with the theory that a felony had been committed by the company's servants rather than by anyone else. It is perfectly clear that a felony was committed by some one. The box was taken, broken open, and the goods abstracted. Now what is the evidence as to the time and place of its disappearance? I regard both Wilson's possession and Hindley's part in the matter as being material with respect to that question when, and where, and how this box could have been taken. It is clear that it arrived safe at Liverpool, entered in the book for inward delivery, and was checked into Hindley's book as an article for which he was accountable. The evidence as to what happened on that checking taking place and that change of position from the company's van to the cart of the person who is to be taken as the company's servant, is left very meagre, and we can only judge of it from our knowledge of the kind of transaction and the way in which it would be carried on. I understand the mode of business to be this: the articles are checked at the office, and entered in a book of the carman, and that book is evidence against him that he is to account for the things received. It is plain that those goods were given into his hands, and were lost after he had possession of them. He goes to the hotel, and there does that which shews that he supposed, or *pretended* to suppose, that he had got the box, for he induced the young person there to sign the book, and it was only by the master coming forward and pointing out that but two boxes had been delivered that the fact is discovered. When complaint was made, no doubt he said, "Oh, is it not here?" but that indicates that he *was accountable* for it; and when it is suggested that it might have been lost while he was in the hotel, I answer that that is not consistent with the facts, because a piece of the box which had been broken open was afterwards found upon the company's premises only a hundred yards off, and no thief stealing it from the railway van at the door of the hotel would have so run into danger of detection as to take it to the station for the purpose of rifling it there. The evidence tends to shew that the box was stolen from the premises of the company at the time it was in their possession, or just after it had been transferred from the booking office to Hindley's cart. If that were so, who had any opportunity of taking it at that time? It is not shewn that the public could have gone into the office and have taken it without being seen. It must be presumed they could not. Nor is it shewn that anyone could have got into the cart without being observed, and it must be presumed he could not. This, therefore, brings the abstraction of the box to a point in time which makes it more *consistent* with its having been taken by the company's servants than by any one else. Moreover, when we find that the box was broken open upon the defendants' premises, and that Wilson had some of the articles, and there had been no hue and cry, although all these servants must have been aware of the loss, and the one who is supposed to have found a piece of the box and part of the jewellery did not think it worth while to mention it, does not that throw the *onus* on the company's servants of explaining the matter as far as they can? It seems to me perfectly obvious that it does so, and indeed I do not see how circumstantial evidence could otherwise be brought to shew that the company were liable if this were not sufficient. Consequently I am of opinion that there was evidence *more* consistent with the fact alleged in the replication than with the innocence of the servants.

Amphlett, B.—I am of the same opinion. I think this case of very great consequence, both to railway companies and to the public, and I am sure the Court would not be doing their duty, if they frittered away the protection given to railway companies by the statute. But what we have to consider is, whether there

was evidence to go to the jury of felony by one of the defendants' servants. It is impossible, in considering that, not likewise to consider the circumstance, of some importance, that the evidence was left in a somewhat vague state, and that the company had, necessarily, in their possession material evidence which was not brought forward. In the first place, an important question arises on the statute as to whether it is necessary to shew that an individual servant has committed the felony. This point has been dealt with by my Lord, and I need only say that I entirely agree with him, that if it is shewn beyond reasonable doubt that the felony was committed by some servant or servants without proof as to any particular servant, the case is taken out of the protection of the statute. Applying that principle to the present case, I do not see any sufficient proof that the felony which had been undoubtedly committed, was committed by some one of the servants, because there does not appear sufficient evidence to shew that the felony might not have been committed by some one of the public. But we are considering whether there was evidence for the jury. Now some evidence was given by the plaintiffs, and the company did not choose to produce rebutting evidence at all. The facts have been fully discussed by those who have preceded me in delivering judgment, therefore I do not propose to go into them at length, but will say that I agree as to Hindley and Wilson. As to Hindley I think that if he were being tried at the bar, and the only evidence against him were the facts proved on the present occasion, the Judge would feel bound not to leave the question of his guilt to the jury. The case with respect to Wilson has appeared to me throughout the whole discussion to rest on a different footing. I wish pointedly to say I do not entertain any suspicion that he committed the felony; but there was the fact that Wilson had chosen to leave the matter entirely unexplained. What is the evidence then? It is that, a robbery having been committed of this box on the 30th of January, a fact which we must, I think, assume to have been known to every one in the office,—on the Thursday before the 10th of February, viz., the 6th, it seems, according to Wilson's own statement, that he found a pin-head, part of the stolen property, and that a companion of his found two more, and when told that he ought to have disclosed it, he admitted that he did not do so until the police came. Now I do not for a moment say that Wilson might not have controverted those facts, nor do I say that a jury would have convicted him of felony, even if he left them unexplained, but I do feel very strongly that when such a case had been made against him, and he had given no further explanation, there was evidence to leave to the jury in support of the present replication. Nothing could have been more reasonable than that Wilson should have been called as a witness.

Mr. Carter made some forcible observations with regard to the destruction of a servant's character in such a case as this; but I think the answer is that it was rather to the benefit of these parties that they should have been put into the box, and I have no reason to believe that their explanation would not have been satisfactory.

Rule discharged.

Attorneys—Burton, Yeats & Co., agents for Hodgson, Birmingham, for the plaintiffs; R. F. Roberts, for the defendants.

1874. Feb. 10, 12. } HIORT AND ANOTHER *v.* BOTT.

Trover—Conversion—Unauthorised Act depriving Plaintiff of Property without Intention to appropriate to Defendant's own Use.

Where one by an unauthorised act deprives another of his goods, though without any intention to appropriate them to his own use, it is a conversion of the goods.

The defendant having through an error of the consignor of goods received what purported to be an invoice of goods sold by the consignor to the defendant through a named broker, and an order which required a railway company to deliver the goods to the

order of the consignor or consignee, indorsed the order to the broker who thereby obtained from the company and made away with the goods:—Held, *that, though the defendant indorsed the order with the intention of correcting what he believed to be an error and of returning the goods to the consignor, yet since the circumstances did not require him to indorse the order or interfere with the goods in any way, he was liable in trover to the consignor.*

Trover for barley; and the common money counts for goods bargained and sold, and for goods sold and delivered. Pleas, not guilty, not possessed, and never indebted. Issue thereon.

At the trial before Archibald, J., at the Staffordshire Summer Assizes, 1873, the following facts appeared—

The plaintiffs, corn merchants at Kingston-upon-Hull, had been in the habit of employing one Greemet at Birmingham as their broker to sell corn for them. In pursuance of an order which they received from him in June, 1873, they sent barley by the London and North Western Railway Company to the railway station at Birmingham, and at the same time sent to the defendant a letter by post containing an invoice, which purported to be an invoice of barley sold by the plaintiffs to the defendant through a broker, so named in the invoice, of the name of Greemet. The letter also contained a delivery order upon the railway company which required them to deliver the barley to the order of the consignor or consignee. This letter and its contents were received in due course of post by the defendant, a licensed victualler at Birmingham, who did not know what it meant as he had given no order for the barley; and within a day or two Greemet called on the defendant, who gave the following account of the interview, which was taken at the trial as correct. The defendant shewed Greemet the papers and said, "What does this mean? I never bought any barley through you of the plaintiffs." Greemet thereupon said it was a mistake of the plaintiffs; they had no doubt confused the defendant's name with some other name; they were doing a large business and were very likely to make a mistake. The defendant then signed the order with the words, "deliver [illegible] to the order of Greemet," and gave it and the invoice to Greemet, as he said, because Greemet said, "Do not send the order back, but indorse it to me, which will save the expense of a fresh order. I cannot get the barley without it." Thereupon Greemet went to the railway company with the order so indorsed, obtained the barley from the company, sold it, ran away and has never been heard of since.

In answer to a question put by the learned Judge, the jury found "that the defendant in indorsing the order had no intention to appropriate the barley to his own use, but did it for the purpose of correcting what he believed to be an error;" and, added the Judge, "of returning the barley to the plaintiffs?" to which the jury assented. A verdict was then entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for 180*l.* 19*s.*, the value of the barley, on the ground that there was an appropriation of the barley to the defendant's own use notwithstanding the verdict.

A rule *nisi* having being obtained to enter the verdict for the plaintiffs for 180*l.* 19*s.*, on the ground that upon the facts proved the plaintiffs were entitled to have it entered for them,

Jelf (*J. J. Powell* with him), for the defendant, shewed cause.—There is no conversion unless there be an *intention* to convert the goods either to the defendant's own use or to that of some other person, or unless the goods be destroyed or altered in character—*Fouldes* v. *Willoughby* (1).

[Bramwell, B.—Is it not sufficient if the defendant eloignes them?]

If my tailor sends me a coat I have not ordered, am I liable in trover if I give it to a messenger to take back, and he steals it? An involuntary bailee of goods is not liable for misdelivery if he acts with reasonable care—*Heugh* v. *The London and North Western Railway Company* (2). It was the conduct of the plaintiffs in

(1) 8 Mee. & W. 540; s. c. 10 Law J. Rep. (N.S.) Exch. 364.

(2) 39 Law J. Rep. (N.S.) Exch. 48; s. c. Law Rep. 5 Exch. 51.

holding out Greemet as their authorised agent that induced the defendant to act as he did, as in *McKean* v. *McIver* (3), where it was held that even carriers, being mere conduit pipes, were not liable for misdelivery. He also referred to *Fowler* v. *Hollins* (4).

Bosanquet (*Huddleston* with him), for the plaintiffs, referred to *Burroughes* v. *Bayne* (5), and *Wilbraham* v. *Snow* (6).

Cur. adv. vult.

BRAMWELL, B. (on Feb. 12).—We are all agreed that this rule must be made absolute, and my brother Pigott has asked me to deliver judgment for him as well as for myself. The case was really a singular one. [The learned Judge stated the facts above set out, and proceeded.] The jury found, in answer to my brother Archibald, that the defendant had no intention of appropriating the barley to his own use, but indorsed the order for the purpose of correcting what he believed to be an error, and of returning the barley to the plaintiffs, and the jury were no doubt right. For this good-natured act on the part of the defendant this action was brought. Now, though I am sorry for the defendant, yet if one is to be pitied more than the other, the plaintiffs are more to be pitied than the defendant, because they have done nothing wrong at all, but through the unauthorised act of the defendant they have lost their barley. But the question is, not which of the two is the more to be pitied, but which of the two is right in point of law, and it appears to us the plaintiffs are right. I think Mr. Bosanquet gave as good a description of what constitutes a conversion as I ever remember to have heard. It is where a man does an act unauthorised which deprives me of my property permanently or for an indefinite time. The expression used in the declaration is, "converted it to his own use." That means converted to his own purposes; it does not mean he consumed it himself, because there is not the least doubt if a man gave a quantity of wine to a friend to drink, and the friend drank it, that is as much a conversion as if he drank it himself. Here the defendant did an act that was unauthorised, because there was no occasion for it, for by the terms of the delivery order the barley was deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would not have been delivered. There is no doubt, therefore, that by what the defendant has done, he has deprived the plaintiffs of their property; because, fortified with this order, Greemet went to the railway company, got the barley, and made away with it, and no action could lie against the railway company, because they would say, "We have done what you desired us to do. We have delivered it to the order of the consignee." It stands, therefore, that by an unauthorised act of the defendant the plaintiffs have lost their barley, without any remedy against anybody except Greemet, which is a worthless remedy. It does seem to us, therefore, that this was assuming a control over the disposition of these goods, and causing them to be delivered to a person who deprived the plaintiffs of them, and that a case of conversion is well made out.

A good many ingenious cases were put as to what would happen if a parcel were left at your house by mistake, and you gave it to a messenger to take back to the person who left it there by mistake, and the messenger converted it to his own use. Probably the safer way to deal with those cases is to say, Wait until they arise. But there really is this difference. When a man does deliver a parcel to you by mistake in that way, it is contemplated that if there is a mistake you will do something with it. What are you to do? Warehouse it? No. Are you to turn it out of doors into the streets? That is unreasonable. Does he not impliedly authorise you to take reasonable steps with regard to it, that is, send it back by a trustworthy person, and when you say to such a person, "Go and deliver it to the people who sent it," are you in any manner converting it to your own use?

(3) 40 Law J. Rep. (N.S.) Exch. 30.

(4) 41 Law J. Rep. (N.S.) Q.B. 277.

(5) 5 Hurl. & N. 296; s. c. 29 Law J. Rep. (N.S.) Exch. 185.

(6) 2 Wms. Saund. ed. 1871, p. 108, note (a).

The same distinction exists between the present case and *Heugh* v. *The London and North Western Railway Company* (2), where it was taken that the plaintiff authorised the defendants to deliver the goods to the person applying for them, if they had reasonable grounds for believing him to be the right person.

One word more. This is an action for conversion, and I lament such a word should appear in our proceedings, which does not represent the fact in reality, and which always gives rise to the discussion as to what is and what is not a conversion. But supposing this case were stated according to a non-artificial system of pleading: "I, the plaintiff, had at the London and North Western Railway Station certain barley. I had sent the delivery order to you, the defendant. You might have got it if you were minded to be the buyer of it. You were not minded to be the buyer, and therefore should have done nothing with it. Nevertheless you ordered the Railway Company to deliver it, without my authority, to Greemet, who took it away." Would not that have been a logical and precise statement of the tortious act on the part of the defendant causing loss to the plaintiff? It seems to me it would. I think, but not without some regret, this rule should be made absolute.

Cleasby, B.—I am of the same opinion, and shall only add a few words for the purpose of making the ground of decision clearly understood, and of shewing that we are not questioning or overruling any of the authorities referred to. It should be particularly noticed in this case that the plaintiffs had not by what they had done placed the defendant in any position of difficulty, as is often the case with an involuntary bailee (an expression often used in the argument) who has received property into his possession for a purpose which cannot (as it afterwards appears) be exactly carried into effect, and who does his best and acts in a reasonable manner for carrying into effect the purpose of the bailment. In such cases the bailee has a duty to perform in relation to the goods, and he is placed in a difficulty in the discharge of that duty by the default of the plaintiff who ought not to be allowed to complain if under that difficulty the bailee has acted in a manner which is considered reasonable and proper. But no difficulty of that sort arises here, because the goods were consigned to the order of the consignee *or consignor*, and the defendant being the consignee and in possession of the order must have known that there was some mistake in making him consignee, and so the goods were properly deliverable to the order of the consignor. He had no duty to perform in relation to the goods, and was a mere stranger except that by mistake he had been made consignee, and so had an ostensible title and could dispose of the goods. This distinguishes the present case from the cases against railway companies referred to in the argument.

It is also to be observed that the present case is different from a class of cases referred to in the argument, in which some act is done to goods, such as shoeing a horse, packing goods or forwarding them on. In these cases no act is done having reference to the property in the goods or the right to the possession of them. The act is consistent with the title of any person. But in the present case the act of the defendant transfers the title to the possession of the goods so as to cause them to be lost to the real owners.

The jury have found that the defendant did not intend to appropriate them to himself by the transfer, but intended them to be returned to the plaintiffs. According to the evidence the object of the transfer was not the having the goods actually returned to the owners, but to dispense with the necessity of sending to the plaintiffs for a fresh order making the goods deliverable to the real purchaser. And although it does not make any real difference, this must have been what the jury meant, because by the form of the note the goods were at the disposal of the plaintiffs if the defendant did nothing.

The ground of the decision in the present case is that the defendant had no title whatever to the goods, that there was no necessity whatever for his interfering in any manner in the disposal of them, but that he improperly, though innocently (being prevailed upon to do so by Greemet), having the *indicia* of title by mistake

as he knew, transferred that title to the possession to Greemet. I think a person who deals with the property of another person in this way does so at his peril, and if by means of it a fraud upon the owner is accomplished he is responsible. It was not left to the jury in this case to say whether the conduct of the defendant in this case was reasonable and proper, but I do not think that this was necessary. No objection was made on the argument that this had not been done, but it was unnecessary because to transfer voluntarily the title to the possession of goods in which you have no interest whatever to a third person is, in my opinion, under the circumstances of the present case, obviously improper and unreasonable, and that is the ground of my judgment.

Rule absolute.

Attorneys—Chester & Co., agents for Arnold & Son, Birmingham, for plaintiffs; Wm. Rogers, agent for W. H. Powell, Birmingham, for defendant.

END OF HILARY TERM, 1874.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

EASTER TERM, 37 VICTORIÆ.

1874. April 16. } SMITH *v.* SMITH.

Practice—Execution—Haste in issuing fi. fa. on Taxation of Costs.

Judgment for 20l. having been recovered and signed against the defendant, a man of known and undoubted wealth, the costs were taxed at 72l., and on the allocatur being given for that sum about one o'clock in the day, the attorney's clerk, who represented the defendant at the taxation, asked the attorney's clerk attending for the plaintiff, to grant time, until a return of post, in which to pay the money. This the latter clerk refused to do, and he at once issued execution which was levied at four o'clock the same afternoon. A master made an order setting aside the fi. fa. and all proceedings thereunder, with costs, on the ground that the execution had been issued in unreasonable haste:—Held, *that such order was wrong, as the plaintiff had a right to issue execution instanter, not being bound to wait during the time asked for, and no other indulgence of a more reasonable kind having been craved.*

In an action by the plaintiff against the defendant, a wealthy distiller, for negligence causing personal damage, the former obtained a verdict for 20*l.*, on the 12th of November, 1873. Judgment was signed on the 27th of November, and notice of taxation of the plaintiff's costs given for the following day, together with a copy of the bill of costs, and affidavit of increase. On the 28th of November, a meeting for taxation took place, but the defendant's attorneys then objected to the omission of the words "a London commissioner to take affidavits, &c.," in the jurat of the copy affidavit of increase, and the taxation was postponed until the 29th of November, when the adjourned taxation was resumed and completed; the master's allocatur for 72*l.* 11*s.* 6*d.* costs was obtained about one o'clock in the afternoon of that day, whereupon the clerk of the plaintiff's attorneys asked the clerk of the defendant's attorney, if he was prepared with a cheque for the amount, the latter clerk asked time until a return of post, the former replied—"I shall not wait, after what was done on the first appointment for taxation," and received the answer—"As you will not wait, then, I tell you the money is attached." The clerk of the plaintiff's attorney thereupon, viz., at a quarter-past one o'clock, and before leaving the building, issued a writ of *fi. fa.* and at once delivered it to the sheriff's officer who levied upon the defendant's goods at about four o'clock the same Saturday afternoon. The defendant had more than one place of business, and the levy was made not at that where the injury occurred to the

plaintiff, but at a separate establishment. A summons to chambers was taken out by the defendant to set aside the execution for irregularity, on the ground that it was issued with unreasonable haste, and the master who heard the summons made an order "that the writ of *fi. fa.* issued herein, and all subsequent proceedings had thereunder, be set aside, and that the sheriff do withdraw from possession, Messrs. Few & Co. undertaking to pay whatever shall appear due to the plaintiff under his judgment, and that the plaintiff do pay to the defendant all costs occasioned by such execution and of this application, and that the defendant be at liberty to deduct such costs when ascertained from the amount due to the plaintiff."

An appeal against this order to Grove, J., was heard and dismissed by his Lordship with costs.

A rule having been obtained calling on the defendant to shew cause why the Master's order, and the order dismissing the appeal from the same, should not be rescinded or varied, on the ground that the plaintiff's proceedings were regular, and why the defendant should not forthwith pay to the plaintiff the sum of 19*l.* 7*s.* 1*d.*, balance of damages and costs recovered in the action, and also the plaintiff's costs of execution and levy, or why the plaintiff should not be at liberty to issue execution for the same—

Roland V. Williams (*Willis* with him) shewed cause.—First, the order was made by consent, and therefore cannot be impugned.

[BRAMWELL, B.—I observe that the words "by consent" are struck out of the form, and the Master who made the order reports to us that he believes it was made *in invitum.*]

Then, secondly, it was properly made, even without consent. Execution was issued with undue speed to harass and annoy the defendant, who was not only solvent but a very rich man, and was quite able to pay, as the plaintiff was well aware. The Court will not allow its process to be so abused. Thus, where a Judge's order was made for payment of a debt and costs which were demanded immediately after taxation, and not being paid, the plaintiff on the same day signed judgment, the Court of Exchequer held that the judgment was irregular—*Perkins* v. *The National Investment Society* (1).

[PIGOTT, B.—If there is any delay the judgment creditor may dispose of his goods by a bill of sale. What is reasonable time to wait before issuing execution, is it to be variable?]

The ordinary practice is that where the debtor is obviously solvent the *fi. fa.* is not issued with such haste. If execution may be taken out at once on the allocatur being given, the attorney must either attend personally, or entrust a clerk with authority to receive the sum, however large. And the amount might have to be paid in cash, for there is no obligation to accept a cheque. The speed here was not used for the *bona fide* object of getting the money. Such abuse of the process of the Court was even actionable. In *Grainger* v. *Hill* (2) the defendants, in order to compel the plaintiff through fear of imprisonment to give up the register of a vessel, caused him to be arrested under a *ca. sa.* for 80*l.* advanced by way of mortgage, and a special action on the case was maintained.

[*Willis* mentioned a case of *Day and wife* v. *The South Eastern Railway* (unreported), tried before Martin, B., in or about 1871, where a verdict having been obtained for 250*l.*, judgment for that sum and costs was signed at half-past twelve in the day, and at three o'clock of that afternoon execution was issued, and the office furniture, &c., of the railway company seized under the *fi. fa.*; but Willes, J., at chambers, set aside the execution on the ground that the plaintiff was not entitled to issue it until a reasonable time had elapsed.]

[BRAMWELL, B.—If those facts are rightly remembered, that case would be an important authority on the point.]

Lucius Kelly, in support of the rule.—The plaintiff had a right to issue execution immediately on the amount of the costs being ascertained. The Common

(1) 2 Hurl. & N. 71; s. c. 26 Law J. Rep. (N.S.) Exch. 182.

(2) 4 Bing. N.C. 212; s. c. 7 Law J. Rep. (N.S.) C.P. 85.

Law Procedure Act, 1852, s. 120, enacts that "a plaintiff or defendant, having obtained a verdict in a cause tried out of term, shall be entitled to issue execution in fourteen days. . . . ." And by Reg. Gen. H.T. 1853, r. 57, a similar provision is made for causes tried in term. "As soon as final judgment is actually signed by the Master, but not before, the party in whose favour it is given may immediately sue out execution, and this before the judgment is entered on the roll."—1 *Chitty's Archbold's Practice* (12th ed.), p. 593. [He was then stopped.]

Bramwell, B.—We are of opinion that the rule should be absolute. Without exactly overruling the decision of my brother Grove at chambers, where, perhaps, the matter was not so fully sifted as it has been to-day before us, we think that there really was no consent to the making of the order by the Master. On the second question we have only to consider the order made by the Master, who has reported his reasons for making it, but with great deference to him we think it wrong. The inclination of my opinion is, that immediately a party to a cause has signed judgment, he may issue execution at once, without more. His so doing may, perhaps, lead to difficulty and inconvenience, because, as I pointed out in *Perkins* v. *The National Investment Society* (1), the clerk attending the taxation of costs is not authorized to receive the money; and, therefore, the judgment debtor cannot prevent the issuing of the execution, if the other party acts with such impropriety as to at once proceed to levy, without giving the opposite attorney time even, figuratively speaking, to put his hand into his pocket. If it were necessary now to decide any question as to reasonable time, I should like to see the papers in the case referred to by Mr. Willis, but I do not think it is so. How the reasonable time could be measured I am at a loss to conceive. It may possibly be that there ought to be sufficient time allowed for the clerk attending the taxation to go to his principal for the money, and thence to the office of the plaintiff's attorney, in order to pay it. I do not, however, think there is any such time, or that the reasonableness could depend on the distance of the attorney's offices. The procedure is, in my opinion, regulated by the good sense of the profession. No such case has, in my recollection, occurred before, and I think the matter may be safely left to their own sense of propriety.

But we need not decide the question of reasonableness, for it does not seem to arise here. The one party said, "Give us time until return of post to pay;" the other answered, "We will not give you a minute;" whereupon the former did not say, "I insist on time to go to my principal for the money;" had he done so the question of reasonableness might have become material. The plaintiff had a right to issue execution *instanter*, and it seems to me that there was nothing irregular in his proceeding. I cannot finish without adding that if an attorney acted in such a manner without any justification, he would deserve great reprobation for causing much vexation, and needless increase of costs; but in this case there certainly seems to have been some provocation given for the despatch in issuing the *fi. fa.*

Pigott, B.—I also refrain from giving any opinion on the question of reasonableness, which has been raised. The Master probably thought the case fell within the decision in *Perkins* v. *The National Investment Society* (1), which I quite approve of, and consider to be right. But this does not fall within that case. I think the plaintiff was only pursuing his strict right in signing judgment, and that we may decide in his favour without at all interfering with any other decision, because it is clear that when requested to wait until return of post he had a right to refuse, and no other lesser indulgence was asked for. He seems also to have had some provocation by the defendant obtaining an adjournment of the taxation by taking a mere technical objection to the form of a jurat.

Rule absolute.

Attorneys—Berridge, for plaintiff; Few & Co., for defendant.

1874. April 22. { THE GREAT NORTHERN RAILWAY COMPANY *v.* SWAFFIELD.

Carriers of Goods by Land—Railway Company—Authority to incur Reasonable and Necessary Expenses for Owner of Goods.

When carriers by land have carried goods to their destination, in pursuance of a contract with one who is both consignor and consignee, and through his default the goods are left in the carriers' hands, they are bound to take reasonable measures for the preservation of the goods, and can recover from him payments they have made on account of expenses so incurred.

The defendant sent a horse by railway consigned to himself at a station on the line, and paid the fare. When the horse arrived at the station there was no one on the defendant's behalf to receive it, and the railway company therefore placed it with a livery stable keeper:—Held, *that they could recover from the defendant the reasonable charges which they had paid to the stable keeper.*

Case stated on appeal from the County Court of Bedfordshire.

On July 5th, 1872, the defendant sent a horse, unattended, by the plaintiffs' 8.40 p.m. train from King's Cross, consigned to the defendant himself at Sandy. The defendant paid in London the fare from King's Cross to Sandy, and received a ticket. The horse arrived at Sandy Station at 10.8 p.m., but there was no one at the station to receive it on the defendant's behalf. The defendant and his residence (which was between fifteen and sixteen miles from Sandy) were unknown to the officials at Sandy Station, and the horse was therefore, by the station master's direction, taken for safe custody, shortly after its arrival, to Bennett's livery stables near the station. Soon afterwards a servant, whom the defendant had sent to meet the horse at Sandy, arrived at the station, produced the ticket, and asked for delivery of the horse. He was told by the station master that the horse was at Bennett's, and that he could have it on payment of the livery charges. One of Bennett's servants came up at the time, and said that the livery charges would be 6*d.* This the defendant's servant refused to pay. The defendant's servant then went with a station porter and Bennett's servant to Bennett's stables and demanded the horse. Bennett said he might have the horse on the payment of 1*s.* 6*d.* The defendant's servant refused, with insolence, to pay anything, whereupon Bennett said he should not have the horse for less than 2*s.* 6*d.*, which was the full and usual charge for one night's keep, and was admitted to be a reasonable charge. The next morning the defendant came to the station, and the station master tried to persuade him to pay Bennett's charge and take the horse. The defendant declined, and said he would not recognize Bennett at all, but offered to pay any demand of the company. The station master said the company's demands having been paid in London, they had no further demand, and eventually told the defendant, "Rather than that you should go away without the horse, I will pay the charges out of my own pocket." The defendant declined the offer, and went away without the horse. On July 8th the plaintiffs wrote to the defendant that the horse would be delivered to him at Sandy without payment of the stable charges, but that they should look to him for payment thereof. The defendant wrote in reply, that if the plaintiffs sent the horse to the defendant's house, free of expense, before a named hour, and also paid 30*s.* for his expenses, and loss of time, and for the delay in the delivery, he would receive the horse, but under no other conditions. The plaintiffs replied by letter that the horse would remain at the stables entirely at the defendant's risk and expense. The horse remained at the stables till November 18th, 1872, when the plaintiffs sent it to the defendant's house. The plaintiffs afterwards, without any threat of legal proceedings, paid Bennett 17*l.* for his stable charges, which were at the rate of 17*s.* 6*d.* per week, and were admitted to be fair and reasonable.

The plaintiffs having sued the defendant for that amount in the County Court, the Judge (before whom the case was tried without a jury) gave judgment for the defendant, holding that there was no

ıtract, express or implied, upon which ɜ plaintiffs could recover.

The question for the Court was, whether ıe plaintiffs were entitled to recover any nd what part of the stable charges. Judgment to be entered accordingly.

James P. Aspinall, for the plaintiffs, appellants, was not heard.

W. Graham, for the defendant, respondent.—The plaintiffs were bound by their contract to deliver the horse to the defendant's servant on the night of July 5th, without any charge (the fare having been paid), because a carrier, though he has a lien for the carriage of goods, has none for the warehousing; nor has a livery stable keeper a lien for the keep of horses—*Judson* v. *Etheridge* (1). The plaintiffs therefore rendered themselves liable to an action by refusing to deliver on July 5th unless the charges were paid; and the refusal of the livery stable keeper was their refusal, since even if they were bound to put the horse to livery, they must not put it out of their own power to deliver to the owner. They ought to have paid the stable charges for that evening and delivered the horse to the defendant's servant. Perhaps they could have sued the defendant for that amount, but having wrongly detained the horse in the first instance, they cannot now recover expenses which never would have been incurred but for their own wrong. The defendant having sent for the horse once was not bound to do so again, or to take it away at his own expense, and as soon as the plaintiffs had found out his address they ought to have sent the horse there, at their own expense, as they eventually did, thereby admitting the obligation. There is no precedent or authority for the present action.

[Pollock, B., referred to *Cargo ex "Argos"* (2).]

Kelly, C.B.—We are clearly of opinion that judgment must be entered for the plaintiffs for 17*l*., the amount claimed. The defendant sent a horse to Sandy by the railway, and as it was not directed to be taken to any particular place, some one on his behalf ought to have been ready to receive the horse and take it away. But no one was there. It does not appear that at Sandy Station there was any stable, or other accommodation for the horse. The question then arises, what was it the duty of the railway company to do? We need only ask ourselves the question as a matter of common sense. Had they any choice? They must either have allowed the animal to stand somewhere on their station until it was starved—a place of danger where it would have been exceedingly improper to have allowed it to remain, or they must have turned it into the high road to the danger of itself and all the Queen's subjects, or they must have put it in safe custody; in other words, put it where they did, namely, under the care of a livery stable keeper, who lived close at hand. By and by the owner's servant comes and demands the horse, which was no longer in the plaintiffs' possession, and the man is referred to the livery stable keeper. Looking at what passed that evening, it may be that an action was maintainable against the stable keeper for refusing to deliver. But the next day the defendant himself came, and the statio master offered to pay the charges out of hi own pocket, in order that the defenda might not go away without the horse. Th offer the defendant declined. What w the company to do? They could allow the horse to perish. Then th is a correspondence, in which the def ant declines the repeated proposal of company to restore him the hor Sandy without any charges. At la horse is sent to the defendant. The pany placed the horse under the keeper's care and were liable to p the keep, and did, in fact, pay it. I entertain a doubt that they are to recover that money from the de for whose benefit they have incu expenditure.

My brother Pollock has refe case (2) identical with this in pr which it has been held that wh owner has a cargo of goods f and something occurs which necessary to incur expenses fo of the cargo, he is justified in c

(1) 1 Cr. & M. 743; s. c. 2 Law J. Rep. (N.S.) Exch. 300.

(2) 42 Law J. Rep. (N.S.) Adm. 49, 65.

can maintain a claim for reimbursement of the debt incurred. It appears to me that this is a perfectly analogous case, and that the company are in the same position as the ship owner.

PIGOTT, B.—I am of the same opinion. We have not to deal with any question of lien. We have only to see whether, in consequence of the defendant's conduct in not receiving the horse, the plaintiffs were obliged to keep it, and to defray the expense of its keep. I give no opinion whether, on the evening of July 5th, the charges of 6*d.*, 1*s.* 6*d.* and 2*s.* 6*d.* were rightly made, or whether the defendant's servant was right in refusing to pay those charges. I do not think that is material, because on the following day the defendant himself refused the offer made by the station master to deliver the horse free of all charges; and that is the basis of my judgment. What were the carriers to do? They were bound, out of ordinary feelings of humanity, to feed and take care of the horse. That became necessary in consequence of the defendant's own conduct. The expense was, therefore, rightly incurred, and there is an implied contract, which entitles the plaintiffs to recover the expense from the defendant.

POLLOCK, B.—I am of the same opinion. If the case had rested on the first occasion when the horse having arrived a charge was made, in respect of which a lien was insisted upon, I should have thought that the railway company were wrong. But the matter did not end there. It is distinctly shewn that the defendant might have had the horse the next day without paying anything, but he declined. It then became the duty of the company as carriers, although the transit of the horse was at an end, to take such reasonable care of it as a reasonable owner would take, and if they had turned it out on the highway they would have been in default.

Then, can they recover any expenses incurred from the owner? I do not know of any decision of English law by which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor; but in my opinion he is. The rights and duties of the master of a ship, with regard to the preservation of cargo for the benefit of the owner, were much considered in *Notara* v. *Henderson* (3), where all the authorities are referred to. That case was cited with others in the *Cargo ex "Argos"* (2), before the Privy Council, and although the decisions of that Court are not binding upon us sitting here, I certainly should, on all occasions, give them every respect. The decision in that case was clearly in harmony with what should be law, according to all reason. It is said in the judgment—"It results from them (the cases cited) that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." Now, that seems to me to be a sound rule of law. That the duty is imposed upon the carrier I do not think anybody has doubted. If there were that duty without the correlative right there spoken of, it would be a manifest injustice.

Therefore, under the whole of the circumstances, I come to the conclusion that this was a proper claim on the part of the company.

AMPHLETT, B.—I take entirely the same view, except that I express no opinion on the question of lien, or whether the company were justified in refusing to give up the horse on the evening of July 5th without repayment of the charges which they had necessarily incurred. All questions of that sort are out of the way, because even if the company were wrong then, they put themselves in the right and the defendant in the wrong, the next day, when they offered to deliver the horse to him without claiming any lien at all.

The case involves important principles. The company were bound to take reasonable care of the horse. If they had turned it out into the road they would have been liable, not only to the owner, but also to the general public, in the event of injury. There was nothing which they

(3) 41 Law J. Rep. (N.S.) Q.B. 158.

could reasonably do but what they did, and I think, therefore, that they are entitled to recover the amount claimed, and that the judgment of the County Court must be reversed.

Judgment for the plaintiffs for 17*l.*

Attorneys—Johnston, Farquhar & Leech, for plaintiffs; William Rogers, agent for W. Stimson, Bedford, for defendant.

1874. April 22. } GORRIS AND ANOTHER *v.* SCOTT.

Action — Breach of Statutory Duty causing special Damage to Plaintiff—Penalties — Protection of Animals under Contagious Diseases (Animals) Act, 1869 (32 *&* 33 *Vict. c.* 70), *s.* 75—*Animals' Order,* 1871.

The declaration alleged that the defendant contracted with the plaintiffs to carry on board his vessel the plaintiffs' sheep from Hamburgh to Newcastle, and omitted to provide any pens, battens or footholds for the sheep on board the vessel, as required by an Order of the Privy Council; and that by reason of this omission the sheep were washed overboard by the sea and lost. The Order was made under the powers conferred by section 75 *of the Contagious Diseases (Animals) Act,* 1869, *which imposes penalties for disobedience:*—Held, *that the declaration was bad, because the object of the Act and the Order of the Privy Council was not to protect owners of animals from such injuries, but to prevent the introduction and spread of contagious diseases in Great Britain.*

The first count of the declaration alleged that after the passing of the Contagious Diseases (Animals) Act, 1869, the Privy Council, under the powers vested in them by the Act, duly and within the true intent of the Act, made a certain Order, therein called the Animals' Order of 1871, with reference to animals brought by sea to ports in Great Britain and to the places used and occupied by such animals on board any vessel in which the same should be so brought to such ports, and thereby, amongst other things, made the following regulations.

"1. Every such place shall be divided into pens by substantial divisions.

"2. Each pen shall not exceed 9 ft. in breadth and 15 ft. in length."

That afterwards the plaintiffs delivered on board the *Hastings* vessel, to the defendant as the owner, certain sheep of the plaintiffs, to be carried by the defendant for reward to him on board the vessel by sea from the port of Hamburgh to the port of Newcastle in Great Britain, and there delivered for the plaintiffs; and the defendant as such owner received and started on the voyage with the sheep on board the vessel, for the purposes and on the terms aforesaid. That the Order and regulations continued in force before and at the time of the delivery to the defendant of the sheep, and until the termination of the voyage.

That all conditions were performed, &c. Yet the place in and on board the vessel which was used and occupied by the sheep during the voyage was not divided into pens by substantial or any other divisions, and the defendant wholly omitted so to divide or cause the place to be divided during the voyage or any part thereof, and by reason thereof divers of the sheep were during the voyage washed away by the sea off the ship, and drowned and lost to the plaintiffs.

The second count was similar, except that in addition to regulations 1 and 2 of the Privy Council Order, it set out regulation 3, viz., "The floor of each pen shall have proper battens or other footholds thereon," and alleged that the floor of the place occupied by the sheep had not proper or any battens or other footholds thereon, by reason whereof the sheep were washed overboard, &c.

Demurrer to both counts, and joinder therein.

Hugh Shield (*C. Russell* with him), for the defendant.—The principle governing this case is that established by the authorities, and fully explained in Lord

Campbell's judgment in *Couch* v. *Steel* (1), viz., that where a statute is passed for a public purpose and imposes a duty for the benefit not of individuals but of the public, and penalties for the enforcement, no action can be maintained by an individual who suffers private damage through a violation of that duty. In *Couch* v. *Steel* (1) [followed and approved in *Atkinson* v. *The Newcastle and Gateshead Waterworks Company* (2)] a statute imposed the duty on shipowners (of whom the defendant was one) of carrying medicines on board ship, and penalties in case of default. The plaintiff, a seaman on board the defendant's ship, sued for a violation of the statutory duty whereby he suffered private damage, and it was held that an action lay because the duty was created for the benefit of the seamen of whom the plaintiff was one, and to prevent the very mischief caused, and because the penalties were intended to enforce only the *public* duty, and not as compensation for private special damage. In the present case the intention of the Act (3), as appears from the preamble and elsewhere, especially section 75, was to prevent the introduction and spread of disease, and not to protect the owners from loss by perils of the seas, or benefit them in any way. It is precisely within the principle of *Stevens* v. *Jeacocke* (4), where a statute enacted that under certain circumstances one fishing-boat should not interfere with another within certain defined stations, and that in case of interference the offending boat should incur money penalties, it was held that no action for damages lay at the suit of an owner interfered with in respect of the interference. By ss. 85 and 103 of the present Act, if any person acts in contravention of, or is guilty of any offences against the Act or a Privy Council Order, he is liable to penalties, of which, by section 106, half goes to the person suing or proceeding, and by implication, though not in words, a summary jurisdiction is conferred on justices for the recovery of such penalties — *Cullen* v. *Trimble* (5). The defendant is not liable in any other way than that pointed out by the Act.

Herschell (*James Mellor* with him), for the plaintiffs.—It is not contended that if, in consequence of the defendant's omission to supply pens, a dog got among the plaintiffs' sheep and killed them, any action would lie, because the damage would be too remote; but the damage which did happen is the immediate and necessary result of the breach of duty, for if pens, battens, &c., are provided, the sheep cannot be washed over, and the action therefore lies. Surely it would lie if, in consequence of the want of pens, &c., the sheep were thrown down and

(1) 3 E. & B. 402, 409; s. c. 23 Law J. Rep. (N.S.) Q.B. 121, 125.

(2) Law Rep. 6 Exch. 404.

(3) The preamble runs—"Whereas it is expedient to confer on her Majesty's Most Honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep and other animals, by prohibiting or regulating the importation of foreign animals; and it is further expedient to provide against the spreading of such diseases in Great Britain. . . ."

Part vi. s. 75, says, "The Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes—

"For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing; for protecting such animals from unnecessary suffering during the passage and on landing. . . . And generally any orders whatsoever which they think it expedient to make for the better execution of this Act, or for the purpose of in any manner preventing the introduction or spreading of contagious or infectious disease among animals in Great Britain (whether any such orders are of the same kind as the kinds enumerated in this section or not) . . . . And may in any such order impose penalties for offences against the same not exceeding the sum of 20*l*. for any such offence. . . .

"Every such order shall have the like force and effect as if it had been enacted by this Act."

Part i. of the Animals Order of 1871 made by the Privy Council was headed

"Transit of animals.

Transit of animals by sea.

"5. In this part of this order the term animals extends to all ruminating animals and to horses.

"6. With respect to places used for animals on board vessels, the following regulations shall have effect"—Then followed regulations 1, 2, and 3, set out in the declaration."

(4) 11 Q.B. Rep. 731; s. c. 17 Law J. Rep. (N.S.) Q.B. 163.

(5) 41 Law J. Rep. (N.S.) M.C. 132.

their legs broken. It is conceded by the defendant that the object of the Act and Order is to benefit the animals, but contended that there is no intention to benefit the owners. But the animals cannot be benefited without also benefiting the owners. The plaintiffs knowing that the defendant was bound to provide pens, &c., were entitled to assume that he would not violate the law, and to treat the statutory obligation as the basis of the contract. Herein the case differs from *Stevens* v. *Jeacocke* (4), where there was no contract between the plaintiff and defendant. In that case, moreover, no duty was imposed upon the defendant, only something prohibited, and the decision was based on this, that for each infringement compensation for the injured party was provided by the statute, viz., in one case the forfeiture to him of the fish improperly taken, in others specific penalties recoverable in a specific manner.

Shield was not heard in reply.

KELLY, C.B.—I think this declaration is bad. In order to see whether it can be maintained we must look at the object which the Legislature had in view in imposing these duties. The preamble (which his Lordship read) shews that the Act was passed for sanitary purposes, and to prevent the introduction into Great Britain of diseased animals which might spread infectious disorders among other animals. For that purpose section 75 authorises the Privy Council to make orders for certain purposes, and among others, "for insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing; for protecting such animals from unnecessary suffering during the passage and on landing." Under this authority the Privy Council made the regulations stated in the declaration which the defendant has disobeyed. Now, if this statute had been passed in order to protect owners of animals brought by sea from the danger of losing the animals through being washed overboard, I do not say that this action might not have been maintainable by the plaintiffs. But in the present case nothing is more clear than that it was not the intention of the Legislature to give any benefit or protection to individuals such as is claimed in this action. The object of the statute was a totally different one, viz., to prevent the introduction and spreading of contagious diseases in Great Britain, and the intention of the regulations was to further that object by insuring that animals should not through overcrowding on board vessels be rendered more liable to contract and spread disease. The preamble of the Act shews that there was no intention to protect owners from perils of the sea during the voyage. It presupposes that the animals arrive at a port in Great Britain. All the first five parts of the Act are directed to that state of things. Then comes part vi. section 75, and gives the Privy Council power to make orders "for insuring for animals *brought by sea to ports* in Great Britain, &c. Mr. Herschell argued that the being washed overboard was "unnecessary suffering," and that may be, but it is not the suffering intended by section 75. If, indeed, for want of the pens required by the regulations, the sheep had been overcrowded and had so incurred unnecessary suffering, and had in consequence arrived at Newcastle so affected by contagious disease that it was necessary to destroy them, I do not say that an action might not have been maintained for the special damage sustained by the owner. This is the distinction established by the authorities; that the right of action is confined to cases where the special damage arises from the very mischief at which the statute was aimed.

PIGOTT, B.—I am of the same opinion, and agree with what my Lord has said as to the object of the statute. The Legislature did not contemplate a change of the relation between owners and carriers of animals for any other purpose than that of preventing the introduction and spread of diseases in Great Britain. I agree with Mr. Shield's argument that if the Privy Council had made a regulation with the object only of providing against animals being washed overboard, that would have been *ultra vires*.

If the action had been for special damage caused, not by the washing overboard, but by a contagious disease contracted

during the voyage in consequence of a breach of the regulations, I think the case would have come within the principle of *Couch* v. *Steel* (1) and *Atkinson* v. *Newcastle, &c., Co.* (2).

POLLOCK, B.—I think the declaration is bad. In these counts the plaintiff has not alleged negligence generally in the defendant, with a view of using the breach of the Privy Council regulations as evidence of negligence for the jury,—as was done in *Blamires* v. *The Lancashire and Yorkshire Railway Company* (6)—but he alleges special damage resulting from the non-compliance with the order of the Privy Council. The only question is whether that gives a right of action? I think not, because the statute was passed, not to prevent animals from being washed overboard, but entirely *alio intuitu*. A power is given to the Privy Council to make orders "for protecting *such* animals from unnecessary suffering." The word "such" clearly refers to "animals brought by sea to ports in Great Britain," which expression governs the whole section. I agree with Mr. Herschell that we must remember this case is founded on a contract, and that that distinguishes it from *Stevens* v. *Jeacocke* (4). Although the use of battens would give an additional advantage to the vendors of animals, because it would be a precaution against the animals being washed overboard as well as against the spread of disease, yet the Legislature did not intend that it should give that additional advantage, and that which the Legislature did not intend should not be added to the contract between the parties.

Judgment for the defendant.

Attorneys—Pyke, Irving & Pyke, agents for J. G. & J. Joel, Newcastle-on-Tyne, for plaintiffs; Williamson, Hill & Co., for defendant.

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(6) 42 Law J. Rep. (N.S.) Exch. 182.

1874. April 24. } TRELOAR *v.* BIGGE.

Landlord and Tenant — Covenant by Lessee—Implied Covenant therein by Lessor — Consent to underlease — Arbitrary Refusal of.

The plaintiff was tenant of a messuage which the defendant had by deed demised to him for a term of years. The lease contained, first, a covenant by the lessee not to let the premises without the consent of the lessor, "such consent not being arbitrarily withheld;" second, a proviso for re-entry if the lessee underlet without the consent of the lessor, stipulating "but such consent is not to be arbitrarily withheld." The lessor refused his consent to an underlease because there was a probability that the premises would be compulsorily purchased by a public body, who, having obtained statutory powers so to do, had already bought some houses near. The lessee sued his lessor, declaring upon a covenant by the defendant not to arbitrarily withhold his consent, and alleging as a breach an arbitrary refusal:— Held, *that there was no such covenant by the lessor expressed or implied in the above-mentioned clauses of the lease; and per* KELLY, C.B., *and* POLLOCK, B., *moreover, that the refusal of consent was not arbitrary.*

Declaration, that the defendant by deed let to the plaintiff a messuage for twenty-one years, subject to a covenant of the plaintiff not to assign the lease, or let the premises or any part thereof without the consent in writing of the defendant first had and obtained, and the defendant by the deed covenanted with the plaintiff that he would give such consent when the same should be reasonably required of him and would not arbitrarily withhold the same, and afterwards and during the term the plaintiff was desirous of letting the first floor of the messuage for one year, and then applied to the defendant for his consent thereto in writing. Averment of performance of conditions precedent. Breach, that the defendant refused to give his consent in writing, whereby the plaintiff was deprived of rent. Plea second, traverse of

the covenant. Fourth, denial of the breach. Issue.

The cause was tried in the Middlesex Sittings after last Trinity Term before the Lord Chief Baron, when the following facts appeared:

By deed of the 18th of January, 1865, a messuage in the City of London was let to the plaintiff by the defendant. The lease was in the ordinary form. After the words of demise came various covenants by the lessee, *inter alia*, a covenant that he would not assign or let the premises without the consent in writing of the lessor first had and obtained, "*such consent not being arbitrarily withheld.*" These covenants were followed by provisoes for re-entry in case of breach of covenant, one being stated thus, if the lessee should assign or let the premises without the consent in writing of the lessor first had and obtained, "*but such consent is not to be arbitrarily withheld.*" Finally, there was a covenant by the lessor for quiet enjoyment. The plaintiff entered the premises, but as he only used the lower part for his business, was willing to let the unoccupied rooms, and in March, 1870, received an application from an insurance company, who offered to take the first-floor of the plaintiff for twelve months at a rental of 120*l*. This offer the plaintiff accepted, subject to consent to the underlease being obtained from the defendant, and the plaintiff wrote to the defendant accordingly on the 24th of March, 1870, informing him of the offer made by the company, and requesting his consent to the proposed under-tenancy. The defendant replied by letter of the 26th, "Upon advice, I regret I cannot agree to your proposition under the altered circumstances of the probable tenure of my property in Ludgate Hill." At this time an Act of Parliament had been passed giving the Commissioners of Sewers power to purchase houses on Ludgate Hill for the purpose of public improvements. They had then already taken some buildings there, and in April, 1871, gave the defendant notice to treat for his property, which they ultimately purchased in January, 1873.

The learned Judge directed a nonsuit, giving leave to move, and a rule having been obtained calling on the defendant to shew cause why the nonsuit entered on the trial should not be set aside, and a verdict entered for the plaintiff for the sum of 150*l*. pursuant to leave reserved, upon the ground that the lease contained, expressly or by implication, the covenant of the defendant declared upon, and that there was evidence to go to the jury that the consent of the defendant was arbitrarily refused, and of the breaches alleged.

J. Brown and *Lumley Smith* shewed cause.—First. The covenant is by the lessee, not to assign without the consent of the lessor. The words, "such consent not being arbitrarily withheld," are a mere qualification of that covenant, and do not amount to a covenant by the lessor. They are not proper words of covenant. The only consequences of the lessor arbitrarily refusing his consent would be that the tenant might then assign. Reliance is placed by the counsel for the plaintiff on the phrase in the proviso for re-entry, but it is no more than the former qualification necessarily repeated and slightly varied in form. They also rely on *Sheppard* v. *The Hong Kong and Shanghae Banking Corporation* (1) as being in their favour, but there the lessors seem, from the body of the report, to have expressly agreed not to withhold consent. But in *Wolveridge* v. *Stuart* (2), where a term was assigned by a lessee to the defendant "subject, nevertheless, to the payment of the existing rent, &c.," the defendant was held not liable in covenant to the lessee for rent which the latter had been called on by the lessor to pay after the assignee had assigned over, and Denman, C.J., said, "It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words in a deed which *shew an agreement* to do a thing make a covenant' (*Com. Dig.* Covenant, A. 2); but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification (*Com. Dig.* Covenant, A. 3; 1 Roll. Abr. 518, 30 and 35)." That is

(1) 20 W. R. 459.

(2) 1 Cr. & M. 644, 657; s. c. 2 Law J. Rep. (N.S.) Exch. 303; in error, 3 Law J. Rep. (N.S.) Exch. 360.

the true rule. This clause is common in leases, but no such action as the present can be found in the books. If a covenant by the lessor were intended, it would have been placed with his covenant at the end of the lease, and not amongst covenants by the lessee. In *Smith* v. *The Mayor, &c., of Harwich* (3), the plaintiff contracted with the defendants that he would construct certain works, subject to the provision "that the assent of the Commissioners of Woods and Forests shall be given to the said mayor, &c., to carry out the works, and further, that the approbation of the Lords Commissioners of the Treasury is given to the said mayor, &c., to borrow a sum to pay for the same." The plaintiff sued on the agreement, assigning as a breach that the defendants had omitted to procure such assent and approbation. But it was held that there was nothing in the language of the agreement to warrant the Court in implying a covenant on the part of the corporation to obtain the assent and approbation. And Cockburn, C.J., said, "It is difficult to see, if it be a qualification of the plaintiff's contract, how it can impose any obligation upon the defendants."

Secondly. The refusal of consent was not arbitrary. So long as the lessor does not merely say, *sic volo sic jubeo stet pro ratione voluntas*, but *bona fide* considers the matter, and refuses his consent, he is entitled to do so, and it is not for a jury to entertain the question whether he was right or wrong in his determination, for even if they found his reasons wrong, such refusal would not be arbitrary. The Court, in the absence of evidence to the contrary, will assume that he acted reasonably and *bona fide*—*In re The Gresham Life Assurance Society; ex parte Penney* (4). "Arbitrary" means "depending on will or discretion not governed by any fixed rules."—*Webster's Dict.*

Day and *Petheram*, in support of the rule.—First. This agreement was executed by both parties. A covenant by the one may likewise be a covenant by the other. The arrangement of the clauses in the instrument must not govern the construction. These qualifying words also amount to a covenant. It would be more reasonable to treat them as an agreement than to limit them to mere qualification. The terms used in the proviso for re-entry are clearly those of a covenant, "but such consent is not to be arbitrarily withheld." Who else save the lessor promises that it is not to be so?

Secondly. The refusal was capricious. The "altered circumstances," mentioned as the cause for it, were a mere rumour current that the premises would be required for public improvements. Compensation was payable to the lessor irrespective of the fact of the first-floor being occupied. A man cannot in a matter like this be a judge of his own case without giving reasons for his decision—*The Bishop of Exeter* v. *Marshall* (5). The object of the condition as to consent is to secure suitable under-tenants, and yet, the plaintiff having proposed fit and proper tenants, as they were admitted to be, the defendant refused his consent to the underlease, and gave no reasons for doing so. Such conduct was arbitrary.

KELLY, C.B.—Three questions arise. First, whether certain words at the end of a sentence which prohibits the lessee from re-assigning or re-letting the premises without license from the defendant, amount to a covenant or not? I am of opinion that they do not. Their effect is merely to qualify the proviso with which they are connected, and of which they form part. It runs thus: [His Lordship read it.] Now, the rule of law undoubtedly is, that any words in a deed which impose an obligation upon one of two parties may amount to a covenant, but, on the other hand, those words must be so introduced into the instrument as to shew that it really was the intention of the parties that the one should covenant with the other. There must be an agreement of the two minds. But the words before us have no such

(3) 2 Com. B. Rep. N.S. 651; s. c. 26 Law J. Rep. (N.S.) C.P. 257.

(4) 42 Law J. Rep. (N.S.) Chanc. 183; s. c. Law Rep. 8 Chanc. App. 446.

(5) 37 Law J. Rep. (N.S.) C.P. 331; s. c. Law Rep. 3 E. & I. App. 17.

signification under the ordinary rules. They do not indicate anything like an agreement or promise on the part of the lessor that he will not withhold his consent arbitrarily, but are part of the same sentence in which the lessee covenants not to assign or underlet, and clearly mean that that covenant shall not operate if the refusal of the lessor shall be arbitrary —that is, if a license to assign is asked for, and the lessor refuses without reason assigned, and without any substantial, fair or reasonable cause. If he merely answers, as Mr. Brown suggests, *sic volo . . . stet pro ratione voluntas*, that would be an arbitrary refusal, and the effect of it would be that the lessee might then assign or underlet, and his covenant would not be thereby broken. But these words form part of the sentence restrictive of the character and nature of the covenant; which is not to operate at all if the consent of the lessor be arbitrarily withheld. So, quite admitting the general principle to which I have above alluded, I think there was no covenant there by the lessor.

Next, as to the words in the proviso for re-entry, upon which much stress has been laid by the plaintiff—"But such consent is not to be arbitrarily withheld." Now, had those words been used elsewhere in the instrument, although perhaps part of the same sentence in which they now stand, it is possible there might be a covenant in them, but when we find them following a reference to this very covenant by the lessee, it would be extremely unreasonable to give one effect to the words in the first clause, and another to those in the second. Here, too, the words are part of the same sentence, and I think only serve to shew the description of the refusal, which is not to affect the covenant. Therefore, I think that, according to their plain meaning, neither the words used in the proviso, nor in the covenant itself, operate in any way as a covenant by the lessor, but by the lessee only.

Another point arises, namely, whether the refusal was or was not arbitrary. Of course, if my view of the alleged covenant be correct, no second question arises; but as it is possible that our decision may be appealed from, and overruled, I would add, that my opinion on this latter point is also against the plaintiff. The language of the refusal is this. [His Lordship read the letter of the 26th of March, 1870.] Is that an arbitrary refusal? If, having regard to all the circumstances, the nature of the property, the duration of the term, and the fact that an Act of Parliament had been passed affecting the premises, and which rendered it likely they would be purchased in a short time by a public body, the lessor takes advice, and under that advice refuses his license to assign, that is no arbitrary refusal. "Arbitrary" must mean unreasonable—without reasonable cause. It has been contended that the refusal in question must be a refusal having reference to the character or solvency of the person to whom the assignment is proposed to be made. But I find no such qualification of the words. If they meant that, the parties ought to have so expressed it, and I think that if the lessor had any reasonable, fair and substantial ground, he had a right to refuse, either for his own interest, or in the interest of his tenant. Now here was a very sound and substantial ground for refusing. An Act of Parliament had been passed under which a public body had power to take these premises for public purposes. That body had already begun operations, and had given notice to the owners of property. Then the defendant as an owner in fee might infer that if the public body wished to take his property, and to acquire possession at an earlier period than that at which the notice prescribed by the Act would run out they would pay a much larger sum for that advantage of immediate possession. Expanding the letter of refusal into all that was passing in the defendant's mind, it would amount to his saying to the plaintiff, "Not only would an underlease prejudice me, because in the absence of it I should get a higher payment, but for your own sake I do not give my consent as the commissioners will most likely want the premises immediately, and will give you also a much larger sum for earlier possession, an advantage you would lose were the premises underlet for a year." Those

were sound, reasonable, and substantial grounds on which the defendant might exercise the power he possessed—not an arbitrary power but a reasonable one, and justifying the refusal. On both points I think the defendant entitled to the verdict which was directed in his favour.

My brother Pollock desires me to say that he concurs in this judgment.

PIGOTT, B. — I refrain from giving a formal judgment as I have not heard the whole argument, but from what I have heard of the case I agree with the Lord Chief Baron.

AMPHLETT, B.—The first question is whether the lessee has a right of action against the lessor for arbitrarily refusing or withholding his consent, and I would not for a moment be supposed to say that the words used in this deed are not quite sufficient to raise a covenant by implication if it were necessary for carrying out the intention of the parties as appears by the instrument. But at the same time I apprehend that it is a sound rule of construction that neither a right nor an obligation ought to be implied from the terms of a deed if the intention of the parties can be carried out by a more literal and natural interpretation. Looking at this lease and the words themselves, it seems much more consistent with the language used that they should be a qualification of the covenant by the lessee, than be a covenant by the lessor. The covenant by the lessee is in derogation of his common law right to assign. Then, when we come to the qualification of the proviso that he shall not assign without the consent of his lessor, namely, "such consent not being arbitrarily withheld," it seems to me much more natural, and, indeed, more convenient, that he is to be restored to his common law right of underletting or assigning if the consent should be arbitrarily withheld. He would be then released from his covenant at once, and entitled to deal with the property as he pleased directly he could shew the consent to be arbitrarily withheld. As the Lord Chief Justice pointed out in *Smith* v. *The Mayor, &c., of Harwich* (3) you cannot make use of these words for two purposes, and say they both qualify the lessee's covenant and make a covenant by the lessor, you must take them one way or the other, and if taken as a covenant by the lessor, you have this great inconvenience, namely, that the lessee would not, without breaking his covenant, be able to underlet, notwithstanding the consent were arbitrarily withheld, but would be left to his cross-action for the arbitrary refusal. Moreover, if we look at the proviso for re-entry, the inconvenience becomes still more manifest, for if we hold that the words in question there do not qualify the condition of re-entry, one would then have this strange state of things, viz., that if the consent were arbitrarily withheld, and the lessee assigned, he might be evicted from the property, and be only left to his cross-action. The inconveniences may be got over by construing these words as qualifying the covenant. For here, suppose the lessee were right in saying the consent was arbitrarily withheld, it would, I apprehend, have been quite competent to him without rendering himself liable to an action, or to re-entry under the power, to say to his lessor, "You are not entitled to maintain your action because you have withheld your consent arbitrarily, and therefore the condition requiring your consent has no operation." And even with respect to the lessor himself, he might be very well advised in not entering into such a covenant, because had he done so he would be liable to an action raising difficult questions as to arbitrary refusal. For these reasons, I think this action of covenant will not lie. On the second point discussed by the Lord Chief Baron, it is not necessary for the decision of the case, for if we are right on the first the plaintiff will not succeed, and therefore I do not think I need go at all into the reasons which induced my Lord to say that on that question also he thinks the plaintiff is wrong. With regard to that point I feel much more doubt than on the other, and I do not express an opinion either way.

Rule discharged.

Attorneys—Hyde & Tandy, for plaintiff; A. Dobie, for defendant.

(*In the Second Division of the Court.*)

1874. May 8. } CHILDS *v.* HEARN.

Railway — Fences — Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 68 — "*Cattle*" *inclusive of Swine — Adjoining Owners and Occupiers — Negligence in keeping Animals—Contributory Negligence.*

The obligation imposed on railway companies by section 68 *of the Railways Clauses Consolidation Act*, 1845, *to fence as regards the cattle of adjoining owners and occupiers, extends to swine, and the fence must be reasonably sufficient to prevent ordinary swine from escaping on to the railway.*

The defendant kept swine in a field which he occupied and which adjoined the line of a railway company, who were bound, under section 68 *of the Railways Clauses Consolidation Act*, 1845, *to maintain sufficient fences between their line and the field. The existing fence was sufficient to keep out oxen, sheep and horses, but not swine, and the defendant's swine crawled through the fence and upset a trolly of the company, which was travelling on the line. The plaintiff, a platelayer in the company's service, who was travelling on the trolly in the course of his service, was injured by the accident, and now sued the defendant for the damages caused thereby. The defendant knew that some of his swine had on a former occasion strayed on to the line and been killed by a train, and he had been warned that the fence was insufficient to keep in the pigs:—* Held, *that the company could not have sued the defendant for trespass, because they were bound under the statute to maintain a fence sufficient to keep out swine, and that the present action would not lie, because the plaintiff could not be in a better position than the company, his employers.*

The first count of the declaration alleged that the defendant possessed and occupied a close near the Great Eastern Railway, and therefore ought to have kept his close fenced, so as to prevent his cattle and other animals from escaping out of the close on to the railway, and causing damage to persons lawfully there. Breach—that the defendant did not keep his close fenced, whereby the defendant's pigs escaped out of the close on to the railway, and ran against a trolly, on which the plaintiff, a servant of the railway company, was lawfully travelling upon the railway, whereby the trolly was upset and the plaintiff damaged. The second count alleged that the defendant so negligently kept and managed his pigs that they ran against a truck on which the plaintiff was riding, whereby the truck was upset, &c.

Pleas—first, not guilty; second, to the first count that the plaintiff was not travelling as alleged; third, to the same that it was not the defendant's duty to keep the close fenced as alleged. Issue thereon.

At the trial before Bramwell, B., in Middlesex, on the 13th of January, 1874, the following facts were proved.

The plaintiff was a platelayer, employed by the Great Eastern Railway Company on their line, and on the 12th of July, 1873, after the day's work was over, was travelling along the line homeward with two fellow-workmen, all of them being seated on a truck or trolly of the railway company, which carried their tools and materials, and which the men propelled themselves. At a point between Rayne and Braintree stations some pigs ran out of a potato bed, lying beside the rails, and got in the way of the trolly, which passed over the bodies of two of the pigs, killing them. The jolt caused by the trolly passing over the second pig shook the plaintiff off his seat, and he fell on the ground; immediately afterwards, the trolly fell over upon him, inflicting serious injuries. The pigs belonged to the defendant, a butcher, who occupied a field adjoining the railway, a few yards from the spot where the accident happened. Between this field and the railway was a fence, consisting of a quickset hedge and post and rails, and terminating in a gate. The defendant kept pigs in a yard inside the field, and early on the morning of the 12th of July, the defendant and his servant left them safe inside the yard, with the yard gates shut. Immediately after the trolly was upset, the railway gate was found shut, but there was evidence that the pigs (which were

worth about 25*s.* a piece) might have got through the fence. Some of the defendant's pigs which were kept in the yard had, previously to the 12th July, strayed on to the railway (having, as the defendant said, escaped through the railway gate being left open), and been there killed by a train, and a servant of the company having seen the pigs roaming had warned the defendant often about it, and once told him if he would put wire fencing in the fence between the railway and the field it would stop accidents, to which the defendant replied that he would have it done.

It being admitted that the company were bound under section 68 of the Railways Clauses Consolidation Act, 1845, to erect and maintain fences, &c., between the railway and the defendant's field, the defendant's counsel contended that the action could not be maintained, there being no liability on the defendant in respect of the fences. The learned Judge ruled that the pigs being wandering animals, the defendant was bound to keep them from straying; that the company were bound under the statute to maintain a fence reasonably sufficient to keep out oxen, sheep and horses, but not pigs, and that if the fence was not a proper one, the defendant, having had notice that his pigs wandered, ought to have sued the company for the breach of their statutory duty, and meanwhile kept the pigs in security. In answer to questions put by the learned Judge, the jury found that the fence was a proper fence of the kind and sufficient to keep out horses, sheep and cattle, but not pigs, and that the pigs wriggled through the fence. The jury having assessed the damages at 100*l.*, the learned Judge directed the verdict to be entered for the plaintiff, giving leave to the defendant to move to enter it for him, and if necessary to amend the pleadings.

Thesiger having accordingly obtained a rule *nisi* to enter a verdict for the defendant, or a nonsuit on the ground that there was no evidence of the defendant's liability, or that upon the findings of the jury the verdict ought to have been entered for the defendant; or for a new trial, on the ground that the Judge misdirected the jury in telling them that the defendant was absolutely bound to keep his pigs from straying on the line, and was liable to the plaintiff for damage sustained by him in consequence of the pigs so straying, without proof of the circumstances under which the pigs so strayed, and that the Railways Clauses Consolidation Act, 1845, section 68 (1) did not include pigs under the term cattle—

Bray (*Morgan Howard* with him), for the plaintiff, shewed cause.—The defendant is liable because he was bound to keep his pigs on his own land *at his peril*, according to the principles laid down in *Fletcher* v. *Rylands* (2), where it is said, "as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief . . . . the law seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape." After examining the authorities, the judgment proceeds—"These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does, in *Cox* v. *Burbidge* (3) 'that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.' " The same rule prevailed in *Read*

(1) By the Railways Clauses Consolidation Act, 1845, it is enacted, by section 68—"The company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say) . . . . Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles. . . . . '

(2) 3 Hurl. & C. 263; s. c. 35 Law J. Rep. (N.S.) Exch. 154.

(3) 13 Com. B. Rep. N.S. 830; s. c. 32 Law J. Rep. (N.S.) C.P. 89.

v. *Edwards* (4). The damage is not more remote than was the damage in *Lee* v. *Riley* (5), or *Romney Marsh* v. *Trinity House* (6), or *Hill* v. *The New River Company* (7), or *Sneesby* v. *The Lancashire and Yorkshire Railway Company* (8). The facts that some of the defendant's pigs had previously escaped, and been killed on the line, that he knew the fence was insufficient to keep the pigs in, that he was warned, and said he would put a wire in the fence, ought to have been left to the jury as conclusive evidence of negligence. Negligence being once established as the cause of the accident the defendant (unless some fresh cause is shewn to have intervened) is liable for the consequences, even if some of them be such as no reasonable person would have anticipated—*Smith* v. *The London and South-Western Railway Company* (9). The defendant contends he is not liable because the company were bound under section 68 of the Railways Clauses Consolidation Act, 1845, to erect and maintain fences against the "cattle" of adjoining owners. But pigs are not "cattle" within that section, or in ordinary language. In the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 6, "cattle" are defined—"bulls, cows, oxen, heifers and calves" and animals—"cattle, sheep, goats and swine." Webster's Dictionary says—"cattle," in its primary sense, includes "perhaps swine." It has been held that the duty of a railway company to fence, under section 68, is not more extensive than a duty at common law by prescription to repair fences—*Rickets* v. *The East and West India Docks Company* (10), and *The Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (11). Therefore, without express words, it will not be implied that the Legislature has imposed on railways the very onerous duty of fencing against pigs, for at common law there is no such duty on an occupier bound by prescription to repair fences against his neighbour's cattle. Pigs will grub up or destroy any hedge, and no ordinary fence will keep them out. They are not commonable animals; and except at specified times, *e.g.*, when acorns are on the ground, it is not usual to let them run in a field, and never without a boy to watch. But, whatever the obligation to fence may be as regards adjoining owners, the statute imposes no obligation as regards the general public or passengers—*Buxton* v. *The North-Eastern Railway Company* (12) and *The Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (11). The company, therefore, have not committed any default as regards the plaintiff, and it is no answer to this action to say that they have neglected a duty towards the defendant. Next, assuming they were bound to fence out the defendant's pigs they could still maintain an action against him for the trespass, since the defendant was guilty of negligence. Even if they could not, the plaintiff is not identified with the company as against a wrongdoer. The true rule is correctly stated in *Shearman and Redfield's American Treatise on Negligence* (2nd Ed.), sect. 48—"Where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control, or that he controlled the plaintiff's personal conduct. . . . . A passenger in a public conveyance, such as a railroad car, a ship, or a stage, is not precluded by the mere fact that the injury was in part caused by the negligence of the person in charge of the vehicle in which he was travelling at the time, from recovering against one whose negligence injures him." *Thorogood* v.

(4) 17 Com. B. Rep. N.S. 45; s. c. 34 Law J. Rep. (N.S.) C.P. 31.

(5) 18 Com. B. Rep. N.S. 722; s. c. 32 Law J. Rep. (N.S.) C.P. 212.

(6) 39 Law J. Rep. (N.S.) Exch. 163, affirmed in Ex. Ch. without argument, 41 ibid. 106.

(7) 9 B. & S. 303.

(8) 43 Law J. Rep. (N.S.) Q.B. 69.

(9) 40 Law J. Rep. (N.S.) C.P. 21.

(10) 12 Com. B. Rep. 160; s. c. 21 Law J. Rep. (N.S.) C.P. 201.

(11) 14 Com. B. Rep. 243; s. c. 23 Law J. Rep. (N.S.) C.P. 85.

(12) 9 B. & S. 224; s. c. 37 Law J. Rep. (N.S.) Q.B. 258.

Bryan (13) is the only case where it has been held that where injury is caused by the defendant's negligence to a passenger in a public conveyance, and the driver of the conveyance is guilty of contributory negligence, the passenger is identified with the driver so as to be prevented from recovering in an action against the defendant. That case has never been followed or approved, and doubts were thrown on it by Williams, J., in *Tuff* v. *Warman* (14), and in *The Milan* (15), Dr. Lushington refused to be bound by it.

Lanyon and *A. M. Bremner*, for the defendant, were not heard.

BRAMWELL, B.—I think this rule should be made absolute. It is not necessary to notice all the points raised during the argument. The ground of our judgment is that by section 68 of the Railways Clauses Consolidation Act, 1845, the railway company were bound to maintain a fence sufficient to keep out these pigs. The section binds the company to maintain fences sufficient for three purposes—separating the railway land from the adjoining lands; protecting the adjoining lands from trespass; and (for the words "or the cattle" mean "*and* the cattle") preventing the "cattle of the owners or occupiers" of the adjoining lands from straying thereout. I think "cattle" there includes pigs. It is a word comprehensive enough for that purpose. The fence must be sufficient to prevent pigs from trespassing. This fence was not sufficient for that purpose. I am far from saying—and it must not be taken to follow from our decision—that the company are bound to maintain such a fence as no pig can get through, or such as no cattle can jump, for that would require the fence to be without limit as to strength and height, since if pigs were placed under a very strong temptation, such as a quantity of acorns, nothing would keep them out. Without saying, therefore, that the fence must be such as would stop *any* pig, it must be such that a pig not extraordinarily prone to wander, or not under excessive temptation, will not get through. Here it was shewn that owing to the inequalities of the ground, the space between it and the bottom of the fence was so large that the pigs could crawl under; they had escaped and would again, not from any vice in these particular pigs, but from the ordinary propensities of the animal. The company, therefore, failed in their duty to maintain a sufficient fence, and clearly could maintain no action against the defendant for trespass; and though he has not sued them for the injury done to his pigs, which was probably of a trifling amount, and though I must not be understood to invite such an action, yet, as a consequence of the reasoning, I think he would be entitled to maintain the action.

But now comes the question—assuming that the company were bound to maintain a fence sufficient to keep out ordinary pigs, is the plaintiff to suffer for their default? I give no opinion as to what our decision would be if the railway were a public highway, and the plaintiff a mere passenger in the company's train. Perhaps he might be entitled to say to the defendant — "There was an opening through which your pigs (which you were bound to keep on your own land) strayed on to the railway. As regards me, you must provide a sufficient fence and settle with the company. I, an innocent person, am not barred by the company's breach of their statutory duty." But that was not so here. The plaintiff was not a passenger but a servant of the company, using his master's property, and while acting as such met with the injury. If, then, the owner of the premises could not maintain an action because it was through his own default that the pigs strayed, so neither could the servant if he was using his master's property for his master's purposes. Without, therefore, saying anything about *Thorogood* v. *Bryan* (13), and the other cases cited, the result is that the plaintiff cannot be in a better situation with regard to the defendant than the company would be.

(13) 8 Com. B. Rep. N.S. 115; s. c. 18 Law J. Rep. (N.S.) C.P. 336.

(14) 2 Com. B. Rep. N.S. 740, 750; s. c. 26 Law J. Rep. (N.S.) C.P. 263, 265.

(15) 31 Law J. Rep. (N.S.) Prob. M. & A. 105, 112.

The negligence of the defendant does not alter the question. Whether he was negligent or not, the plaintiff cannot recover, because, assuming the defendant to have been negligent in the performance of his duty, there was no duty on him that was not subject to the duty of the company to maintain a sufficient fence.

PIGOTT, B.—I am of the same opinion. A railway company is empowered by the Legislature to drive their line through a man's estate against his will, severing his lands, and it is therefore only reasonable that the Legislature should impose on the company the burden of maintaining sufficient fences to prevent the consequences which would otherwise ensue from the existence of their railway. But for section 68 of the Railways Clauses Act, the owner of the estate would be bound to maintain sufficient fences, or else would be responsible for all the damage caused by his cattle trespassing and upsetting trains. It is true that the section does not mention "swine," but neither does it mention calves, nor any young of animals, and seeing that the section has as much reference to agricultural lands as to any others, and that in some counties swine are turned out after harvest almost as commonly as sheep, I think the generic word "cattle" is comprehensive enough to include swine. I agree with my brother Bramwell that the fence must be sufficient for ordinary purposes, and that we are not deciding that it must be sufficient to keep out *any* animal of extraordinary propensities. These pigs cannot have been very young, for they were worth 25s. each.

POLLOCK, B.—I think the rule must be absolute. It was argued that the case fell within the principle of *Fletcher* v. *Rylands* (2), but our decision does not touch that case nor *Hill* v. *The New River Company* (7), where it was held that the defendant was liable, since his own act was the proximate cause of the damage, and that he could not better his position by saying that the result would not have been so bad if there had not been some other cause which contributed. Here it is clear that the proximate cause of the injury was the want of a sufficient fence, which the railway company were bound to maintain. I entirely agree with what my brothers have said as to section 68, and that the company certainly could not maintain an action against the defendant.

But it is said the plaintiff is not identified with the company for this purpose. Now, if the present case were within the rule laid down in the passage cited from *Shearman and Redfield on Negligence*, that question might be open to discussion. But that rule has no application here. The plaintiff met with the injury because he was using as the company's servant, with their permission, their premises, which by their default were insufficiently fenced. The case is quite outside *Thorogood* v *Bryan* (13) and that class of cases.

It is more like the case of a person who, while riding in a friend's carriage, which is rotten or not roadworthy, receives an injury through the carriage being damaged by a collision with some other vehicle, a result which would not have happened if the carriage had been properly built. In such a case the person is clearly identified with the carriage. The plaintiff here is identified with the land or the line of the company, since he was using it, not as a public highway, but as the company's servant for his own convenience. He was not in the position of a person who, being independent of the conditions to which the land was subject, could therefore say, that though the land was insufficiently fenced, he could nevertheless recover against the defendant.

Rule absolute.

Attorneys—H. W. Christmas, for plaintiff; Edward Bromley, agent for Veley & Cunnington, Braintree, for defendant.

1874.
Jan. 24.
April 16, 17.

WILLIAMS *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway—Gates at Level Crossings—8 Vict. c. 20. ss. 47 & 61—Child straying on Line—Negligence, Evidence of.

The plaintiff, a child aged four and a half years, lived near a public carriage road and a footpath (both highways) which were crossed on a level by the defendants' railroad at places about 300 yards from the child's abode, and 30 yards apart from each other. There were no gates, nor was there a gatekeeper at the carriage road level crossing as prescribed by 8 Vict. c. 20. s. 47; neither was there any gate or stile at the footpath level crossing as required by section 61. One day the child left his home to go to the next house, but was shortly afterwards found upon the railway close to the footpath crossing, with his foot cut off by a train. An action having been brought against the defendants for negligence in not providing gates, fences and means to protect the crossings,—Held, *that the fact of the absence of a gate or stile at the footpath level crossing, and the fact of the plaintiff being found injured there, were sufficiently connected to afford evidence for the jury of liability on the part of the defendants.*

Action for negligence. The first count of the declaration alleged that the defendants' railway crossed a public carriage road on a level, and that it was their duty to place proper gates at the crossing and to keep proper officers or servants there for the protection of persons using the road, but that the defendants failed to do so, and by their negligence the plaintiff, lawfully using the road, was injured by a train.

The second count alleged that the railway crossed on a level a public highway, but that the defendants did not take reasonable and proper care or means for the protection of persons lawfully using the highway there, and so negligently managed a train that the plaintiff who had gone along the highway on the railway was injured.

The third count alleged that the plaintiff was an infant of tender years and was lawfully in a close of land adjoining the railway, and the defendants negligently conducted themselves in maintaining a good and sufficient fence between the close and the railway.

The fourth count charged merely negligent management of the train.

The defendants pleaded not guilty, and that the plaintiff was not lawfully upon the road, highway, railway or close.

Issue thereon.

The cause was tried before Keating, J., at the last summer assizes for Denbighshire, when the following facts appeared.

The plaintiff, a child of four years and eight months, lived with his father, whose house was situate beside a public carriage road, over which the railway of the defendants passed at a level crossing three or four hundred yards distant from the house. A public footpath diverged from the carriage-road, and was also crossed by the line on a level about thirty yards from the other level crossing. The carriage road level crossing had no gates nor a gatekeeper placed there as required by the 8 Vict. c. 20. s. 47 (1). Neither was there any gate or stile at the footway crossing as required by section 61.

On the 22nd of December, 1871, the plaintiff was sent upon an errand to an adjoining house. He left his home accordingly, but shortly afterwards was found crawling on the railway close to where the footpath was crossed by it. His foot had been cut off by a train which had passed.

At the end of the case for the plaintiff,

(1) The 8 Vict. c. 20. s. 47, enacts that "If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road . . . . and shall employ proper persons to open and shut such gates . . . ."

By section 61, if the railway shall cross any highway other than a public carriage way on the level the company shall, if the highway shall be a footway, maintain good and sufficient gates or stiles on each side of the railway where the highway shall communicate therewith.

the learned Judge directed a nonsuit on the ground that there was no evidence of negligence, but gave leave to move, and asked the jury to find the damages contingently, which they assessed at 250*l.* A rule having been obtained calling on the defendants to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff for 250*l.*, on the ground that there was evidence for the jury in support of the declaration,

M'Intyre (*Horatio Lloyd* with him) shewed cause.—The accident to the plaintiff was not evidence of negligence in the defendants. Some proof should have been given of the manner in which he went upon the railway. Possibly he may have wandered along the line from the carriage-road crossing to the spot where he was found. Being so young he might, child-like, have opened, crept through or climbed over any stile protecting the footpath from the line, for the defendants were not bound to have watchmen there—*Stubley* v. *The London & North Western Railway Company* (1). The facts of that case were stronger in favour of the plaintiff, but this Court held that there was no evidence to support the action, but evidence of negligence on the plaintiff's part in not looking out for approaching trains before passing over the railroad. The defendants were indeed held liable in *Stapley* v. *The London Brighton & South Coast Railway Company* (2), but because the gate being left partially open and no gate-keeper being present, the plaintiff was invited by that state of things to cross the line. The facts in *Singleton* v. *The Eastern Counties Railway Company* (3) resemble those here, yet a rule to set aside a similar nonsuit was refused.

M. Lloyd and *English Harrison* supported the rule.—The nonsuit was wrong. The defendants had directly violated a statutory duty by neglecting to provide gates or stiles at the level crossings—8 Vict. c. 20. ss. 47, 61. See also 26 & 27 Vict. c. 92. s. 6. If a gatekeeper had been at the carriage road crossing he would probably have saved the child from harm. Had there been a stile or gate protecting the footpath the plaintiff might have been stopped or hindered from going on to the line. The fact of the absence of such stile or gate, and the fact of this very young child being found hurt upon the railway close beside the level crossing which ought to have been guarded, are naturally connected, and together amount to evidence for the jury of negligence in the defendants, causing the injury to the plaintiff.

KELLY, C.B.—My opinion much fluctuated during the argument, but finally, I think, that the learned counsel who last addressed us has put the case on the true ground, and that the question is, not so much whether there was negligence, as to which no doubt exists, but, whether that negligence was so connected with the accident in question as to entitle a jury to say the plaintiff was entitled to recover. The facts are these: A child of tender years, perhaps not absolutely unable to cross a stile or gate, but still of tender years, left his home, and a short time afterwards was found on this footpath across the railway, run over, and his foot severed from his body. The first question is whether there was any negligence in the defendants which could have contributed to this accident. Secondly, whether such negligence, if any, was the cause of this accident; and this last is the principal point discussed. It is impossible to imagine a case where the negligence of the company was more completely made out or more blameable. Here was a carriage way for various kinds of vehicles or animals, and some thirty yards or less away from it was a footpath. Both carriage way and footpath crossed the line on a level. The statute is clear and imperative, making it the duty of the railway company to have a gate on each side of the rails at the carriage way which is to be kept closed except when carriages or animals

(1) 35 Law J. Rep. (N.S.) Exch. 3; s. c. Law Rep. 1 Exch. 13.

(2) 35 Law J. Rep. (N.S.) Exch. 7; s. c. Law Rep. 1 Exch. 21.

(3) 7 Com. B. Rep. N.S. 287.

cross. And with respect to the footpath, it is equally imperative on the company that they should for the protection of the place have a gate or stile on each side of the railway there. But these duties were left unperformed. There were no gates across the carriage way, and no stiles or gates to the footway. That is negligence of a character which I was rather surprised to find in a case of this nature. But I say no more about the breach of duty with regard to the carriage road by the neglect to put gates, or their not being closed, or the absence of any person to watch them, for I do not see that there was any evidence by which it was possible to connect the negligence of the company in that respect with this accident. With respect, however, to the footway it is different. The law required the defendants to make and keep and maintain either a gate or stile on each side of this railway across the footpath for the protection of the public, and perhaps peculiarly human beings less able than ordinary persons to protect themselves, such as infants. But, however that may be, in this case nothing can be clearer than that it was at least possible that there being no stile or gate, this child, which had left its home a little while only before the accident, *might*, if there had been a stile, have been thereby prevented from going on to the railroad at all, or detained long enough to let the train go by to which it fell a sacrifice. It is not impossible, but even very probable that the child, intending to cross by this footpath, went across the line finding no impediment, and so was hurt, whereas, if there had been a gate or stile it would at all events have detained the child either to open or climb over it and might have averted the injury. These are mere possibilities, but, being such, it was for the jury to consider them, looking at all the circumstances of the case, and particularly having regard to the short time from the child's departure from home and his being found on the rails. The case may be one of considerable difficulty, but I think it is one which should have been left to the jury, and in which they might have been justified in finding for the plaintiff. Therefore this rule should be made absolute.

POLLOCK, B.—I am of the same opinion. The question is whether there was evidence which ought to have been left to the jury, and I should be sorry to think that by our decision we were extending the rule laid down on this subject and correctly stated in *Daniel* v. *The Metropolitan Railway Company* (4), thus: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to . . . and that the plaintiff should also shew with reasonable certainty what particular precaution should have been taken;" per Willes, J. I do not think that it is for us to speculate on the precise reasons why the statute requires a gate or stile across a footpath; enough to say that the defendants have neglected to comply with that statutory requirement. The only other question is whether there was reasonable probability that the accident occurred from this want of a stile—whether, as Mr. English Harrison correctly pointed out, the neglect of duty by the company and the injury to the child were so clearly connected as to give a cause of action. That was the real question and one peculiarly for the jury to decide.

AMPHLETT, B.—My opinion, like that of my learned brethren, wavered a good deal during the argument, but I now come satisfactorily to the conclusion that this verdict ought to stand for the damages found by the jury. We start with this fact, viz., that the company, I might almost say, wantonly failed to comply with the statute in not providing a gate or stile for the footway. I do not enter into the question of the carriage road, as I do not consider that there was any reasonable evidence that it had anything to do with the accident. But I think the

(4) 37 Law J. Rep. (N.S.) C.P. 146, 148; s. Law Rep. 3 C.P. 216, 222; 37 Law J. Rep. (N.S.) C.P. (Ex. Ch.) 280; s. c. Law Rep. 3 C.P. 591; House of Lords, 40 Law J. Rep. (N.S.) C.P. 121; Law Rep. 5 E. & I. App. 45.

reasonable presumption, from the fact that the child was found close to the footway and had no long time before left his home very near the junction of the foot and carriage ways, is that he met with the accident while on the footway. Therefore, the only remaining question seems to be, whether the accident would be connected with the breach of duty by the company. I do not, however, think that we are now bound to decide that question as if we were sitting here as a jury. Were I a juryman I should have great difficulty in answering it. Yet it clearly appears to me a question which ought to be submitted to a jury. The child may have been merely wandering about for amusement, and it is by no means improbable that if, so wandering, he had met with a stile or gate, he might have been turned away by it and never have cared to cross the railroad. The first object of the statute requiring a gate or stile is, that persons should thereby have warning by it before they reach a dangerous place such as this crossing was. I entirely concur with the rest of the Court.

Rule absolute.

Attorneys—Kennedy & Kennedy Hughes, agents for John Jones, Wrexham, for plaintiff; Young, Maples & Co., for defendants.

1874. May 5. } THE ATTORNEY-GENERAL *v.* PRATT.

Revenue—Probate Duty—Locality of Assets at Death of Testator—Bills of Exchange on the High Seas.

A testator remitted moneys from India to England by means of bills of exchange payable six months after sight, drawn by an Indian bank upon a London bank in favour of his bankers in London. The bills were in transitu at sea, and unaccepted, when the testator died in India. They arrived, were paid at maturity, and the proceeds were subsequently received by the defendant, who, as the executor in England, had duly proved the testator's will in this country:—Held, *that the defendant was liable to pay probate duty upon such proceeds.*

Information to recover additional probate duty on the estate of Archdeacon Pratt, of Calcutta, who died on the 28th of December, 1871, having, in the year 1866, made his will, of which he appointed the defendant executor in England and another person executor in India. Shortly before death the testator, intending to return to England, ordered the Bank of Bengal to realise certain Indian securities belonging to him, and to remit the proceeds to the bank of Coutts & Co. in London. The securities were realised, and with the proceeds five bills of exchange were purchased, amounting in the whole to 9,241*l.* 6*s.* 9*d.*, four dated the 12th and one the 19th of December, 1871, all drawn by the Chartered Bank of India on the London Joint Stock Bank, and payable six months after sight. Prior to the death of the testator the Bank of Bengal remitted these bills by the post to Coutts & Co. in London with instructions to collect and invest the proceeds in accordance with instructions previously given by the testator.

The bills were in course of transit by post from India to England at the time of the testator's death; and in January, 1872, were received by Coutts & Co., who collected the proceeds when the bills became payable, and placed the amounts to the credit of the defendant who afterwards, viz., on the 20th of September, 1872, proved the will and codicil in England. The personalty in England was sworn under 300*l.*, and probate duty paid on that sum only. The defendant considered that no duty was payable in respect of the amount remitted by the bills, and the Crown now sought to obtain that additional duty.

Sir R. Baggallay (*Attorney-General*), *Holker* (*Solicitor-General*), and *W. W. Karslake*, for the Crown.—The duty is given by 55 Geo. 3. c. 184. s. 2 and the schedule. Probate has, in fact, been granted as to bills of exchange *in transitu* at the death of the testator, but the ques-

tion of liability does not seem to have been previously contested. *In the goods of Wyckoff* (1), a foreigner coming to England died on board ship possessed of bills drawn on Liverpool merchants, and administration *ad colligendum* was granted to the owner of the ship.

[KELLY, C.B.—This then is an *a fortiori* case, for here the testator was an Englishman.]

If it were necessary to take out probate abroad in respect of these bills then duty here would not be payable—*The Attorney-General* v. *Bouwens* (2). But there was no such necessity. The principle is laid down by Lord Campbell, L.C., in *The Attorney-General* v. *Brunning* (3), "that all moneys which the executor recovers by virtue of the probate, must be considered part of the estate and effects of the testator and subject to probate duty . . . ," and adopted by Kelly, C.B., in *Bacon and others, Executors of Perry*, v. *The Queen* (4). No doubt duty does not become payable merely because the probate may be used or available for getting in "foreign estate." *The Attorney-General* v. *Hope* (5). But this fund was not "foreign." The proceeds of these bills were recoverable by virtue of the probate, and therefore the duty was payable. Were it otherwise duty might often be evaded by simply putting the bills on board ship.

Manisty and *Hemmings* for the defendant.—The liability does not depend upon whether the assets can be administered *without* probate, nor whether they are transmitted from a foreign country to be administered here; the only test is to ask, "What was the local situation of the assets at the time of the testator's death?" The answer determines the liability. These bills were not assets locally situated in England at the time of the death. They were not then accepted. The only remedy in respect of them would have been an action against the drawers to recover back the money paid for them.

[KELLY, C.B.—On the 28th of December the executor could sue no one. He could not sue the drawers because the bills had not been presented for acceptance and dishonoured, nor the London Joint Stock Bank, because they were not due.]

"The law appears to be now settled that, by the terms of the Act of Parliament, the amount of the probate duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the wills or letters of administration, but by the value of such part, as are at the death of the deceased within the jurisdiction of the Court by which the probate or letters of administration are granted."—1 *Williams, Executors* (7th edit.), p. 617. This view is fully supported by the judgment of Lord Lyndhurst, C.B., in *The Attorney-General* v. *Dimond* (6), and *The Attorney-General* v. *Hope* (5).

[KELLY, C.B.—If, at the time of death, the property was in a foreign country, then it is clear from the case last cited that probate duty would not be payable, but here the assets were on the high seas.]

The mere pieces of paper were at sea no doubt, but the assets were not the material bills of exchange, but the *debt*, and the locality of the debt is the locality of the assets. The debt was not due in England at the time of the death. The drawee of the bills was under no obligation, but the drawer abroad had put himself under contract to pay in the event of non-acceptance or non-payment.

[AMPHLETT, B.—Suppose the intended acceptor had funds of the drawer in hand?]

That would be a matter between himself and the drawer, but would not affect the holder of the draft.

[PIGOTT, B.—The real effect of the transaction is that the moneys of the deceased were in London.]

(1) 3 Sw. & T. 20; s. c. 32 Law J. Rep. (N.S.) Prob. & M. 214.

(2) 4 Mee. & W. 171; s. c. 7 Law J. Rep. (N.S.) Exch. 297.

(3) 8 H.L. 243, 256; s. c. 30 Law J. Rep. (N.S.) Exch. 379, 381.

(4) 38 Law J. Rep. (N.S.) Exch. 5, 7; s. c. Law Rep. 4 Exch. 27, 30.

(5) 1 Cr. M. & R. 530; s. c. 2 Cl. & F. 84; s. c. 8 Bligh, N.R. 44.

(6) 1 Cr. & J. 356; s. c. 9 Law J. Rep. Exch. 90.

being in London, on both grounds, either on the ground of the locality of the bills, or of the place where the debtor resided when he became a debtor, the debt became assets in London, within the jurisdiction of the Court, and so liable to probate duty. The question might have arisen in a different form had the drawees refused to accept, so that they never could have become debtors, and so that the drawers became the debtors; for the latter resided in India without the jurisdiction. Enough to say that whether we consider these bills of exchange as property, chattels, assets upon the high seas at the death of the testator, or whether we regard the fact that the debtors, when the debt came into existence, were residing in London, the result of all the authorities is that these moneys were assets upon which probate duty was payable.

PIGOTT, B.—I am of the same opinion, and think we must grant the prayer of this information. The law, as to probate duty, is clearly laid down by Lord Abinger, who, in *The Attorney-General* v. *Bouwens* (8), says, "the law has been settled by the two cases of *The Attorney-General* v. *Dimond* (6) and *The Attorney-General* v. *Hope* (5), that the duty is to be regulated—not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the will or letters of administration, but by the value of such part as are at the death of the deceased within the jurisdiction of the spiritual Judge by whom the probate or letters of administration are granted." Therefore the question is, whether the proceeds of these bills were, at the time of the death of the testator, within the jurisdiction of the Court of Probate. To ascertain that, we must look at the existing state of things at the time of death. Archdeacon Pratt had ordered that certain securities should be realised by the Bank of Bengal, and the proceeds be transmitted to Coutts, his agents in England. The Bank of Bengal had realised the securities, and purchased bills of exchange, dated in December, at Calcutta, and drawn by the Chartered Mercantile Bank of India on the London Joint Stock Bank in favour of Coutts & Co. They were payable six months after sight. As far as the Bank of Bengal was concerned, they were not in any sense the *debtors* of the testator. They had done what they were ordered to do, they had realised the securities, and put the proceeds *in transitu*. (I use that for want of a better phrase.) This they had done before the testator's death. These bills were drawn by the bank in India on the London bank. It is said they might never have been accepted in London; but that was a contingency which did not arise, and we must put an ordinary construction upon these matters from our knowledge of the common affairs of life. When we find bills drawn in India on London, it means that the persons in London owe money to those in India, or, if they do not owe money, that it would be allowed in the accounts between them, which is the same thing. Such was the case here. Are we to presume that the London bank was improperly, or properly drawn upon? Of course we must assume it was rightly drawn upon. The drafts were duly honoured. That is the way money is paid which is sent from Calcutta to London. The effect is to shew that when these bills were drawn on London, it was known that the money was in London, and that they would be paid. Accordingly the bills came over and were paid. *A priori* what was the state of things?—That the London bank owed money to the Indian bank, and in the result it turned out to be so. The Joint Stock bank paid money which they must be assumed to have owed. Now, with regard to bills of exchange, the law as laid down by Lord Abinger in *The Attorney-General* v. *Bouwens* (8) is quite in accordance with our present decision. Speaking of the locality of the different kinds of assets for the purposes of the Ordinary's jurisdiction, Lord Abinger says, that it was established as law, that specialty debts are assets where the instrument happens to be, "and simple contract debts, where the debtor resides at the time of the testator's death" (so, here, the real debtor on the 28th of December was the London Joint Stock Bank); "and it was

(8) 4 Mee. & W. 190, 191; s. c. 7 Law J. Rep. (n.s.) Exch. 303.

also decided that as bills of exchange and promissory notes do not alter the nature of simple contract debts, but are merely evidences of title" (that is what I prefer to call the subject matter of the present case), "the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be."

Then, if my inference be right, the London Joint Stock Bank were the persons with whom this money was at the time the bills were transmitted from India, and it follows that the proceeds thereof were in London at the time of the death, and consequently that the defendant is liable to pay the probate duty upon them.

AMPHLETT, B.—I am of the same opinion. The law is clearly settled that we have to look at the local position of the assets at the time of the death of the testator. These assets were something, whatever it might be, represented by bills of exchange which were *in transitu* from India to England. It would seem from the authority of Lord Abinger that a bill of exchange must be considered as not in itself an asset, but *as representing* an asset. We therefore look to see where the bills of exchange representing assets were. The bills were an order for payment of money to the testator's agent in London. No doubt, if that order were not complied with, the right of the testator would have been to have recourse to the drawers of these bills. But if the order was complied with, that is, if the drawer had funds or credit in London to answer them, then the money represented by the bills was in the hands of the bank in London. Had it happened that the order was not complied with in London, and the testator had recourse to the drawers of the bills, then I think the assets would have been in India, and the money payable there. But inasmuch as the order was complied with, and the money paid to the defendant in England, I think the money was assets upon which the duty claimed was payable. The question as to the property of a British subject on board ship being assets, does not arise here, and I refrain from expressing an opinion upon it.

Judgment for the Crown.

Attorneys — The Solicitor of Inland Revenue, for the Crown; Perkins and Weston, for the defendant.

1874. May 8. } STOCK AND OTHERS *v.* HOLLAND.

Execution—Seizure without Sale—Money paid to Sheriff on Account—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87—*Proceeds of Sale.*

Goods of a trader debtor were seized under a fi. fa., for an amount exceeding 50*l.* *He paid the sheriff two sums on account of the judgment debt, and the execution creditors assented to those payments. Within fourteen days of the seizure the debtor filed a petition for liquidation, and the sheriff was restrained. No sale was made. Trustees were afterwards appointed. They claimed the sums which had been paid to and were in the hands of the sheriff:*— Held (*following Ex parte Brooke, In re Hassall,* 43 Law J. Rep. (N.S.) Bankr. 49) *that the money belonged to the execution creditors, since it could not be deemed the proceeds of a sale within the terms of section* 87 *of the Bankruptcy Act,* 1869.

Interpleader summons taken out by a sheriff, and referred from Judges' chambers by Bramwell, B., to the Court. From the affidavits, which, according to the order of the learned Judge, were to constitute a Special Case, the following facts appeared.

On November 13th, 1873, the plaintiffs

signed judgment against Holland, a trader, for 201*l.* 16*s.* 1*d.*, and on the same day, a writ of *fi. fa.* was issued, under which, on the 14th, the sheriff seized goods of the debtor, who, on the 18th, paid him 100*l.*, promising to pay the remainder of the sum in a day or so. On the 20th, the debtor communicated to the plaintiffs the fact of the payment, requested that the execution might be withdrawn, said that his pecuniary embarrassments were only of a temporary kind, and promised to pay the balance of the judgment debt in two months. The plaintiffs consented to grant his request if he would find a surety; he agreed to do so, and arranged to accompany their solicitor next day to see the person whom he suggested as surety, but on that day he postponed the visit until the following day. On the 21st he paid a further sum of 32*l.* to the sheriff on account of the sum for which the seizure was made. On the 24th he filed a petition for liquidation, a receiver was appointed, and the execution restrained, no sale having taken place. On the 20th of December a first meeting of creditors was held, at which two trustees were appointed, and on the 22nd the latter claimed the sum paid to the sheriff and which was still in his hands, whereupon the summons in question was taken out.

Arthur Charles, for the plaintiffs, the execution creditors (1).—No question of fraudulent preference arising, the sole point is whether section 87 of the Bankruptcy Act, 1869, deprives the execution creditors of the money which, but for that section, would clearly belong to them.

First. Section 87 does not apply, because there had been no sale, nor can this sum be deemed in any sense the proceeds of a sale. A similar payment was made to a sheriff who held a writ of *fi. fa.* by a judgment debtor to avoid a levy, *Ex parte Brooke, In re Hassall* (2), and the full Court of Appeal in Chancery held that it was a payment under pressure, and that the execution creditors were entitled to the money as against the trustee. Lord Selborne, L.C., said, "There was no seizure. The case does not come within the provision of the Act as to an execution not completed by seizure and sale; a payment was made under pressure to the sheriff's officer, and the money which was paid over to the creditor may be retained by him." The second "not" is obviously a misprint. The Lord Chancellor expressly says that section 87 did not apply.

[KELLY, C.B.—I should say that section 87 cannot apply, for there has been no sale.]

It has, however, been held, *Ex parte Rayner, in re Johnson* (3), that the trustee is entitled to the goods of a trader seized for a debt exceeding 50*l.*, where a petition is presented before any sale has taken place, and upon that decision reliance will probably be placed by the trustees here. But in the present case the debtor paid a sum to the sheriff for the execution creditors, and as soon as the latter were informed of and assented to that payment, as they did on this occasion, the sheriff held the money for them. It was money had and received to the use of the execution creditors—*Morland* v. *Pellatt* (4), and as soon as it was paid to the sheriff they might have recovered it from him. See per Littledale, and Bayley, J., says in that case, "After sale or payment of the money the sheriff becomes the debtor, and the original debt is extinguished."

[AMPHLETT, B.—How, if only part is paid?]

Then it is extinguished *pro tanto*.

Secondly.—Even if section 87 applies where there is no sale, nevertheless the case is not within that section, for no notice of

(1) This case had been previously argued, but udgment was reserved pending the decision of the Full Court of Appeal in Chancery in *Ex parte Brooke, in re Hassall* (43 Law J. Rep. (N.S.) Bankr. 49).

(2) 43 Law J. Rep. (N.S.) Bankr. 49; s. c. Law Rep. 9 Chanc. App. 301.

(3) 41 Law J. Rep. (N.S.) Bankr. 26; s. c. Law Rep. 7 Chanc. App. 325.

(4) 8 B. & C. 722, 726; s. c. 7 Law J. Rep. K.B. 54.

ıe bankruptcy petition was given within ɔurteen days. By the Bankruptcy Act, ı869, 32 & 33 Vict. c. 71. s. 125. sub-sec. 4, the liquidation by arrangement shall be deemed to have commenced from the appointment of the trustee. Now he was appointed long after the expiration of the fourteen days. By sub-section 7 the appointment of a trustee in a liquidation by arrangement is to be deemed equivalent to the presentation of a petition in bankruptcy. Therefore, construing section 87 with reference to the present case, the words "appointment of the trustee" must be substituted for "presentation of a bankruptcy petition."

Francis Turner, for the trustees.—This seizure, together with the facts, first, that the debtor was insolvent, and secondly, that the money was paid, amounted to an act of bankruptcy then available to found a petition against the debtor, and the money was received by the creditors with notice thereof.

[CLEASBY, B.—You contend that seizure ripens into an act of bankruptcy by means of what is equivalent to a sale.]

Precisely so. The transactions enumerated in section 95 of the Bankruptcy Act, 1869, are only protected when the person protected has, at the time thereof, no notice of any act of bankruptcy committed by the bankrupt, and *available against him for adjudication.*

Now, to save his goods, the debtor gets money and pays the sheriff. The money takes the place of the goods. *Ex parte Brooke, in re Hassall* (2) is distinguishable. There was in that case, first, no seizure, secondly, an unqualified assent of the creditors to the payment. Whereas, in the present case, seizure had taken place, and the assent to the payment was conditional only as to the 100*l.*, viz., if the debtor would obtain security, which never was obtained; and there was no assent whatever to the payment of the 32*l.* Section 87 may apply even where there has been no sale. See per Sir W. M. James, L.J.—*Ex parte Pearson, in re Mortimer* (5). *Ex parte Rayner, in re Johnson* (3), shews that sale is not essential, but that the trustees get a title to the goods themselves where there is a petition after seizure and due notice thereof before sale.

Lastly, this transaction was, in fact, a fraudulent preference.

[He referred also to the judgment of Mellish, L.J., *Ex parte Villars, re Rogers* (6).]

KELLY, C.B.—In this case the creditor, having got judgment, issued execution, under which the sheriff seized goods of the debtor. When the seizure had taken place, but before, or rather without, any sale, the debtor, in order to prevent immediate sale, paid to the sheriff 100*l.* and afterwards 32*l.* in part payment, and in consideration of the debt. On that state of things, a question might possibly have arisen, if nothing more had occurred, whether this was equivalent to payment to the creditors themselves? But from the case as it stands, it is clear that on a communication being made to the creditors of what had taken place, they agreed to it, and afterwards received the money. The question is, whether, under section 87, the trustee in bankruptcy is entitled to that money so received. It is quite enough to say that this case is identical with *Ex parte Brooke, in re Hassall* (2), decided by the Lords Justices. We are bound by that decision, and have no doubt that it is correct, and had the case come before me sitting alone, I should have held as the Lords Justices held. It is, however, argued by the learned counsel for the trustees that this transaction is indeed a sale, or something equivalent thereto The answer is, that this doctrine of equi valency must not be so extended. Th trustee now claims both the moneys ar the goods. The transaction was not sale at all. It was merely payment money to release the goods. There v no *deal* or bargain. Lastly, it was c tended that the payment or delivery

(5) 42 Law J. Rep. (N.S.) Bankr. 44; s. c. Law Rep. 8 Chanc. App. 667.

(6) Simultaneously (May 8th) reversed second argument—43 Law J. Rep. (N.S.) 76; s. c. Law Rep. 9 Chanc. App. 432.

of the money to the creditor was a fraudulent preference. Let it suffice to say that this was a payment under pressure and for good consideration, and certainly not voluntary. And instead of being in contemplation of bankruptcy, as is contended, the very object was to avoid it.

CLEASBY, B.—If it were necessary to pronounce an opinion upon the various questions raised in the course of argument, I should certainly have asked for some time, to treat them with as much accuracy as I could, for they are very important. It is, however, quite unnecessary to deal with them in the present case, because I think that, as my Lord said, *Ex parte Brooke* (2) is conclusive. There, money having been paid to the sheriff to prevent a levy, the Chief Judge in Bankruptcy decided that the money so paid was money paid in some way into the hands of the Court, and therefore was money realised by sale, and that section 87 applied. But when the case came before the Full Court of Appeal, and it appeared that the execution creditor *assented* to the sale, they held that it must be taken to be part of his judgment debt, and the decision below was reversed, and the money paid to the execution creditor. That case, therefore, decides this. The learned counsel for the trustees was compelled to resort to distinctions, and said, first, that in *Ex parte Brooke* (2) there was no seizure, and that here there was; and secondly, that there the assent was absolute, and here the assent was in some sense conditional. I think the fact or absence of seizure makes no difference, since the money was paid in both cases to avoid execution, and that as soon as it is ascertained to be the creditor's, it becomes money which he is entitled to have in part discharge of his judgment, and that after it is paid the sheriff could not be called on to pay the money again. With respect to the other distinction, I think it is a mistake to say the assent here was conditional, although in some cases it may be made conditional where it is said that the sheriff shall go on or hold his hand, according as the condition may or may not be fulfilled; but that was not so here. I think, therefore, the execution creditor is entitled to the money and to our judgment.

AMPHLETT, B., concurred.

Judgment for plaintiffs.

Attorneys — Vizard, Crowder & Anstie, for plaintiffs; F. T. Dubois, for trustees.

1874. April 27. May 4. } THORN *v.* THE MAYOR AND COMMONALTY OF THE CITY OF LONDON.

Contract—Plans and Specification—Defective Scheme—Implied Warranty.

The plaintiff, having seen certain plans and a specification which had been prepared by an engineer for the defendants, contracted with the latter to build a bridge according thereto. The work was begun; but the mode of erection prescribed by the plans and specification proved defective, and an alteration was necessarily made whereby the plaintiff incurred a loss of valuable time in completing the bridge. He brought an action for compensation:—Held, *that there was no implied warranty by the defendants that the work could be done in the mode prescribed by the plans and specification, and that the plaintiff was not entitled to recover.*

Special case stated under an order of Bramwell, B.

The action was commenced on the 19th of December, 1873, and it was alleged in the declaration that the defendants guaranteed and warranted to the plaintiff that Blackfriars Bridge could be built according to certain plans and a specification then shewn by the defendants to the plaintiff without tidework and in a manner comparatively inexpensive, and that certain caissons shewn on the plans would resist the pressure of water during the construction of the bridge, whereby the plaintiff was induced to contract with

the defendants for the construction of the bridge for a certain sum of money far less than he otherwise would have done. And the plaintiff relying on the warranty commenced the bridge, whereas the bridge could not be built according to the plans and specification, and without tidework, and the caissons would not stand whereby the plaintiff was compelled to expend divers large sums of money in endeavouring to build the bridge according to such plans, and in afterwards completing the bridge, and lost all the profits he otherwise would have realised in building the same.

The claim was for damage founded upon the declaration and arising as therein alleged out of an alleged implied warranty or guarantee (no express warranty or guarantee being alleged) which the plaintiff contended arose under the circumstances hereinafter mentioned.

1. By the Blackfriars Bridge Act, 1863, the Corporation of the City of London were authorised to pull down and remove the then existing Blackfriars Bridge and the work connected therewith, and to construct a new bridge and certain other works as therein mentioned across the river Thames, and they were further authorised to appoint a committee to carry the Act into execution, to whom they might delegate the powers given by the Act to the corporation.

2. Such committee was appointed and exercised the powers.

3. The committee appointed and employed Mr. Joseph Cubitt, C.E., as their engineer for the execution of the works. A specification, and plans and drawings of such works were prepared by him (1).

4. Afterwards the committee issued an advertisement inviting tenders for the execution of the works, and stating therein that "the plans of the intended

(1) These formed part of the case. The material clauses of the specification were in substance as follows—

1. This specification refers to drawings (described by letters and numbers), and the present contract will include the whole work to be executed as shewn thereon or hereafter described, as well as all contingent works, which, in the opinion of the engineer, are thereby implied or are requisite for the due completion of the work shewn and described as to be executed under this contract.

4. The word engineer is intended to refer to Mr. Joseph Cubitt, of 37, Great George Street, Westminster, or other the engineer for the time being employed by the corporation for the rebuilding of Blackfriars Bridge.

12. The contractor will be bound to complete the whole of the work included in this contract within three years of the date of order to commence. Should he fail to complete the works within that time the contract will not be vitiated, but the sum tendered will be subject to a deduction of 1,000*l.* per month.

16. Payments will be made monthly on the engineer's certificates on account of work done and materials delivered to the amount of ninety per cent. of the value, in the opinion of the engineer, then executed.

18. The whole of the works will be under the direction and superintendence of Mr. Cubitt, the engineer, and his decision on all questions relating to the works, or the construction and meaning of the plans, section and detail or other drawings, or of the specification of works or of the specification of conditions, or of the schedule of prices referred to therein, or of any drawings or directions for the more particular explanation of any portions of the works, is to be final and binding upon all parties to the contract.

26. No extras beyond the contract sum will be allowed, unless a written order from the engineer, or his authorised agent, be produced.

28. Any work executed under this contract, which in the opinion of the contractor is not included in the lump sum tender, will, on the requisition of the contractor, be taken note of by the clerk of the works, and the quantities having been ascertained, the question of payment will be referred to the engineer whose decision shall be final and binding.

30. Contractors will have to take out their own quantities, no surveyors being appointed or authorised to act on the part of the corporation.

Specification of works.

36. Drawings lettered A.B. (&c.) are plans and sections of the existing bridge. They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor will not be entitled to charge any extra should the work to be removed prove more than indicated on these drawings.

54. The contractor must satisfy himself as to the nature of the ground through which the foundations have to be carried; all the information given on this subject is believed to be correct, but is not guaranteed.

Iron Caissons.

63. The foundations of the piers will be put in by means of wrought iron caissons as shewn in drawing.

67. The form and dimensions of the ironwork

new bridge and specification of the works to be executed may be seen and further particulars obtained upon application at the office of the engineer, Joseph Cubitt, Esq., No. 37, Great George Street, Westminster."

5. Upon and in consequence of this advertisement the plaintiff and his then partner (since deceased) sent in a tender to the corporation, which was accepted by them, and in pursuance thereof a contract was afterwards entered into by deed dated the 24th of May, 1864, and made between the contractors of the one part and the corporation of the other part. [So much of it as was material formed part of the case (2).]

6. The corporation did not nor did the committee at any time interfere in any way directly or indirectly with Joseph Cubitt in his dealings with the contrac-

and size of rivets are shewn on the drawings, or will be hereafter supplied by the engineer. The edges of all abutting plates must be accurately planed. The face of the irons and plates, which form the outer edge of the movable panels, must also be planed up after riveting, so as to insure perfect accuracy in the dimensions and form of these movable panels. Particular attention is drawn to this point, as without great accuracy in these movable parts, a watertight dam can never be obtained; and the contractor will be bound to make the caissons perfectly watertight, before being allowed to take out the last spit of excavation previous to commencing the foundation.

76. When the separate caissons of each pier are sunk to the full depth, the foundations must be put in up to the level of the top of the permanent plates. The intermediate spaces must then be carefully dredged out, the ends closed with double piling and clay, the enclosed space must then also be filled up to the top of the permanent plates with cement concrete, and when thus secured, the water must be pumped out and the temporary plates removed as the work proceeds; thus clearing the whole pier from end to end and allowing it to be bonded throughout.

77. All risk and responsibility involved in the sinking these caissons will rest with the contractor, and he will be bound to employ divers or other efficient means for removing and overcoming any obstacles or difficulties that may arise in the execution of the work.

(2) By it the contractors agreed (*inter alia*) as follows—

1. To execute and perform under the superintendence and according to the directions and to the satisfaction of the engineer all the work of every description which shall be required in and about or connected with the pulling down and removing Blackfriars Bridge and constructing the proposed new bridge, according to the specification and drawings, which specification and drawings have been produced to the contractors immediately before the execution by them of the

contract, and signed by them under a memorandum importing that they respectively are the specification and drawings therein referred to, and generally the whole of the works shewn on the drawings, or described or mentioned in the specification, and also all contingent works which in the opinion of the engineer are implied thereby or are requisite for the due completion of the works aforesaid, and will or shall execute the works thereinbefore mentioned under and subject to the directions, rules, regulations, explanations and instructions mentioned or referred to in the specification, with such alterations, if any, as may from time to time in manner hereinafter mentioned be directed by the engineer.

5. That the contractors will be responsible for and repair, and make good any settlement, failure or damage which from any cause whatever and however occasioned may take place in or happen to the proposed new bridge or any of the works the subject of these presents, or connected therewith, until the expiration of three calendar months from and after the date of the final certificate to be given by the engineer.

6. That the contractors will employ good and experienced workmen and an able, experienced foreman, and generally all labour requisite for the due performance and completion of every work described or mentioned in the aforesaid specification or shewn in the aforesaid drawings.

8. That the works shall be commenced immediately after an order signed by the engineer, and after possession given to the contractors of the ground, and shall thenceforth be proceeded with unless hindered or delayed as hereinafter mentioned, with such expedition as in the opinion of the engineer shall be regular and proper, and the whole of the works shall be finished and completed in every respect within three years, unless the work shall be impeded or retarded as hereinafter mentioned, from the time at which such order of possession shall have been given.

12. That the contractors will execute and complete the works for 269,045*l.*, increased by such sum or sums (if any) as shall become payable, or as the case may require, diminished by such sum or sums as shall have to be deducted as hereinafter provided, in respect of alterations or variations in the works.

13. That it shall be lawful for the engineer at any time during the progress of the works to vary the dimensions or position of the various parts of the works without the contractors being entitled to any extra charge for such alteration, provided the total quantity of work be not increased or diminished thereby. But in case any greater or less quantity of work shall be required by the engineer, the addition or diminution (as the case may be) shall be valued according to the schedule of prices written under

ors or with their mode of conducting the works, or with any alteration or addition to the plans and drawings.

7. Under this contract the work was commenced by the contractors on the 7th of June, 1864, and by the following October had advanced sufficiently for the commencement of the operation of putting in the foundations of the piers.

8. (*a*) The contractors commenced and proceeded with the work to be done for putting in the foundations of the piers in strict accordance with the directions of the specification and the drawing relating thereto, and the caissons were constructed as thereby required, and the proper measures were taken by the contractors for preparing the ground and for lowering and sinking the caissons, but it was found necessary to add to their strength by introducing additional iron girders and temporary internal struts and other supports, that such alterations were accordingly made by order of the engineer, and by reason thereof the difficulties of lowering and sinking the caissons were finally surmounted, and they were sunk to the full depth shewn upon the drawings.

(*b*) After the separate caissons for forming one of the piers of the intended bridge had been (as so altered and added to) lowered and sunk, the foundations

these presents, or in case any of the works shall not be provided for in that schedule, then to be valued according to the schedule of the Government Board of Works in force at the time. And that in case and as often as the engineer shall give previous notice in writing under his hand of any such alteration or variation as aforesaid to the contractors, then and so often the contractors will execute and complete the works according to any and every such alteration or variation, and in the manner and within the time in and within which such works ought to be completed according to the true intent of these presents, or in case the works or any of them shall be increased, then within such further or extended time (if any) as the engineer shall certify as above to be proper, and no such alteration or variation shall vacate or lessen the validity of any of the covenants or agreements in these presents on the part of the contractors, but such sum shall be added to or deducted from the sum of 269,045*l.*, as shall be estimated to be a fair proportionate addition or deduction to be allowed for such alterations or variations according to the list of prices as above mentioned, and that in case any alteration or variation directed as aforesaid shall require any day work or any extra work of any kind which is not provided for by the specification, the contractors will or shall deliver to the engineer on or before the morning of the Wednesday in the following week an account in writing of all such works as shall have been done in the week preceding from Monday to Saturday, and in case an account of day work or extra work of any kind done during any week (from Monday to Saturday) shall not be so delivered as aforesaid, the contractors shall be deemed to have abandoned any claim in respect thereof, and shall not be entitled to any payment or compensation for the same unless the engineer shall certify the omission to deliver the account arose from accident or unforeseen circumstances. And it is hereby expressly declared that no extras beyond the said sum of 269,045*l.* shall be allowed for or claimed unless an order in writing for the same under the hand of the engineer or his authorised agent shall be produced.

14. That the contractors will guarantee the stability of all the works, notwithstanding the same may have been done with the approbation of the engineer, and shall be responsible for all injuries, damages and accidents of every description, whether to property or persons, arising out of the execution of the works; and will or shall forthwith, and without delay, make good all damage which may happen to the works during their progress.

20. That in case the contractors shall, without the happening of any of such causes or excuses for delay as herein mentioned, fail to complete the works hereinbefore covenanted to be executed, ready for the proposed new bridge being opened to the public traffic within the said time of three years, computed from the date of the said order to proceed with the works, they, subject to the exercise by the engineer and by the committee of the powers conferred on them respectively, shall be allowed further time for the purpose of completing the same, upon the terms of the aforesaid sum of 269,045*l.*, being reduced by a reduction after the rate of 1,000*l.* per calendar month for each and every month during which or any fraction of which the works aforesaid shall remain uncompleted after the expiration of the said time of three years, such deduction being considered and accepted as an equivalent for the accommodation of the longer period thus allowed for the completion of the works, and such failure shall not affect these presents further than to subject the sum of 269,045*l.* to such deduction as aforesaid. Provided, nevertheless, that no deduction shall be made, nor shall any damages be payable, for or in respect of such time as the engineer shall, by writing under his hand, certify that the works have been delayed or suspended by reason or in consequence of bad weather, or inevitable accident or other circumstances not avoidable by the exercise of reasonable care, skill or diligence on the part of the contractors, or by or in consequence of any order of the engineer. . . .

were put in up to the level of the top of the permanent plates; the intermediate spaces were dredged out, the ends closed up with double filing and clay, and the enclosed space was also filled up to the top of the permanent plates with cement concrete, according to Article 76 of the specification; but in endeavouring to carry out the further work to be done for putting in the foundations of the piers, it was found necessary to take away the two upper tiers of temporary plates, to cut off the dam timbers to the top of the second plates (and since this brought the top of the caissons considerably below high water mark), to build the rest of the pier by tide work. By the original plan (if practicable) the water of the river Thames when once pumped out would have remained excluded (very little pumping being thenceforth needed to keep the interior of the caissons dry), and the work of laying the masonry within the caissons, removing the caissons, and otherwise completing the piers, might then have proceeded regularly and without intermission, while by the new plan no work could be done except when the river was not more than half tide. The caissons were filled with water at each tide, and had to be pumped dry after half tide before any masonry could be laid, or other permanent work executed, and the work had thus to be done intermittently and at irregular times. Such different manner of executing the work was ordered by the engineer, and executed by the contractors, without objection, in all the piers of the bridge, and thereby the piers were finally completed.

(*c*) The contractors were delayed in the execution of the works, and put to considerable additional cost by reason of the premises in the two preceding subsections of this case respectively mentioned.

(*d*) The said difficulties in carrying out the work in accordance with the plans and designs of the engineer of the corporation in the several respects before mentioned, were not known by the contractors at the time of entering into the contract, although the same might have been discovered on careful examination of the specifications and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment before and at the time of tendering for the contract a civil engineer who saw the plans, but no such careful examination had in fact been made by him or by any other person on behalf of the contractors.

(*e*) The contractors acted on the assumption of the specification and drawings being fit and sufficient, and of the plan and method of executing the works as shewn and specified thereby being fairly and reasonably practicable, and upon that assumption the quantities of the several materials which would be required, and the nature of the work were calculated and estimated, and the tender was made. It was also stated by the plaintiff and the said civil engineer in his employment, that it was the usage of contractors to assume and to make their calculations and tenders upon that footing.

9. [Two models accompanied the case.]

10. The bridge itself as finally built (notwithstanding any alterations in the mode of construction) was the same bridge as that originally designed by the engineer.

11. The contractors contend that the corporation having invited them to tender upon the specification and drawings as prepared by their engineer, must be taken to have guaranteed to them that the same were reasonably fit and sufficient for the purposes of the works, and that the works could reasonably and properly be executed in accordance with the same, and that the plan and method of executing the same, as shewn and specified, were fairly and reasonably practicable, and consequently that the corporation were liable for the several faults and defects therein as before mentioned, and for the loss and damage thereby caused to the contractors.

12. The defendants contend that they are not liable, and that the advertisement, contract, plans, and specification mentioned in the 4th and 5th paragraphs of this case do not shew or contain, nor can there be inferred from them any such implied warranty or guarantee on the part of the defendants as is stated and

alleged in the declaration, and that the alterations mentioned above and the additional expenses thereby incurred by the plaintiff were matters to be dealt with by the engineer of the corporation under the contract.

The question for the opinion of the Court was whether there was any and (if any) what implied warranty on the part of the defendants to the effect stated in the declaration, or so as to give to the plaintiff a cause of action against the defendants.

If the Court should be of opinion that such warranty existed, and that on the facts the plaintiff had a cause of action, then judgment was to be entered for the plaintiff for forty shillings damages with costs. If otherwise, then for the defendants with costs.

Benjamin (with him *Littler* and *Batten*), for the plaintiff.—The failure of the scheme for laying the foundation of the bridge by means of caissons was an event contemplated by neither party. That it did fail was admitted by the engineer causing the top tier of caissons to be removed. The possibility of failure might have been discovered by an engineer of competent skill: Par. 8 (*d*).

The contractor was in no default. He ought not to suffer for the want of skill in a servant of his employers. There is no provision in the contract that the whole cost of attempting to carry out this impracticable scheme should fall on the innocent party.

[POLLOCK, B.—Then ought he not to have thrown up the undertaking directly it was found to be impossible?]

No, his right course was that adopted, viz., to endeavour to mitigate the damage. The claim does not come within the stipulations as to extras or compensation in the contract, but is founded on a distinct implied agreement. Nor is it for work done and materials provided; the plaintiff has been paid in respect of all for which the engineer was empowered to certify. But the plaintiff says that whereas he bound himself to do, within three years, work upon certain plans and specifications for the accuracy of which the defendants were responsible, a correlative obligation was incurred by the defendants that the plaintiff should not be prevented from doing the work within three years by their default or obstruction, yet that during the progress of the work, he, by their default and obstruction, was prevented from doing it in three years, and therefore incurred great loss.

[KELLY, C.B.—But that is not your declaration.]

Power is however reserved to the Court to find for the plaintiff if, upon the facts, any form of action is maintainable. The publication of these plans and the specification amounted to a statement that the plans were proper and that the work which they prescribed was feasible. It was not so.

[KELLY, C.B.—Supposing, however, that a right of action accrued when that fact appeared, yet the plaintiff did not avail himself of it, but went on with the work. POLLOCK, B.—Under a new or *cypres* contract? AMPHLETT, B.—And is he not estopped now from saying that the new work was not done under the original contract since no objection was made that it was not within the terms, and the plaintiff received payment under the original contract?]

The legal liability to an action could not be changed by his proceeding to finish his work under an arrangement by which he was paid, and the right was not lost unless expressly abandoned. *Roberts* v. *Bury Commissioners* (1) was a case somewhat like the present one, but in the conditions of the contract there was a proviso that if the contractor were delayed by default of the employers he should have no claim for damages, but have an extension of time in which to complete. No such clause can be found in the contract here, yet the defendants would wish to insert it, and, as Kelly, C.B., said in the above cited case, such stipulations must not be imagined when they are not introduced into the agreement.

[PER CURIAM.—Ought not both parties to have known of the defects in the plan?]

(1) 38 Law J. Rep. (N.S.) C.P. 367; s. c. Law J. Rep. (N.S.) C.P. 129; s. c. Law Rep. C.P. 755; s. c. Law Rep. 5 C.P. 310.

No. The corporation said, as it were, we have provided a competent engineer of peculiar knowledge, you, the contractor, take the plans and drawings which we guarantee. Moreover when the defendants meant to exclude a guarantee they knew how to do so, and did so expressly in several of the stipulations in the case.

Hardinge Giffard and *Thesiger* for the defendants.—First. There was no express warranty of these plans, nor can any warranty be implied from the publication of them. When once accepted by the contractor it matters not how they came into existence for they were no longer any more the plans of the corporation than of the contractor who adopted them, and who had full opportunity of ascertaining what was to be done and the mode of doing it. He might, no doubt, have required a special guarantee of their practicability, but he did not do so. There is no authority for such an action as this, whereas there are decisions opposed to it. In *Scrivener* v. *Pask* (2) the defendant employed an architect to prepare plans and a specification for a house, and to procure a builder to erect it for him. The architect took out the quantities and represented to the plaintiff, a builder, that they were correct, and the plaintiff thereupon made a tender which was accepted. The quantities proved to be incorrect, and the plaintiff expended upon the building a much larger amount of materials than he contemplated. But the Court of Common Pleas and the Exchequer Chamber held that there was no evidence that the architect acted as the defendant's agent in taking out the quantities, or that the defendant guaranteed their accuracy, and that, therefore, the plaintiff could not recover more than his contract price. The failure of this caisson scheme from an unforseen cause did not entitle the plaintiff to treat the contract as at an end. He was bound to complete the work—*Hills* v. *Sughrue* (3), *Marquis of Bute* v. *Thompson* (4).

By the contract the plaintiff says, "I will build the bridge thus." The employers say, "We will pay for it when done," and that was the only contract entered into between the parties.

Secondly. The new work done was but an "alteration ordered by the engineer."

[KELLY, C.B.—What matters who ordered it? It was necessary.]

Certainly. But the plaintiff contends that the corporation by their engineer ordering the substitution of another mode of work obstructed the plaintiff, and hindered the completion of the bridge within three years. There was however no obstruction. The plaintiff was bound to complete his work, and the engineer shewed him how to do so when the first method failed. The doctrine *caveat emptor* applies by analogy. The builder should have examined his undertaking before he began it.

[They cited *Searle* v. *Laverick* (5) and *Redhead* v. *The Midland Railway Company* (6).]

[KELLY, C.B.—Those cases do not come into question here.]

Benjamin in reply.—The engineer was the agent of the defendants only. The *ratio decidendi* in *Scrivener* v. *Pask* (2), was that inasmuch as the architect was the agent of the plaintiff *to take out the quantities*, there was no warranty. Suppose the specification here had required the bridge to be built of Portland stone, and that when half built the engineer, doubting whether the materials would endure, had directed the contractor to take it down and rebuild it with granite, and the completion was thereby delayed for a year, surely the employers would have been responsible. That would have been, as the present is, a *casus omissus* from the contract. The sufficiency of the caissons was a matter of abstruse engineering calculation as to the pressure of water, the momentum of tides, the varying force of the stream, and many other things. The plaintiff was justified in relying upon the accuracy of the calculations upon which the plans were prepared. If the engineer were

(2) Law Rep. 1 C.P. 715.
(3) 15 Mee. & W. 253.
(4) 13 Mee. & W. 487; s. c. 14 Law J. Rep. (N.S.) Exch. 95.
(5) 43 Law J. Rep. (N.S.) Q.B. 43.
(6) 36 Law J. Rep. (N.S.) Q.B. 181; s. c. 38 Law J. Rep. (N.S.) Q.B. 169; s. c. Law Rep. 2 Q.B. 412; s. c. Law Rep. 4 Q.B. (Ex. Ch.) 379.

competent, then the case finds, in effect, that he was careless—Paragraph 8 *b*.

[KELLY, C.B.—But does not state that it was known to the defendants. Are not both parties *in pari casu?*]

The contract was to build in three years; there was great delay, but there being no stipulation as to delay on the part of the corporation, the general principles of law apply, and as the delay was caused by their obstruction of the plaintiff's work they are bound to make him compensation.

[He referred to *Hill* v. *The Mayor, &c., of London* (unreported) decided by this Court in 1873.]

KELLY, C.B.—The question for us to determine is a simple one. The Corporation of London being desirous of entering into a contract for pulling down and taking away old Blackfriars Bridge and for erecting a new bridge, employed an engineer of special knowledge and education to prepare a scheme enabling them to advertise for tenders. He accordingly prepared the specification now before us, and whatever else was necessary to enable contractors to come forward, and having considered the specifications, make proposals to undertake the work. Upon the specification and advertisements which the defendants issued the plaintiff came forward, and having considered the terms of the specification, and the nature of the thing to be done required by the advertisement, made a proposal to execute the work according to the specification and with the materials and in the time therein prescribed. He contracted on the specification, and it is annexed to the contract in question. The work was begun, the old bridge removed and the new one commenced. In the course of the construction of it, literally according to the terms of the specification, after having sunk the first and second tiers of caissons, and proceeded to erect the others, and having altogether completed four pairs of caissons, on proceeding to pump out the water the plaintiff found that, from their want of solidity or some such cause, the two upper tiers were insufficient to keep out the tidewater in a river of the magnitude of the Thames, that the two upper tiers of caissons must be removed, and that he must pump out the water, and build the foundations only at low tide, where he had a dry space only up to the second tier. The consequence was that it took about twice the time to execute and complete the work, and, therefore, during the whole of that additional period the plaintiff was prevented from entering into other contracts, and sustained in a variety of ways a very considerable loss. He now, when the whole work is completed, complains of the injury he has sustained, and sues the corporation, insisting that, although nothing of the kind is to be found in the contract, they impliedly contracted that the work could be executed in the time fixed and in the mode and with the materials perscribed by the specification. The question is, whether the contract being wholly silent, we are to infer that such was the intention of the parties, and to hold that the corporation did impliedly contract that the works could be completed according to the contract within the period and with the materials pointed out. No authority whatever was cited to shew that in a contract of this kind there is any such implied warranty. Therefore we must deal with the case on the principles of law entirely, and we must be careful how we decide judicially that in contemplation of law persons must be presumed to have contracted for something not expressed in their written contract, and, consequently, that the contract must be deemed to contain something which the parties have not said, and which the contract does not in fact contain, or that the parties intended that which they have not declared as their intention, and which one of them at least, beyond all doubt, never did intend. There are, indeed, certain implied warranties known to the law, but they are applied to cases of a totally different description; as, for example, where a passenger is carried by railway, there is an implied warranty that he shall be carried in a carriage reasonably sufficient for the purpose. The present case is of quite another kind. Here there is a very express contract, and it appears to me that we should be making a contract for

the parties, and a different contract from that which they made, if we held that a warranty or undertaking such as that contended for were to be implied. It is said that the engineer was an agent of the corporation, and that *he* therefore must be taken to have contracted for them that the specification which he had prepared was fitting for the purpose, and that it was reasonably practicable to have executed the work according to the specification; but when we look at the contract itself we find only that it is to be performed in a substantial and workmanlike manner, and is to be done in a certain time. But it is absolute that the plaintiff will execute the work in question for a certain sum, and in the space of time prescribed; and supposing that it turned out that it was physically impossible to complete the contract within the three years, could it be pretended that, because the time three years is specified in the contract and the corporation had proposed to the plaintiff that he should execute the work within three years for a certain sum, that they *warrant* to him that it could be done within that time? Surely when such a contract is made by a contractor it is *his* duty to ascertain whether it can be executed in such time. Nobody obliges him to enter into a contract to do it within three years. He has to judge for himself by looking through the specification. He determines that he *will* do it, and I cannot understand on what imaginable grounds it can be contended that the corporation have entered into such implied contract.

Reliance was placed upon the finding in the case that the difficulties in carrying out the work in accordance with the plans and designs "were not known by the contractors, although the same might have been discovered on careful examination of the specifications and drawings by a civil engineer of competent skill and knowledge." The corporation had no more knowledge of engineering, nor means of knowing whether this bridge could be built in the manner pointed out than the plaintiff. They took the advice of the engineer who prepared the specification, and it may have been that when he did so he had no idea that the works could not be executed in the manner prescribed. The contractor should have consulted a competent engineer who could tell whether this work was feasible or not. Whose fault was it that the contractor, instead of taking the advice of competent engineers and assuring himself, failed to do so? He blindly accepted the work, taking it for granted that it could be done; whereas if he consulted engineers he would, as the case finds, have been informed that the caissons were insufficient. I cannot see that the corporation were bound to do anything more than to pay the other contracting party according to the express agreement, and the question whether Mr. Cubitt ought to have more efficiently conceived the plans is a matter entirely between himself and the corporation. There is no contract between him and the plaintiff. I think neither were the corporation nor was the engineer, any more than their attorney would be, under any obligation to the plaintiff with respect to this specification on which he could exercise his own judgment. I can discover no contract, except that under seal and in writing. And I am at a loss to see on what ground or principle of law the plaintiff is entitled to recover. It is submitted that, by the terms of the case, we may amend the record and introduce a count into the declaration adapted to the facts. But I am also of opinion that no action of any kind accrues to the plaintiff under the contract, except for the work he has done according to the terms of the agreement. It remains only for me to observe that the case of *Hill* v. *The Corporation of London* (unreported), which has been cited, not only has no application to the present one in favour of the plaintiff, but is directly adverse to him. There there was a contract to erect a house on land to be supplied by the first contracting party to the other, and the house was to be completed within a time specified. It was impossible to do it within that time; but why? Because the land was not supplied. Of course the first party must, as it were, open the door for the other to go in and do the work, but the door was not opened in time. But here there was no difficulty whatever made on the part of

the defendants, but it has arisen from its proving to be impossible to complete the work in the mode indicated by the specification.

The parties were, however, *in pari casu* as to the possibility of executing the contract, and I think there was no warranty whatever such as that now suggested for the plaintiff in consequence of his being kept a longer time than was expected by reason of the specification not being altogether practicable.

PIGOTT, B.—Without intending to add much to what my Lord has said, I feel bound to state generally my reasons for deciding that the plaintiff is not entitled to recover in this action, nor in any other form of action for what has happened in carrying out the work. Let me adopt the view taken by the plaintiff himself in the case. He puts the question for us thus, "Whether there is any, and (if any) what implied warranty on the part of the defendants to the effect stated in the declaration or so as to give to the plaintiff a cause of action against the defendants." Therefore we have to see—First, whether there is any warranty which could be implied, or, secondly, whether there are any facts on which we could say the plaintiff was entitled to recover. The declaration [his Lordship read it] alleges the claim in a very intelligible form, and, indeed, the only form on which one can conceive that an argument could be founded.

The contract has been carried out. It was to remove the old bridge, and to build a new one according to certain plans and specifications. The old bridge has been removed, and the new one built. It has not, however, been built by the means prescribed in the specification, because difficulties arose. It is in respect of loss of time by these difficulties that the plaintiff now sues. The contract has nevertheless been carried out by the contractor building a bridge, and the corporation paying for it and also for extras. The learned counsel for the plaintiff presents his claim as a claim of compensation for the greater expense in doing this work by stating the mode in which the new bridge was to be built according to plans and specifications prepared by the engineer. It appears to me that the corporation and the plaintiff were in this condition, the ordinary one in which the parties are when either builders or contractors are about to undertake work—the corporation employed one whom they believed to be a very eminent engineer for the execution of a very difficult engineering task. They neither had nor could, either as a corporation or as ordinary individuals, have any peculiar knowledge of such a matter. All that they could do was to employ the most eminent person acquainted with the subject, and having so employed him, and these plans being prepared and lying in the office of the engineer, the plaintiff chose to look at them, tendered, and became the contractor for the work. When he became so what more had the employers to do than to carry out the terms of the contract entered into by them? Was there anything by which they undertook to warrant that the engineer was competent, or had made no miscalculation in his specification? Mr. Benjamin has pointed out several passages as affording an argument on the general principle *expressio unius exclusio alterius*, and he says that in the cases where they meant to prevent any implied warranty they expressly stated that they did not warrant. But Paragraphs 36, 54, and 77 only go to shew that where they *could* anticipate difficulty then by express contract they *excluded* any implied warranty. [His Lordship referred to those clauses.] The difficulty which arose was not contemplated. It was altogether, as was rightly said in argument, *omitted* from the contract. In fact Mr. Cubitt was perhaps the most competent man of the time. He would not be likely to risk his own reputation and loss to the corporation by involving them in an impossible undertaking. It was argued that what has happened throws a liability on the defendants, and Mr. Benjamin says, the work must be taken to have been represented to the plaintiff as practicable. On what ground? I find none. This only do I find in the case, that the difficulties in carrying out the work "were not known to the contractors at the time of entering into the said contract, although the same might have been discovered on careful examination of the specifications

and drawings by a civil engineer of competent skill and knowledge." No doubt that tends to shew that the engineer was to some extent responsible for want of skill. Then the paragraph proceeds to state that "The contractors had in their employment before and at the time of tendering for the contract a civil engineer who saw the plans, but no such careful examination had in fact been made by him or by any other person on behalf of the contractors." Therefore whatever want of care there was on the part of the engineer there was the same amount of want of care on the part of the contractors. But the fact of the engineer having been guilty of want of care—if he were so—throws no liability on the defendants. They did not warrant his care and skill. True, it is difficult to define the circumstances under which the law does imply warranty. In *Chitty on Contracts* (9th edit.), p. 56, the writer says, "there is a large class of contracts called *implied* contracts, which rest merely on construction of law, and in which there is strictly speaking no agreement of the parties to the terms by which they are bound. . . . So there are many cases in which where there is no express agreement by writing or word of mouth, the law looks to the circumstances or acts of the parties; and from these circumstances or acts raises the duty and implies the promise by which in the individual case, the party will be bound." Now, from what circumstances or acts on the part of the defendants could the law raise any such duty as that alleged? It was a duty they could not discharge in any other way than by answering in damages if they failed. They have said nothing in this contract which shews that they *meant* to undertake that the plaintiff should not be required to build the bridge if anything proposed by their engineer was wrong. This distinguishes the case from *Hill* v. *The Corporation of London* (unreported), for there there was a plain duty to give the plaintiff the land to build on, and it was the first duty, for without the land he could not build. But there is nothing of that kind here which the defendants were bound to do, nothing to be done by them except to have plans prepared, to submit them to contractors, and to make the payments agreed on, nothing in the nature of warranty or guarantee on the part of the defendants that their engineer was either a competent engineer or could not fall into an error. No case was cited which could support the proposition contended for by the plaintiff, nor are any analogies even suggested shewing that such a liability ought to be imposed. It would render contracts of this description impossible were any such warranty implied.

AMPHLETT, B.—I am of the same opinion. This may perhaps be a case of hardship on the plaintiff, giving him some sort of claim in honour upon the defendants. With that we have nothing to do. The question for us is, whether they are under any legal obligation to him. The damage has arisen from the fact that the plaintiff, instead of employing a surveyor of his own to investigate the nature of the work he was about to undertake, did that which, according to the case, is very usual for contractors to do. He assumed and made his calculations on the plans and specifications furnished to the corporation by a very skilful and eminent engineer. Of course it would be more prudent for contractors to employ their own engineer; but, still, when they found the plans and specifications prepared by such an eminent man as Mr. Cubitt, they no doubt desired to avoid expense, and chose to rely on those plans and specifications. Now, of course, if those plans had been *fraudulently* put forth to impose on the contractors, the case would have presented a very different aspect. But, as it is, we must assume that Mr. Cubitt was, as nobody denies, an honest and skilful engineer, who *bona fide* prepared these plans and specifications. But the very important question underlying the whole dispute is, assuming, as we may, the plans and specifications to have been honestly prepared, whether under a contract of this kind the corporation impliedly contracted (for there is no express contract) that the plans and specifications were such as rendered the work reasonably practicable. To say that there is any such implied contract seems to me a very wide propo-

sition. To hold that where, in any large hazardous undertaking an employer has applied to a skilful engineer, who says it is practicable, and it turns out not to be so, the contractor who has chosen to rely on that statement is to make the employers pay all damages which he has sustained by acting on that view, would be putting on persons who wish to have works done for them a liability greater than has been imposed in any case cited. The question, therefore, is most simple, viz., if persons wanting work to be performed publish a scheme, and plans and specifications of the manner in which they wish it to be done, and tell the public they are by an eminent engineer, not concealing anything in their own breasts, and give contractors an opportunity of ascertaining the practicability of the work, and it turns out that the work is, as in this instance, impracticable, that is to say, could not be carried out in the exact mode prescribed, who is to bear the loss entailed by that? Is there, or is there not, an implied warranty? In the absence of authority, I think it would be a dangerous extension of the doctrine of implied warranty were we to hold that any such liability existed. It goes to shew that neither employers nor employed were responsible for what happened, when we look to see what was done upon the difficulty being apparent. There was an extensive power given to the engineer by the terms of the contract, although I have great doubt whether this variation did come within the powers of the engineer, as found in the case. However, when it was discovered that it was impracticable to carry out the caisson scheme in the manner proposed, the engineer suggested a new mode, and then it appears from the case that these works were executed without objection. So that, although possibly the contractor might have been at liberty to say, "I will not go on with my contract, this is not contemplated therein, nor is it a variation which the engineer is entitled to make," instead of doing so the contractor made no objection at all, and, therefore, as it seems to me, sanctioned the alteration, and then, it is said, that years afterwards he can make his employers responsible for the necessary delay consumed by the alteration. It is surely too late for him now to seek indemnification. This, however, is but a minor point, and the ground upon which my decision rests is, that I do not think in a case of this kind that there can be said to be any implied warranty by the corporation upon which, when the work was found to be impracticable, a right of action would accrue to the contractor. For these reasons I agree with the rest of the Court.

Judgment for the defendants.

Attorneys—J. B. Batten, for plaintiff; F. Brand, for defendants.

END OF EASTER TERM, 1874.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

TRINITY TERM, 37 VICTORIÆ.

1874. May 26. } HERMITAGE *v.* KILPIN.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5 — *Order of Committal by Superior Court.*

An order of committal by a Superior Court under section 5 *of the Debtors Act*, 1869, *s.* 5, *is valid for the arrest of a debtor, though it has been made more than a year before and has not been renewed.*

The plaintiff signed judgment on the 2nd of January, 1872, for 30*l.* 17*s.* 1*d.* On the 23rd of April, 1873, Martin, B., made an order under section 5 of the Debtors Act, 1869, that the defendant be, for default of payment of the debt, committed to prison for six weeks from the date of his arrest, or until he should pay the judgment debt, together with the costs of the order and sheriff's fees, the learned Judge being satisfied that the defendant had the means, and had neglected to pay the judgment debt.

This order was on the same day delivered to the sheriff of Sussex, to whom it was directed.

The sheriff of Sussex not having succeeded in finding the defendant, a concurrent order of committal, dated the 23rd of April, 1873, was on the 21st of February, 1874, obtained at Judges' Chambers, under rule 4 of Reg. Gen. Mich. T., 1869, and delivered to the sheriff of Surrey, to whom it was directed, and who, on the 8th of May, 1874, arrested the defendant thereunder. A summons having been taken out the next day on behalf of the defendant for his discharge on the ground that the order of committal, not having been renewed, had ceased to be in force at the time of the arrest, Denman, J., referred the question to the Court. A rule *nisi* for the discharge of the defendant having been obtained,

Arbuthnot, for the plaintiff, shewed cause.—The rule was obtained on the ground that section 124 of the Common Law Procedure Act, 1852—which enacts that "a writ of execution, if unexecuted, shall not remain in force for more than one year from the teste of such writ, unless renewed in the manner" there provided — applies to an order of committal under section 5 of the Debtors Act, 1869, because section 5 enacts that "every order of committal by any superior Court, shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ." But section 124 of the Common Law Procedure Act, 1852, is inapplicable to an order of committal, because that section provides for the sealing of writs on renewal by a seal kept at the master's office, whereas there is no machinery provided by the Debtors Act, 1869, or the prescribed rules for sealing orders of committal. This is the only enactment requiring writs of execution to be renewed, and before this a writ might be executed at any time after its teste, however remote, if it was returnable "immediately after the execution" of it—1 *Chit. Prac.* 528, 8th edit. The execution of a writ of *ca. sa.* extinguishes the debt, and therein differs essentially from the execution of an order of committal, which is a proceeding *in pœnam*, and leaves the debtor liable for the debt. The framers

of Reg. Gen. Mich. T. 1869, seem to have taken this view, since they have prescribed many things with regard to orders of committal, but nothing as to their renewal.

Pinder, for the defendant, in support of the rule.—There is no authority on the question, but the spirit of section 5 of the Debtors Act is that an order of committal shall be treated in all respects as a writ of *ca. sa.*, and the words, "shall be issued, obeyed *and executed* in the like manner as such writ," will bear the defendant's interpretation that orders of committal must be renewed like writs of *ca. sa.*, under section 124 of the Common Law Procedure Act, 1852. The framers of the Reg. Gen. Mich. T., 1869, did not specifically prescribe renewal, probably because they thought the words of section 5 had already enacted it. By rule 4 they do prescribe that the same particulars shall be endorsed on an order as on a writ of execution. In the County Courts the order remains in force for only one year, as prescribed in rule 16 of the County Courts Debtors Act Rules, January, 1870—*Davis' C. C. Prac.*, 341, 4th edit. As to the practice before 1852 see *Simpson* v. *Heath* (1).

KELLY, C.B.—I was certainly disposed to hold that under the Debtors Act, 1869, orders of committal required renewal, but as my brothers are all of a contrary opinion I do not wish to differ from them. At the same time I think it is to be lamented that the rules drawn up under the Debtors Act, did not put such orders on the same footing as writs of *ca. sa.* with regard to renewal. For otherwise the order must hang over the debtor's head as long as the judgment remains in force.

CLEASBY, B.—I see no reason for holding that the provisions of the Common Law Procedure Act, 1852, with regard to renewal of writs of execution, apply to orders for committal under the Debtors Act, 1869, though it might be convenient if such a practice had been prescribed by the rules. The two things are essentially different in their nature. The *ca. sa.* is a writ of execution issued by the judgment creditor as of right. The order of committal is not obtained as of right, but only on an affidavit, and the Judge must exercise his discretion before making the order. The *ca. sa.* is issued without regard to the question whether the debtor has means to pay. The order of committal can be made only "where it is proved to the satisfaction of the Court that the person making default, either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same"—section 5. The execution of a *ca. sa.* is a satisfaction of the debt. The order of committal is not, for by section 5 it is expressly enacted that "no imprisonment under this section shall operate as a satisfaction or extinguishment of any debt, etc."

The Reg. Gen. Mich. T., 1869, which have been made under the powers of the Debtors Act, 1869, create the machinery for carrying into execution the first part of the Act, and they prescribe (among other things) the mode of applying for an order and serving the summons, and proving the debtor's means, and the form of the order, and the issuing of concurrent orders for execution in different counties; but there is no provision as to the mode of execution except in section 5 of the Act itself, which says that the order shall, subject to the prescribed rules, be issued, obeyed and executed in like manner as a writ of *ca. sa.* The books of practice (2) contain a number of decisions upon what is necessary to constitute a lawful arrest under a *ca. sa.*, whether it may be done without touching, and so on. The words of section 5, "shall be executed," mean, I think, that the debtor shall be arrested in the same manner as he may be lawfully arrested under a *ca. sa.*; and not that the order shall be renewed like a *ca. sa.*

POLLOCK, B., and AMPHLETT, B., concurred.

Rule discharged.

Attorneys—Robinson & Preston, agents for F. G. Phillips, Hastings, for plaintiff; Garrard & James, for defendant.

(1) 5 Mee. & W. 631; s. c. 9 Law J. Rep. (N.S.) Exch. 129.

(2) 1 Chit. Pract. 12th edit. 701.

1874.
Jan. 30.
Feb. 9.
June 4.

MILL *v.* HAWKER AND OTHERS.

*Highway—Obstruction—District Surveyor—*25 *&* 26 *Vict. c.* 61. *s.* 9, *sub-sect.* 2, 6; *s.* 12, 16, 17*—Corporation—Liability of Individual Corporators for Acts ultra vires—Maxim, Respondeat Superior.*

A highway board under 25 *&* 26 *Vict. c.* 61, *has no authority to determine whether a disputed highway is or is not a highway, or to order the removal of an obstruction from a disputed highway. That statute, by section* 9, *sub-sect.* 6, *protects the members of the board from liability by reason of any "lawful act done by them in execution of any of the powers of the board;" but if the board, acting as a corporation, order the surveyor to commit a trespass on private property for the purpose of removing an obstruction from a disputed highway, such an order is ultra vires, and the members of the board who concur in giving the order are personally liable and may be sued for the trespass, though they have acted bona fide. The surveyor who obeys such an order and commits the trespass is also liable to be sued; and he is not protected from such a liability by section* 16, *which requires him "in all respects to conform to the orders of the board in the execution of his duties."*—So held, *per* PIGOTT, B., *and* CLEASBY, B.; *dissentiente*, KELLY, C.B.

Action for trespass to the plaintiff's close, and for breaking open gates therein, and carrying away locks.

Plea, not guilty, by statute (5 & 6 Will. 4. c. 50, and 25 & 26 Vict. c. 61). Issue thereon. At the trial before Kelly, C.B., at Bodmin, at the summer assizes, 1873, it was proved, on the plaintiff's part, that he had caused a gate which crossed a footway on his property at Crapps' Park to be locked. It was alleged that this was a public footway, and the subject was brought forward at a meeting of the board of waywardens or highway board of the Camelford highway district, held on or about the 29th of November, 1872, at which all of the fourteen defendants were present. The defendant, Claudius C. Hawker, was clerk of the board, and all the other thirteen defendants except Wickett were members of the board. The defendant Wickett was the district surveyor of the board. It was sworn, in answer to the usual interrogatories administered by the plaintiff to the defendants, that all the defendants (except Hawker and Wickett), being present at the board meeting, directed or concurred in directing the defendant Wickett to remove the locks from the plaintiff's gate, and that the defendant Wickett did so on the day following the meeting by direction of the board given at the meeting. Before removing the locks Wickett received from the clerk of the board the following order:—

"Camelford Highway District,
"30th Nov., 1872.

"Dear Sir,—The highway board at their meeting yesterday ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Lesnewth, and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the said road.

"By order of the board,
"Claud C. Hawker, Clerk.

"Mr. Wickett."

It was admitted by the plaintiff that he could not maintain the action against C. C. Hawker.

The evidence prepared on either side for the determination of the question whether this was a public footway or not was not given, because it was objected on the defendants' behalf that the action should have been brought against the highway board, and that none of the defendants were individually liable; and Kelly, C.B., admitted the objection and nonsuited the plaintiff.

A rule *nisi* to set aside the nonsuit and for a new trial having been obtained on the ground that the learned Judge misdirected the jury in ruling that the defendants were not individually liable, and that the surveyor was not liable—

Kingdon and *Pinder* (*Lopes* with them), for the defendants, shewed cause.—Those defendants who were members of the board, are not liable individually. Assuming that the removal of the locks was a trespass, the order to commit the trespass was an act done by the highway board, as such, in a matter over which they had jurisdiction, and by the common law for such an act they can be sued only as such corporation. The board is made a body corporate by 25 and 26 Vict. c. 61. s. 9, sub-sect. 2; and the jurisdiction to remove an obstruction to a highway is conferred upon them by section 17, which requires them to maintain the highways. Section 11 places them in the same position as the old surveyor had under 5 & 6 Will. 4. c. 50, of which section 72 imposes penalties for obstructing a highway, and section 73 empowers the surveyor, by order in writing from a justice, to remove timber, &c., placed on a highway so as to be a nuisance. Moreover, by section 9, sub-section 6, of 25 & 26 Vict. c. 61, individual liability is excluded, for it protects members "lawfully exercising any of the powers given to the board" from trial or prosecution; and the bodies, goods, or lands of members from execution by any legal process "by reason of any lawful act done by them in execution of any of the powers of the board." Even supposing the act to be beyond the jurisdiction of the board and unlawful, the defendants can be sued only as a corporation. The contrary opinion expressed in *Grant on Corp.*, p. 547—"That where a majority takes upon it to do acts which it is beyond the competence of the corporation consistently with its constitution to adopt, the persons forming such majority are individually and in their private characters responsible for such acts, and cannot shield themselves behind the corporate powers and corporate responsibility which they have exceeded and violated"—is not supported by the cases cited.

[For the rest of their arguments and authorities on this point, and on the question of the liability of the surveyor, it is sufficient to refer to the judgment of Kelly, C.B.]

Arthur Charles (*Cole* with him), for the plaintiff in support.—1. The 25 & 26 Vict. c. 61. sect. 9, sub-sect. 6, protects "lawful acts" only. The act in question was unlawful, being admitted, for the purposes of this argument, to be a trespass on the plaintiff's private property. The old surveyor, under 5 & 6 Will. 4. c. 50, had no power to determine whether a way was a highway or not, or to remove an obstruction from a disputed highway, or even to remove an obstruction from an admitted highway, without an order from a justice. The board have not more extensive powers than the old surveyor, and the act was therefore *ultra vires*, and for such an act individual corporators are liable to be sued. The passage cited from *Grant on Corporations* is borne out by *The Attorney-General* v. *Wilson* (1), and by the dicta in *Taylor* v. *Dulwich Hospital* (2). At p. 281 Grant asserts "a most important principle of corporation law, that a corporation is not responsible as a corporation for acts which, though colourably corporate acts, are not within the competency of the corporation to perform; in such case the individuals who take part in the pretended corporate act are personally responsible. Thus, where the majority concurred in placing on the corporation books a resolution libelling a Court of justice, the individuals composing the majority were held liable to a criminal information—*The King* v. *Watson* (3)." See also *Sands* v. *Child* (4) and *Poulton* v. *The London and South Western Railway Company* (5). For precedents of actions of trespass before 25 & 26 Vict. c. 61, against surveyors, see *Witham Navigation Company* v. *Padley* (6), and *Brook* v. *Jenney* (7), and against the individual members of a highway board and the surveyor—*Smith* v. *Hopper* (8).

(1) 1 Cr. & Ph. 1; s. c. 10 Law J. Rep. (N.S. Chanc. 53.
(2) 1 P. Wms. 655.
(3) 2 Term Rep. 199.
(4) 3 Lev. 351.
(5) 8 B. & S. 616; s. c. 36 Law J. Rep. (N.S. Q.B. 294.
(6) 4 B. & Ad. 69.
(7) 2 Q.B. Rep. 265; s. c. 11 Law J. Rep (N.S.) M.C. 10.
(8) 9 Q.B. Rep. 1005; s. c. 16 Law J. Rep. (N.S.) Q.B. 93.

[As to the liability of Wickett, the surveyor, he referred to *Stephens* v. *Elwall* (9), per Lord Ellenborough, for the general doctrine that a servant cannot justify a tort on the ground that his master authorised it. For the rest of his arguments and authorities, it is sufficient to refer to the judgment delivered by Cleasby, B.]

Cur. adv. vult.

The following judgments (on June 4th) were read—That of Pigott, B., and Cleasby, B., was delivered by

CLEASBY, B.—There are two questions raised in this case. A trespass was committed upon the plaintiff by taking the lock off one of his gates, and the two questions are—

First, whether the defendant, Matthew Wickett, is liable for the trespass.

Secondly, whether the other defendants (except Claudius C. Hawker) are liable.

[After stating the facts above set out, the judgment proceeded—]

For the purpose of the present enquiry, the trespass having been proved, and no justification proved, it must be taken that the removal of the locks was unlawful; if the objection had not prevailed, as matters stood, the plaintiff would have been entitled to a verdict.

With regard to the first question, viz., the liability of Wickett, it appears to us that the general rule applies, and that a servant who does an act which is unlawful cannot justify it because it was done by the order of his master or employer. This rule applies as much to the servants of those who act in a public as in a private capacity. The mere fact of persons having a public office or employment (whether created by Act of Parliament or not) does not take them out of the operation of the law, and give to their acts any greater force or efficacy, or to their servants any impunity.

There is an apparent exception to this in the case of sheriffs or officers of Courts of justice, who are excused if the judgments and process under which they acted are subsequently reversed; and the officers are still excused if they acted in the execution of the process. The defendants relied on this exception, and cases were referred to. See judgments in *Andrews* v. *Marris* (10), and *Dews* v. *Ryley* (11). But there is no analogy between the case of the officer of a Court of justice —whose duty it is to give effect to the judgment of the Court, which, though erroneous, cannot be called illegal, if the Court have jurisdiction on the subject-matter—and a servant obeying the order of his superiors, whose orders may be legal or not, as the case may be. It is, no doubt, a hardship that an act of obedience to the order of a public body should involve a responsibility, but the risk is small of public bodies (which act generally under advice) doing illegal acts, and the hardship is no ground for setting aside so fundamental a rule as that the person who himself does an illegal act becomes by doing so responsible, and may be sued by the person injured without his looking any further.

There is nothing in the Act of Parliament under which the surveyor is appointed to exempt him from liability. The effect of the sections relating to the appointment of surveyor is (sections 12 and 16) to establish the relation of principal and agent, or master and servant, between them. The words of the 16th section, that "he shall in all respects conform to the orders of the board in the execution of his duties," cannot be read to mean that he shall be bound to obey the orders of the board whatever they are. Previous to this Act of Parliament the surveyor had been authorised to act upon his own judgment; but this enactment makes it his duty to abide by the directions of the board as his superiors in all matters relating to the repair of the road. It is hardly reasonable to read it as importing that he is relieved from responsibility for whatever he does, provided he acts by their orders. The object is to regulate his conduct, and not to limit his responsibility to third persons.

As regards the other defendants who

(9) 4 M. & S. 259, 261.

(10) 1 Q.B. Rep. 3; s. c. 10 Law J. Rep. (N.S.) Q.B. 225.

(11) 11 Com. B. Rep. 434; s. c. 20 Law J. Rep. (N.S.) C.P. 264.

came to the resolution, in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued—*The Attorney-General* v. *the Mayor, &c., of Liverpool* (12); *The Attorney-General* v. *Retford* (13). There is, indeed, an express provision to this effect as regards the members of the highway board, but it is expressly limited to lawful acts of the board in sect. 9, sub-section 6 of the Highway Act, 25 & 26 Vict. c. 61; and it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do it, are acting *ultra vires*, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for the conclusion. But the case of *Taylor* v. *The Dulwich Hospital* (14) and *The King* v. *Watson* (3) may be referred to in support of it. And in this case, unless the letter of the 30th of November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant, Wickett, swears in answer to the interrogatories, that he removed the locks by the direction of the board, given at the meeting, that is, of the 29th of November. In the case of *Poulton* v. *The London and South Western Railway Company* (5), and particularly the judgment of Blackburn, J., the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts. Now the highway board have authority to do what the surveyor would do under the previous Act. They have all the powers, rights, duties, liabilities, capacities and incapacities of the surveyor (section 11), and are to be deemed successors to the surveyor (section 43, sub-section 3). It might be sufficient to say that in the case of a disputed footway the order to remove an obstruction could only follow upon something like a judicial act of the surveyor in determining whether there was or was not a public footpath, and he has no authority whatever to act judicially in such a matter.

But a reference to the sections of the previous Act would shew that the surveyor had no such power of removal. Section 72 of 5 & 6 Will. 4. c. 50, does not apply at all, and section 73 only enables the surveyor to remove any obstruction after he has obtained the order of a justice. In like manner the power of a surveyor to remove encroachments is founded upon a conviction under section 69—*Keane* v. *Reynolds* (15).

In reality the right of a person to take the law into his hands, and use force to remove an obstruction, is founded upon this, that he is at the time using the highway (as he is entitled to do), and as he cannot use it without removing the obstruction, he is justified in doing so, and the precedents in pleading put it on that ground. There is no right to remove the obstruction as a retaliation upon the person who has put it there. But a corporate body who orders the removal, and so uses force in determining a legal right, is in a different position. They do not want to use the road, and have not the justification of necessity in the exercise of a legal right; they can only justify it on the ground that they have come to

(12) 1 Myl. & Cr. 171.
(13) 3 Myl. & Cr. 484.
(14) 1 P. Wms. 655.
(15) 2 E. & B. 748.

the determination that the obstruction is illegal and ought to be removed, and they are not authorised to enter upon such an enquiry, or form such a conclusion. It is the province of the justice to whom an application may be made to form such a conclusion.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal, and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them perhaps the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds entrusted to them for public purposes, by proceedings which might originate in feelings which it would be most inconvenient to enquire into. Sections from 17 to 19 shew what the office of the highway board is, and that it is a corporation for a particular purpose to do what is necessary to keep the highways in repair. And the provision in section 18, as to certain costs resulting from applications to justices being regarded as costs of the board in repairing the highway and paid accordingly, shews conclusively, to our minds, that the damages and costs of defending an action of trespass such as the present, could not be costs of the board or in any way chargeable upon the parishes forming the board, or either of them. It would appear to be only right if such damages and costs were payable at all, that they should be paid by the parish in which the road is situate, like the expense of repairing the road. And yet the persons who ordered the trespass might be the persons representing the other parishes in the district and not the parish where the road is situate; and what a strange state of things this would introduce. Section 20 provides that there shall be a district fund, and that the salaries of the officers of each parish, and all expenses incurred by the highway board for the common use and benefit of all the parishes in the district, shall be paid out of the district fund. This could not include the damages and costs, and they could not come out of the district fund. The section goes on to provide that the expense of keeping in repair the highways of each parish, and all other expenses in relation to such highways, shall be a separate charge on each parish. It would certainly seem strange if the highway board had the power by a resolution of throwing upon a particular parish such a charge as that of paying the damages and costs of an action like the present; and unless they could do so, there would be no fund out of which the damages and costs could be paid. When the parish denies the obligation to repair, section 19 points out the course to be pursued.

It appears to us that it is not the province of the highway board to contest the question, whether a particular way is a public highway or not, as the members of the board chose to do by the resolution set forth at the beginning of this case.

For the above reasons, we think that, as the plaintiff was nonsuited, there ought to be a new trial in this case.

KELLY, C.B.—The Highway Board of the district of Camelford, in Cornwall, constituted and incorporated under section 9 and other sections of the 25 & 26 Vict. c. 61, upon the complaint of the churchwarden of the parish of Minster, that a highway in that parish and within the district had been obstructed by a locked gate thrown across it (as was alleged contrary to the statute), at a corporate meeting duly convened and held according to the Act, having investigated the matter of the complaint, came to the following resolution which was then and there entered in the minutes — "Resolved that the board having heard the complainant, and the defendant, Mr. Mill" (the plaintiff in this action), "and their witnesses as well as Mr. White (the defendant's attorney), is of opinion that the road leading from Boscastle by the Wellington Hotel through Crapps' Park is a public road, and that therefore Mr. Mill, the tenant, and Miss Helyer, the owner of the land through

which it passes, be served with notices to remove the obstruction they have created, and if the same be not removed on or before six o'clock of the 31st inst., the district surveyor remove the same (16)."

These notices having been given and disregarded, and the resolution being notified to Wickett, the district surveyor, an order of the board, signed by their clerk, forthwith to remove the obstruction, was duly served upon him, and he proceeded in obedience to the order to remove the lock from the gate, which was the trespass complained of in this action.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character, but against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not.

The making of the resolution was a corporate act, done at a corporate meeting, convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise, or did exercise any personal authority or power. The resolution was the act of the corporation, and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof.

I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act; or unless the act is *ultra vires*, and is not and cannot be, in contemplation of law, a corporate act at all.

In *Harman* v. *Tappenden* (17), the free fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected—"That no action would lie to recover damages against individuals for acts done in their corporate capacity; and that *non constat*, but that all or some of the defendants might have voted against the order of amotion."

When the case came before the Court upon a motion to enter a nonsuit or in arrest of judgment, the Court intimated very strong doubts on this ground, how far the defendants were answerable in damages in their private character for acts done by them in their corporate capacity, and Lord Kenyon, C.J., said that he entertained considerable doubt notwithstanding what was said in *Rich* v. *Pilkington* (18), and *The King* v. *Ripon* (19), and added that he had many years ago moved for a mandamus to the Master and Fellows of Wadham College to compel them to put the college seal to a return which they were required to make and to which Dr. Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences; but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character. Lawrence, J., expressed the same doubt, and finally on cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged. See also *Ventris*, 351, and *The King* v. *Windham* (20), the case alluded to by Lord Kenyon.

It is true that where individuals make a pretended corporate Act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *The King* v. *Watson* (3). But an individual corporator is no more liable for a tort committed in his corporate capacity than for

(16) This meeting appears to have been held on [illegible] of August, 1872.
[illegible] 555.

(18) Carth. 171.
(19) 1 Ld. Raym. 563.
(20) Cowp. 377.

a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member who like Dr. Windham in the Wadham College case may have been opposed to the Act in respect of which the action may be brought. It was indeed once imagined, though on very technical grounds, that trespass would not lie against a corporation; and it is so stated in *Comyn's Digest*, Franchises F (20). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation or under its authority or by its direction trover or trespass is maintainable.

In *Yarborough* v. *The Bank of England* (21), the plaintiff recovered in trover for the unlawful detention by a clerk in the bank under its authority, of a Bank of England note. Can it be contended that an action could have been maintained against one of the directors of the Bank of England who might have been present at the resolution that the clerk be directed to detain the note? In *Smith* v. *The Birmingham and Staffordshire Gas Light Company* (22), trover was held maintainable against the company (a corporation) for the wrongful seizure of a quantity of furniture by a bailiff under their authority. And in *Maund* v. *The Monmouthshire and Staffordshire Canal Company* (23), the plaintiff recovered in trespass for the seizing and converting under the orders of the defendants of certain barges and a quantity of coal. It was never suggested that in either of these cases the action should have been brought against the individuals who happened to be present when the act in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board; and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law are great and obvious. If judgment be recovered against these defendants, execution might issue for the whole amount of damages and costs against any one among them; and he would have no remedy for contribution against the rest, nor, as it should seem upon the facts of the case, for indemnity against the corporation, and it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand if the action had been brought against the board and judgment obtained against them they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by sections 20 and 21 and others.

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*.

If the board by resolution or otherwise had accepted a bill of exchange, directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could recover the amount against them. It would have been void upon the face of it; and it is immaterial to consider whether the individuals who had written or authorised the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorised, as a trespass or the conversion of a chattel. If such an act was to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorised, it is clear that a corporation would not be liable for any tort at all committed or authorised by them; and the decisions above cited would be contrary to law. Two cases only have been cited which seem to bear upon this question against the defendants, but the first, *Poulton* v. *The London and South Western Railway Company* (5) merely shews that there is no implied

(21) 16 East 6.
(22) 1 Ad. & E. 526; s. c. 3 Law J. Rep. (N.S.) K.B. 165.
(23) 2 Dowl. N.S. 113.

authority by a railway company to their servants to do an illegal act. But here no question arises upon an implied authority; for this board have expressly authorised and commanded the surveyor to do the act complained of. On the other hand, in the *Dulwich College Case* (*Taylor* v. *Dulwich Hospital*) (14), the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was *ultra vires* and not binding on the corporate body; and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the indviduals who had executed an instrument in the form of a corporate act, but which being *ultra vires* was absolutely void.

The remaining question is whether Wickett, the surveyor, is liable to this action. The general rule no doubt is that one who does an unlawful act cannot justify himself by pleading the authority or direction of another. But here the surveyor is a public officer charged with the performance of various public duties, and bound by the express words of an Act of Parliament to obey the orders of the highway board; the board themselves being a public body incorporated for public purposes and having public duties to perform, and who in ordering their surveyor to remove the obstruction in question have acted *bona fide*, and within the general scope of their duties and authority under the Act of Parliament.

To determine this question we must first consider the provisions of the Act. By section 17, "The highway board shall maintain in good repair the highways within their district." And it "shall be the duty of the district surveyor to submit to the board an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district." And by section 16, "The district surveyor shall act as the agent of the board in carrying into effect all the duties by this Act required to be carried into effect or to be performed by the board; and he shall in all respects conform to the orders of the board in the execution of his duties. And the assistant surveyor, if any, shall perform such duties as the board may require under the direction of the district surveyor." And then there are further provisions already referred to, enabling the board to obtain funds for the performance of their duties and the carrying of the Act into execution.

Now where all the public highways in any district are well known and ascertained, no difficulty can arise in the execution of the Act. The surveyor inspects them, and observes their condition, he makes his estimate of the expense of repairing and keeping them in repair during the ensuing year, and delivers it to the board, who thereupon direct him to effect the repairs from time to time accordingly, and he obeys their directions. But where, as here, he finds a highway which requires or will shortly require to be repaired, but the owner of the land gives him notice that the land is his private property and is no highway at all, what is the course to be pursued? We may suppose that upon his report an order has been given to him to repair the highway, and when he proceeds to do so, he finds a locked gate thrown across it, and he makes a report to that effect to the board. They, the board, after communicating with the owner of the land, and finding that the question raised and must be determined—highway or no highway—must next consider how this may most conveniently be done. They may indict the landowner for obstruction, or they may do as they have done here. They may give him notice to remove the obstruction, and in default of his doing so, that they will remove it themselves, and that he may try the question by bringing an action of trespass against them. They accordingly come to the resolution they have made, and they give the order in question to the surveyor, and he in obedience to it removes the locks. If an action be then brought against the board, they plead the highway, or defend under the general issue by statute, and the question is settled by the verdict of a jury, and no difficulty arises. But if the law be that the landowner may select the surveyor as a defendant, in what condition is he

l? The board have ordered him ect the necessary repairs, and for purpose to remove the obstruction. oks to the statute, and he finds that guage is imperative—" He shall in spects conform to the orders of the ," and " act as the agent of the " in carrying the Act into effect.

has no means of ascertaining before or without the verdict of a jury, ner there is a highway or not, nor the board themselves; he must fore at the risk of absolute ruin obey rder as required by the Act, or he refuse obedience; in other words he disobey the order whenever a high- is in dispute. The board cannot selves in their own persons remove bstruction any more than they can the highway. They must, there- either instruct their surveyor to act eir behalf, or resort to some other , as by indictment, of raising the ion, and if a public highway be es- hed, perform their duty by putting repair.

n not aware of any direct authority erence to this Act of Parliament. there are cases which establish a ple within which I think this case e well decided.

Buron v. *Denman* (24) it was held rke, B., after consulting the other s of the Exchequer, that where a officer had committed a series of sses for which he was personally to an action for damages, but the n had afterwards ratified his acts, tification was equivalent to a prior and, and the action against him not be maintained. Baron Parke lf had some doubts whether the ation had that effect, but the Judges, ling Baron Parke, were unanimous he defendant whose duty it was to he commands of the Crown could made personally responsible in an for the acts done in obedience to command. In *Andrews* v. *Marris Witham* (10), the clerk of a Court of sts whose duty it was to issue war- or writs of execution at the orders Commissioners having mistaken the effect of an order, issued a precept without authority under which the plaintiff was taken in execution, and he was held liable in trespass accordingly. But it was also held that Witham, the other defendant, one of the serjeants of the Court, and to whom the warrant was directed, and who actually made the arrest, was not liable to the action on the ground " that he was a ministerial officer of the commissioners bound to execute their warrants and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not." It was further observed by the Court, that there would be something very unreasonable in the law, if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant, and that " as the subject matter of this suit was within the general jurisdiction of the commissioners, and the warrant appeared to have been regularly issued," the defendant Witham was not liable. It appears to me that in this case the surveyor was in the exact position of Witham in the case cited.

Dews v. *Riley* (11) was a similar case. There a void order of commitment had been made by a County Court under which the clerk of the Court made out a warrant of commitment, and the plaintiff was arrested by a bailiff under that warrant. It was held that the action was not maintainable, and the Court observed that " the clerk was a mere ministerial officer to carry into effect the order of the Judge, and cannot be liable in trespass for the mere performance of the duty cast upon him by the express language of the Act of Parliament."

And in *Keane* v. *Reynolds* (15), where trespass was brought for pulling down a cottage, which three magistrates had adjudged to be an encroachment within fifteen feet of the centre of a highway, and convicted the plaintiff of having made the encroachment, and the defendant, who was surveyor of the highways, had pulled down the cottage in the supposed execution of the Act 5 & 6 Will. 4. c. 50, it appeared that the conviction was void, the way never having been repaired

(24) 2 Exch. Rep. 167.

with stones or otherwise. But the Court held that the defendant was not liable to the action, "on the principle that the surveyor acted in obedience to the judgment of a Court of competent jurisdiction, which he was bound to execute."

It is true that in most of these cases the defendants who were held irresponsible were bailiffs or other officers acting in obedience or supposed obedience to the order of a Court or some legal tribunal made in the course of the administration of justice. But here also, as in all these cases, the surveyor is a mere ministerial officer bound by the express words of an Act of Parliament to obey the orders of the board, and having no means of knowing or ascertaining whether such orders were valid and lawful or otherwise; and the board itself is a public body, having public duties to perform, and created and incorporated for public purposes. I know not, therefore, why this officer should not be protected by law as well as the subordinate officers of a Court of justice.

It appears to me, therefore, upon the whole case, that the defendants have acted throughout strictly within the scope of their authority and their duty. A complaint is made to the board that a highway is unlawfully obstructed. Upon investigating the case they find that an obstruction exists, but that it is disputed whether the spot is a public highway or not. Upon further inquiry they are advised and believe that it is a highway, and therefore that it is their duty to keep it in repair and free from obstructions. There are two modes in which this question, whether a public highway or not, may be raised and determined—by indictment and by action. They think, and I may venture to add, I think also, that an action is preferable to an indictment, inasmuch as in a civil action points may be reserved, a motion made for a new trial, and appeals facilitated. They determine to try the question in that form accordingly. They give notice to the parties interested to remove the obstruction, and as it is still persisted in, and the opposite parties are resolved to try the question, they hold a meeting and make the order in question, and it is executed; and we are now called upon to decide whether this action, in which a controversy between the board, on behalf of the public, and the owner of the land is to be settled, may be brought against individuals who have acted, as they believe, in the strict performance of their duty, in holding and attending a meeting, and resolving in their corporate character that the necessary steps shall be taken, and who may possess no funds or means to meet the expenses of the suit, or to pay damages or costs, or against the board who are charged with the duties and entrusted with the powers and provided with the funds necessary to the management of the highways within the district, and to the carrying of all the purposes of the Act into execution. The question as between the surveyor and the board is of equal importance, and is open in many respects to the same consideration.

I think, therefore, and for the reasons I have assigned, that the action should have been brought against the board, and that this action is not maintainable.

Rule absolute.

Attorneys—Pattison, Wigg & Co., agents White & Dingley, Launceston, for plaintiff. Coode, Kingdon & Cotton, agents for C. Hawker, Boscastle, for defendants.

[IN THE HOUSE OF LORDS.]

1874. March 26. } THE COMMISSIONERS OF INLAND REVENUE *v.* HARRISON.

Succession Duty—16 & 17 *Vict. c.* 51. *ss.* 15, 38—*Annuitant succeeding to Realty on which his Annuity is charged—Allowance of Deductions in respect of the Annuity—Power of the House of Lords to overrule a prior Decision of its own.*

Where a person in possession of property as tenant for his life joins with the person next entitled as tenant in tail and opens the entail, reserving a joint power of appointment over the estate, and by means of

that power settles an annuity upon the tenant in tail for their joint lives, and the tenant for life afterwards dies the tenant-in tail being alive, the value of that annuity must be taken and allowed as a deduction, under the 38th section of the Act of 1853, *from the value of the succession of the tenant in tail upon which duty is to be paid.*—So held, *following the decisions of this House in* The Attorney-General *v.* Lord Braybrooke, *and* The Attorney-General *v.* Floyer.

Decisions of the House of Lords upon questions of law, as the construction of statutes, and especially of fiscal Acts, are binding upon the House in subsequent cases.

This was an appeal from a judgment of the Court of Exchequer Chamber which had affirmed a judgment of the Court of Exchequer on an appeal to that Court, under section 50 of the Succession Duty Act, 1853, from an assessment made by the Commissioners of Inland Revenue (the appellants) whereby the Commissioners, in assessing the duty payable by the respondent on his succession to real property on the death of his father, refused to make any allowance in respect of an annuity of 400*l.* which during his father's life had been payable to him out of such real property under the following circumstances:

On the 4th of April, 1862, the respondent being the next remainderman in tail and his father tenant for life of certain hereditaments under a will, dated the 5th of March, 1842, of a person who died in 1844, the father and son by a disentailing deed, duly enrolled, joined in conveying the hereditaments to such uses as they should jointly appoint, and in default of such appointment to the use of the father for life, and after his death to the use of the respondent in fee.

By indenture dated the 28th of October, 1863, the respondent and his father, in exercise of the power reserved in the deed of the 4th of April, 1862, appointed and conveyed the hereditaments comprised in that deed and in the will of 1842 to the use that the respondent should during the joint lives of himself and his father receive out of the rents and profits a yearly rent-charge of 240*l.*, and, in the event of his marrying during the lifetime of his father, a further rent-charge of 160*l.*, making rent-charges to the aggregate amount of 400*l.* a year, and subject thereto to the use of the father for life, and after his decease to the use of the respondent for life, and after his decease to certain other uses, with an ultimate remainder to the use of the respondent in fee.

On the 10th of January, 1866, the respondent married, his father being then alive, and thereupon he became entitled to receive, and he did thenceforth during the life of his father receive out of the rents and profits of the said hereditaments the yearly rent-charge of 400*l.*

On the 3rd of July, 1866, the respondent's father died, whereupon the respondent became entitled in possession to the said hereditaments, and the rent-charge of 400*l.* a year ceased and determined.

The respondent in pursuance of the Succession Duty Act, 1853, gave notice to the appellants of his succession in the said hereditaments, and of his liability to pay duty, and he claimed that in assessing such duty an allowance of 385*l.* should be made in respect of the value of the rent-charge of 400*l.* a year which had ceased. The account of the succession as delivered by the respondent shewed that the total gross annual value of the property was 1,432*l.* 12*s.*, from which he claimed a deduction for repairs, &c., amounting to 246*l.* 0*s.* 10*d.*, and a further deduction of 385*l.* in respect of the rent-charge of 400*l.* a year. The Commissioners allowed the deduction of 246*l.* 0*s.* 10*d.* for repairs, &c., but they refused to allow the further deduction of 385*l.* in respect of the rent-charge. The result was that they estimated the net annual value of the succession at 1,186*l.* 11*s.* 2*d.*, and as the value of an annuity of that amount for a life aged twenty-seven, which was the age of the respondent, is 19,901*l.* 16*s.* 7*d.*, and as the duty payable by the respondent, the succession being from his uncle, was at the rate of three per cent., they assessed the duty to be paid by him for his succession at 597*l.* 1*s.* On the other hand, if the further deduction claimed by the respondent of the

385*l.* was allowed the net annual value of the succession would be 804*l.* 11*s.* 2*d.* instead of 1,186*l.* 12*s.* 2*d.*; and the value thereof for a life aged twenty-seven would be 14,033*l.* 16*s.* instead of 19,901*l.* 16*s.* 7*d.*; and the duty payable thereon would be 421*l.* 0*s.* 2*d.* instead of 597*l.* 1*s.* as claimed by the Commissioners.

Against the assessment of the Commissioners the respondent appealed to the Court of Exchequer, and that Court gave judgment in his favour, and held that in assessing the duty an allowance ought to be made in respect of the rent-charge. This judgment having been affirmed by the Court of Exchequer Chamber the Commissioners now appealed to this House.

The Attorney-General (*Sir John Karslake*) and *The Solicitor-General* (*Sir R. Baggallay*), *Pinder* with them, for the appellants.—The judgments of the Courts below proceeded entirely on the cases in this House of *Braybrooke* v. *The Attorney-General* (1) and *The Attorney-General* v. *Floyer* (2). But those two cases have been misunderstood. For in *Floyer's Case* (2) the only questions argued before this House were as to the rate of interest, and although in that case the decision of the House did allow a deduction in respect of an annuity under circumstances similar to those in the present case it did so on the assumption that that case was governed on that point as well as on the question of the rate of interest by *Lord Braybrooke's Case* (1). But this was an erroneous assumption, for the two cases were not alike. In *Braybrooke's Case* (1) the re-settlement had been made before the Act came into operation, whereas in *Floyer's Case* (2), and in the present case, the re-settlement was made after the commencement of the Act. And the difference is this, that in *Lord Braybrooke's Case* (1), the annuity having been created in 1850, three years before the passing of the Act, the interest of the successor had in fact *pro tanto* ceased before the passing of the Act to be expectant on his father's death, and had become an interest in possession, and consequently was never subject to duty. Besides—the decision in *Braybrooke's Case* (1) may well have been founded on the 15th section, the annuity being treated as an acceleration. For inasmuch as that section expressly declares that in cases of acceleration since the Act, the duty should be payable as if no such acceleration had taken place, it is very plain by implication that in cases where the acceleration happened before the passing of the Act, no duty would be payable. But the case is different, where, as in this case and in *Floyer's Case* (2), the annuity has been created after the commencement of the Act, and after the duty has attached to the whole of the expectant successor's interest. With regard to such cases the language of the 15th section is clear, and if, "After the time appointed for the commencement of the Act," the title to the succession has been accelerated by the surrender or extinction of a prior interest, in all such cases that section provides that the duty shall be payable as if no such acceleration had taken place. And although, where a remainderman is at the time of the acceleration of his interest already entitled in expectancy to a succession, the payment of the duty is by section 20 postponed until he becomes, by virtue of the original disposition, entitled in possession; he cannot by any arrangement with the tenant for life evade the payment of the duty thus already become chargeable. It thus appears that the decision in *The Attorney-General* v. *Braybrooke* (1) is therefore fully capable of justification. And the case of *In re Micklethwaite* (3) was decided on the same principle, the annuity in that case having been granted in 1849. But in *The Attorney-General* v. *Sibthorp* (4) the Court of Exchequer decided in a similar case in favour of the Crown on the ground that a man cannot be said to lose or be deprived of that which has died a natural

(1) 9 H. L. Cas. 150; s. c. 31 Law J. Rep. (N.S.) Exch. 177.

(2) 9 H.L. Cas. 477; s. c. 31 Law J. Rep. (N.S.) Exch. 404.

(3) 11 Exch. Rep. 452; s. c. 25 Law J. Rep. (N.S.) Exch. 19.

(4) 3 Hurl. & N. 424; s. c. 28 Law J. Rep. (N.S.) Exch. 9.

death, and which, having been enjoyed during the full measure of time for which it was created, has come to an end by the same event which gave the remainderman possession of the whole estate, and indeed it is submitted that the 38th section was not intended to apply to such a case, but only to cases where a successor on taking a succession, as estate A., is bound to give up another estate, as estate B., for in that case estate B. would be chargeable in the hands of the person to whom it would be given up with the duty, and thus were it not for that section two duties would be charged in respect of the same value. It is therefore evident that there is no principle by which such an allowance as this now claimed can be supported. The only argument, to which the respondent is reduced, is the authority of the case of *The Attorney-General* v. *Floyer* (2). But in that case the attention of the House was not called to the point now raised; this point has never till now been argued in this House. As Mr. Hanson, in his book on the Probate, Legacy and Succession Duties Acts, observes, p. 379, There can be no doubt if the attention of the House in *The Attorney-General* v. *Floyer* (2) had been drawn to the circumstance that the settlement was made after and not, as in *Lord Braybrooke's Case* (1), before the time appointed for the commencement of the Act, the allowance would not have been made. If indeed the expectant successor could, under such circumstances, defeat the claim of the Crown for duty to the extent of the amount of the annuity, there is no apparent reason against his being able to defeat the claim to the extent of the whole annual value of the estate. As, therefore, it is clear that the decision in *Lord Braybrooke's Case* (2) could not have been grounded upon the 38th section, but must have proceeded on the 15th section, and as that section does not apply to the present case neither *Lord Braybrooke's Case* (1), nor *Floyer's Case* (2), which proceeded on a misunderstanding of *Lord Braybrooke's Case* (1), and where the point was not argued, ought to govern the present case.

Garth and *A. L. Smith*, for the respondent.—The argument that *Lord Braybrooke's Case* (1) proceeded on the ground of acceleration is not sound, for in cases like the present, there is no surrender or extinction of a prior interest such as is contemplated by the 15th section. That and *Floyer's Case* (2) were decided on the 38th section, which expressly exempts from duty cases where the successor shall be deprived of *any* other property, whether such other property is liable to succession duty in the hand of some other person or not. As to the highly technical argument that a person cannot be deprived of something which has come to the end of its existence, that argument was most forcibly pressed by the then Attorney-General (Sir R. Bethel) upon this House in *Lord Braybrooke's Case* (1), as appears from the report of the case and from Mr. Hanson's notice of the decision. But this House disregarded that argument. And it is, therefore, clear that the decision in that case did proceed on the 38th section and not on the 15th, and it was followed by the case of *The Attorney-General* v. *Floyer* (2), and those judgments cannot now be reviewed or overruled even by this House itself. Not only is a judgment of this House conclusive, so that it cannot be reversed but by an Act of Parliament—*Tommey* v. *White* (5), its decisions are binding upon itself when sitting judicially, as much as upon the parties, and upon all inferior tribunals. For as the Lord-Chancellor Campbell observed in *The Attorney-General* v. *Windsor* (6), the doctrine on which the judgment of this House is founded must be universally taken for law, and can only be altered by Act of Parliament, so that even where, as in *Regina* v. *Millis* (7), to which his Lordship referred, there is an equality of votes, and the judgment of the House is given in conformity with its rule in such a case, *semper præsumitur pro negante*, that judgment is binding on this House, and in truth, the judgment in *Regina* v. *Millis* (7) was held as binding on this House in

(5) 3 H.L. Cas. 49.

(6) 8 H.L. Cas. 369; s. c. 30 Law J. Rep. (N.S.) Chanc. 529.

(7) 10 Cl. & F. 534.

the subsequent case of *Beamish* v. *Beamish* (8).

The Solicitor-General in reply cited *Bright* v. *Hutton* (9) as a case in which it was questioned whether the House of Lords might not over-rule a previous decision of its own.

THE LORD CHANCELLOR.—I think that your Lordships will not find yourselves at liberty on this occasion to enter into the question of what is the proper construction of the 38th section of the Succession Duty Act as if it were a question uncovered by authority. I propose, therefore, to abstain from any expression of my own opinion as to whether the decisions which have been already come to upon the meaning and effect of that section are satisfactory or unsatisfactory.

In the case of *Braybrooke* v. *The Attorney-General* (1) a contest was distinctly raised whether, when a father and son, tenant for life and tenant in tail of the property, open the entail, and, reserving a joint power of appointment over the estate, settle by means of that power an annuity upon the son for the joint lives of himself and the father, and the father afterwards dies, the son being alive, the value of that annuity is to be taken and allowed as a deduction, under the 38th section, from the value of the succession upon which duty is to be paid. That point was deliberately argued in that case, and in the speeches which were addressed to this House by the noble and learned Lords who were then present the subject was entered into, and their opinions were expressed, and unanimously expressed, in favour and in support of the decision, which was embodied in the Order of the House. The Order, upon the face of it, refers not by an express reference, but by the use of words which leave no doubt as to what was meant, to the 38th section, and, in fact, repeats the very words of the 38th section.

It is perfectly true that in the case of Lord Braybrooke the deeds which had been executed between the father and the son were executed before the Succession Duty Act came into operation. But the *ratio decidendi* of this House was not founded upon that consideration, it was founded upon the words of the 38th section, to which I have referred, and if the decision had proceeded upon the fact that the deeds had been executed before the Act came into operation, all reference to the provisions of the 38th section would have been immaterial, and would, in fact, have been irrelevant.

In the case of Floyer, which subsequently came before this House, it is true that the deeds which were executed between the father and the son, and under which an annuity was secured to the son on the joint lives of himself and his father, were executed after the Act came into operation, and it is possible that an argument might have been addressed to this House, making that circumstance a difference between the two cases, and calling upon your Lordships to deal with the case of Floyer upon that distinction. No such argument was addressed to your Lordships. The case of Floyer upon this point, namely, upon the point whether an allowance was to be made or was not to be made, with respect to the annuity, was treated as governed by the case of Braybrooke, and in my opinion it was governed by the case of Braybrooke. In my opinion if the case of Floyer had been decided otherwise than in the manner in which it was decided by this House, it would have been inconsistent with the order which this House had made in the case of Braybrooke.

Your Lordships are now asked, in the face of those two cases, consistent with each other, and both proceeding upon a certain construction of the 38th section of the Succession Duty Act, to arrive at a decision which would be antagonistic to the decisions in those cases, and which would put upon the 38th section a construction different from the construction which this House assigned to that section in those two decisions. I think that a course of proceeding of that kind is one which your Lordships never have adopted. It appears to me that it would be a most dangerous course for this House to adopt, and if it could be more dangerous in one case than in another it would be so in the

(8) 9 H.L. Cas. 274.
(9) 3 H.L. Cas. 341.

case in which your Lordships are dealing with one of the fiscal Acts of the country, as to which our object must be, more than in the case of any other Acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of charge and burthen which they are to sustain. I think that with regard to statutes of that kind, above all others, it is desirable not so much that the principle of the decision should be capable at all times of justification as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty.

I therefore advise your Lordships in this case, without entering into the merits of it, which have been argued at the bar, that the judgment of the Court below should be affirmed and the appeal dismissed.

LORD CHELMSFORD.—My Lords, I consider the case of *Lord Braybrooke* v. *The Attorney-General* (1) as a binding authority applicable to the present case, and I am therefore of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD HATHERLEY.—My Lords, I concur in that view, and entirely for the same reason.

LORD SELBORNE.—If it had really turned out that *Floyer's Case* (2) had proceeded upon an application of *Lord Braybrooke's Case* (1), which, when examined, was found to depend upon some erroneous assumption of fact not called to your Lordships' attention during the argument at the bar, it might have deserved consideration whether or not that was an impediment to your Lordships dealing with a subsequent case according to a sound appreciation both of the facts and of the law, as your Lordships in the well known case of *Bright* v. *Hutton* (9) felt yourselves at liberty to do, where it was alleged that upon the facts and the law together, that case was not distinguishable from a former decision in *Hutton* v. *Upfill* (10). But the course of the argument shews that no such distinction exists in the present case. The argument has really been directed to a totally different purpose, namely, that of shewing that *Lord Braybrooke's Case* (1), which was decided by your Lordships' House upon one ground, might have been supported and ought to have been decided upon a different ground; *Lord Braybrooke's Case* (1) ruling the present case on the ground upon which it was actually decided, but, as it is said, not ruling it if it had been decided upon the other ground, namely, the acceleration of interest, and not the allowance under the 38th section. Now that, I apprehend, is an enquiry into which the House cannot possibly enter, because the ground upon which *Lord Braybrooke's Case* (1) was decided is a part of the decision and judgment itself of the House; and that being so, I think that there is really no distinction whatever between the present case and Lord Braybrooke's, or between *Floyer's Case* (2) and Lord Braybrooke's, arising out of the fact that the re-settlement in *Lord Braybrooke's Case* (1) was prior to the passing of the Succession Duty Act, and in *Floyer's Case* (2), and in the present case, was subsequent to it. That, in my judgment, is a wholly immaterial distinction with reference to a case depending upon the 38th section. In *Lord Braybrooke's Case* (1), as well as in the present, the succession of the son was taxed, and was subject to duty under the Act; in each case the father's life interest was not subject to duty; and in that respect the priority of the re-settlement or the posteriority of the re-settlement to the passing of the Act is wholly immaterial. The very doctrine of *Lord Braybrooke's Case* (1) upon the principal point decided in it was, that when a re-settlement takes place by father and son who, by the former settlement, are tenants for life and in tail in succession to each other, the operating deed being by virtue of the joint power, the interest will be treated for the purpose of the Succession Duty Act as identical with that out of which it is, in substance, carved; and that what the son takes by the re-settlement, though by the exercise of a joint power, is to be treated as derived from himself if, in point of substance, the interest coincides with what

(10) 2 H.L. Cas. 693.

would have been previously taken, or with what came out of it; and so the duty will be charged according to the rule applicable to a succession taken by emanation from himself.

That being so, it is manifest that in the present case, in substance, the annuity comes out of the father's life-interest, which was never the subject of succession duty; and the son's succession is taken, in substance, out of his own former estate tail, which is the subject of succession duty. Under these circumstances it really can make no difference whatever with regard to the nature of the annuity, whether the instrument creating it was executed before or after the passing of the Act.

Judgment of the Court of Exchequer Chamber affirmed with costs.

Attorneys—The Solicitor of Inland Revenue, for the appellants; Meyrell & Pemberton, for the respondent.

(*In the Second Division of the Court.*)

1874. June 4. } CROSSE *v.* RAW.

Landlord and Tenant—Lease—Covenant to pay Rates, Taxes, Assessments and Outgoings—Sanitary Act, 1866 (29 *&* 30 *Vict. c.* 90), *s.* 10.

The lessee of a house which was demised for twenty-one years at an annual rent covenanted with his lessor during the term "to bear, pay and discharge the sewers rate, tithes, rent-charge in lieu of tithes, and all other taxes, rates, assessments and outgoings whatsoever, which at any time or times during the said demise should be taxed, rated, charged, assessed or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved (except as aforesaid)." Under section 10 *of the Sanitary Act,* 1866, *the local board of the district were empowered to require the owner of the house to connect the house-drains with a main-sewer belonging to the board, and on his default, to do the work, and recover the expenses from the owner in a summary manner. The local board having, during the demise, required the connection to be made,*—Held, *that the lessee was bound by his covenant to pay the expense of making it.*

SPECIAL CASE stated by order of Martin, B., and by consent.

By indenture dated the 21st of October, [illegible], 1865, made between the defendant and [illegible] the plaintiff, a copyhold messuage and [illegible] premises at Hornsey, and known as Eagle [illegible] House, were demised by the defendant to [illegible] the plaintiff, for twenty-one years from the [illegible] 25th of March, 1865, at an annual rent of [illegible] 160*l.*, free and clear of all rates, taxes [illegible] deductions and outgoings whatsoever [illegible] with a covenant for granting a further [illegible] term of nine years, at the same rent, to [illegible] commence at the expiration of the first [illegible] term.

The lease contained covenants on the [illegible] part of the plaintiff to pay the rent re[illegible] served free and clear of and from the [illegible] sewers-rate, tithes or rent-charges in lieu [illegible] of tithes, and all other rates, taxes, charges [illegible] assessments and deductions whatsoever [illegible] the landlord's property-tax only excepted [illegible] and also during the term of the demise [illegible] bear, pay and discharge the sewers-rate [illegible] tithes, rent-charge in lieu of tithes, and [illegible] all other taxes, rates, assessments and outgoings whatsoever, which at any time [illegible] times during the said demise should [illegible] taxed, rated, charged, assessed or imposed [illegible] upon the said demised premises or any [illegible] part thereof, or upon the landlord [illegible] tenant in respect thereof, or on the rent [illegible] thereby reserved (except as aforesaid) [illegible].

In 1867 Hornsey was constituted [illegible] district, and a local board was elected [illegible] under the Local Government Acts. [illegible] The conservators of the River Lee having, under statutory powers, required [illegible] the board to alter their system of drainage, the board, under the powers of [illegible] the Hornsey Local Board Act, 1871 (34 & 35 Vict. c. cxxix.) constructed a main sewer, which passed in front of Eagle House; but whether within one hundred feet [illegible] or not, was a matter in dispute.

The existing drainage of Eagle House was connected with the system which the board were required to alter. By s. 10 of the Sanitary Act, 1866 (29 & 30 Vict. c. 90), it is enacted—"If a dwelling

house within the district of a Sewer Authority is without a drain or without such drain as is sufficient for effectual drainage, the Sewer Authority may, by notice, require the owner of such house, within a reasonable time therein specified, to make a sufficient drain emptying into any sewer which the local board is entitled to use and with which the owner is entitled to make a communication, so that such sewer be not more than one hundred feet from the site of the house of such owner. . . . . If the person on whom such notice is served fails to comply with the same, the Sewer Authority may itself, at the expiration of the time specified in the notice, do the work required, and the expenses incurred by it in so doing may be recovered from such owner in a summary manner."

The local board having during the construction of the main sewer left at Eagle House a notice, calling attention to the matter, a correspondence took place between the plaintiff and defendant in which it was apparently agreed that the plaintiff should make the necessary drain, leaving open the question on whom the expense should fall.

The plaintiff then obtained permission of the local board to connect the drains of Eagle House with the main sewer, and, at the plaintiff's request, the contractor to the board did the necessary work. The plaintiff having paid 44*l.* for the contractor's charges, which were fair and reasonable, brought this action to recover that sum.

The question for the Court was, whether the defendant was liable to repay to the plaintiff the money so paid by the plaintiff. Judgment to be entered for the plaintiff or defendant accordingly. The Court to be at liberty to draw inferences of fact as a jury.

Prentice (*Michael* with him) for the plaintiff.—Under s. 10 of the Sanitary Act, 1866, the local board, being the "Sewer Authority," had power to require "the owner" to construct the drain, and, on his default, to do the work, and recover the expenses summarily from him. The defendant, therefore, was bound to pay the expense of the work, and the only question is, whether, if he had paid that expense, he could have recovered it from his tenant, the plaintiff, under the covenant to pay all rates, &c. This case is identical in principle with *Tidswell* v. *Whitworth* (1), where the Corporation of Manchester, as empowered by their Act, required the owner of a house adjoining a certain street, to level, sewer, and pave the street, and, on his default, did the work, and charged him with his proportion of the expenses. The owner paid the charge, as required by the statute, and brought an action to recover it from his tenant, who had covenanted to "pay and discharge all taxes, rates, assessments and *impositions* whatsoever (except property or income tax, in respect of the said rent) which, from and after a certain day and during the term, should become payable in respect of the demised premises." It was held that such a liability was not cast on the tenant even by the word "impositions" (which is as extensive a word as "outgoings"), although the Act empowered the corporation, by way of additional remedy, to require payment of the expenses from the *occupier*, such payment to be deducted from the rent. The present case is *a fortiori*, for the local board had no power to require payment from the occupier, "the owner" being the only person mentioned in the Sanitary Act, 1866, section 10. The only distinction, therefore, between the two cases is in favour of the present tenant.

Herschell (*Holl* with him), for the defendant, began to contend that for several reasons this was not a drain which the local board were empowered, under section 10 of the Sanitary Act of 1866, to require the defendant to make, and that they had not, in fact, required anyone to make it, but was directed to argue first the question arising under the covenant.

Treating the question, then, as if the defendant had been compelled, as "owner," under that Act, to make the drain, or to pay for it if constructed by the local board, the amount paid would clearly be an "outgoing, charged or imposed

(1) 36 Law J. Rep. (N.S.) C.P. 103; s. c. Law Rep. 2 C.P. 326.

payment of rent shews it was the intention of the parties that the landlord should receive his rent clear of all charges, deductions and outgoings whatsoever. As to authority, *Sweet* v. *Seager* (2) and *Thompson* v. *Lapworth* (3) are in favour of the defendant, and the only case as to which there could be any doubt is *Tidswell* v. *Whitworth* (1); but there the words were more limited, and without questioning that case I do not think it stands in the way of our decision.

Judgment for the defendant.

Attorneys—Plaintiff in person; Underwood & Colman, for the defendant.

1874. June 8. } NEVILLE *v.* BRIDGER.

Church and Clergy — Burial Fees — Burial within the Church—Jurisdiction of Courts of Common Law.

A parson having the freehold of the body of the church may contract for a money consideration to permit the burial of a non-parishioner therein, and may sue upon such contract in a Court of law.

CASE stated on appeal from the County Court of Berkshire.

The plaintiff was in January, 1868, vicar of Wyrardisbury or Wraysbury, Bucks, within the jurisdiction of the County Court, and in that month a lady, not a parishioner, having died, the defendant, her executor, instructed an undertaker to bury her if possible in a brick vault belonging to her family in the aisle of Wraysbury Church, and to do all that was requisite for the purpose. The undertaker applied to the parish clerk and the curate, during the plaintiff's absence, for permission to open the vault and bury the deceased there, and was informed that the fees would be high and the charges heavy in consequence of the vault being in the church. The undertaker told the clerk that he had conducted the funeral of the husband of the deceased in 1852, who was buried in the same vault, and was not a parishioner, and that he had paid the charges in respect thereof. Those charges were 30*l.* 1*s.* 6*d.* for obtaining the vicar's consent to the interment in the church and to the breaking the soil and opening a vault therein. The necessary consent was then given by the parish clerk and the curate, who had been duly authorised by the vicar to make all necessary arrangements for burials in his absence, and the deceased lady was buried in the vault, the service being performed by the curate.

The parish clerk who had resided for fifty years in the parish and had filled the office since 1845, produced from the iron chest in the church which he received when he took office an old book containing, amongst other things, the scale of fees and charges in respect of burials in the parish of Wraysbury, for parishioners and non-parishioners. The parish clerk proved that the scale was in the handwriting of a deceased vicar, and had been in force as long as he could remember, and had been always adhered to, that no claim in respect of fees had been resisted before, and that the scale was a matter of common knowledge in the parish, and that it was usual for the undertaker to pay all fees and charges at the time of the funeral. The charges shewn by the book to be made by the vicars were—

On first making a vault within the church 10*l.* 10*s.*, whether for parishioners or non-parishioners.

On the opening of a grave or vault within the church and for the vicar's consent to the burial therein (independently of the fees for church service), 10*l.* 10*s.* for parishioners, and 21*l.* for non-parishioners. The parish clerk having, on the vicar's behalf, sent in a claim for 27*l.* 4*s.* 6*d.* (of which 21*l.* was for burial in the church, and the rest various fees to the vicar, clerk and sexton for entrance, church service and burial), the defendant objected to the claim as exorbitant, but offered to pay "any reasonable amount." Nothing having been paid the plaintiff eventually sued the defendant in the County Court for the 21*l.*, abandoning the other fees. The amended particulars alleged a con-

tract by the defendant to pay the plaintiff 21*l.* in consideration of the plaintiff's permitting the defendant to bury the deceased in the parish church, and doing all things in the church necessary and incidental to the burial and to the opening a vault and otherwise. The defendant's counsel objected that the sum claimed being for burial fees could not be recovered in the County Court; that, even if it could, burial fees could only be due by immemorial custom, and that there was no evidence of such custom; that the amount claimed was excessive, and disproved an immemorial custom; and that there was no evidence of any contract to pay the sum claimed.

The County Court Judge ruled that he had jurisdiction over the claim, and found that the sum claimed was a reasonable sum, and was the sum customarily charged by and paid to the vicars of Wraysbury for their consent to the burial of non-parishioners within the parish church and their leave to open the soil for that purpose, and that the defendant had himself and by his agent agreed to pay such reasonable amount as should be required, and gave judgment for the plaintiff for the sum claimed, 21*l.*

The questions for the Court were—

Had the County Court jurisdiction to entertain the plaintiff's demand?

Can the verdict for the plaintiff be supported?

Bayford, for the defendant, appellant.—It is conceded that no one can insist on burial within the church without the consent of the incumbent, but that right "belongs to the parson, not as having the freehold (at least not in that respect alone) but in his general capacity of incumbent, and as the person whom the ecclesiastical laws appointed the judge of the *fitness* or *unfitness* of this or that person to have the favour of being buried in the church." *Gibson's Codex*, p. 453. tit. 23. cap. 2 (2nd edit.). Hence the incumbent can only refuse consent in regard to one that he judges not to be *fidelis*, and any contract to grant his consent on consideration of a money payment is illegal and void. This view is supported by the very strong dictum of Sir J. Nicoll in *Rich* v. *Bushnell* (1), where he further says that no fee of the kind is due of common right; it can only be by special custom and for a *fixed* amount. Such a customary fee, like burial fees in general, can only be recovered in the Spiritual Court —*Spry* v. *Marylebone* (2), *Spry* v. *Gallop* (3), and *The Dean and Chapter of Exeter's Case* (4). Considering the change in the value of money the Court will hold that there can not have been an immemorial custom to pay so much as 21*l.* for opening a vault—*Bryant* v. *Foot* (5). There was not sufficient evidence to prove a custom. The amount claimed was unreasonable, and there was no evidence that the defendant made any contract with the plaintiff to pay that or any amount.

H. D. Greene for the plaintiff, respondent.—Looking at the facts found by the Judge, it cannot be here disputed that there was a contract and that 21*l.* was a reasonable sum, and the only question is whether a contract between a vicar and another person to pay a sum of money to the vicar for allowing a non-parishioner to be buried in the church can be sued on in a Court of law. There is no decision *contra*. The Court will not grant a mandamus to compel a rector to bury the corpse of a parishioner in a vault or in any particular part of a churchyard—*Ex parte Blackmore* (6), where Littledale, J., said—"The clergyman is bound by law to bury the corpses of parishioners in the churchyard, but he is not bound to bury in any particular part of the churchyard. He and the churchwardens exercise a discretion on that subject, and if a rector is asked to do that which by law he is not bound to do, he may refuse except upon certain conditions." The law is correctly stated in *Prideaux's Churchwarden's Guide*, 357 note (t) 10th edit. thus—"No one can be buried in the body of the church without the consent of the minister, whether rector or vicar—*France*

(1) 4 Hag. Ec. 164, 173.
(2) 2 Curt. 5, 9.
(3) 16 Mee. & W. 716; s. c. 16 Law J. Rep. (N.S.) Exch. 218.
(4) 1 Salk. 334.
(5) 9 B. & S. 444; s. c. 37 Law J. Rep. (N.S.) Q.B. 217.
(6) 1 B. & Ad. 122, 123.

v. *Ley* (7), nor in the chancel without that of the rector, whether lay or spiritual" (with a certain exception). "In these cases a fee may be demanded by the person whose license is necessary; and unless controlled by custom he may stand on his own price." This passage is supported by *The Dean and Chapter of Exeter's Case* (4), and a dictum of Sir W. Scott in *Maidment* v. *Malpas* (8) and by a dictum of Abney, J., in *Andrews* v. *Cawthorne* (9). See also *Palmer* v. *Exon* (10).

Bayford was heard in reply.

BRAMWELL, B.—This case has been very well argued on both sides, and we think the plaintiff was entitled to recover the 21*l.* in the County Court. The learned Judge having found as facts that the defendant agreed to pay such a reasonable sum as should be required, and that 21*l.* was a reasonable sum, there is only one point which it is necessary to notice, and it is this. Mr. Bayford argues that though the freehold of the church is in the vicar, and though it therefore lies with him to determine whether or not the soil of the freehold shall be interfered with for burial purposes, yet he must exercise his judgment to give or withhold his consent not for any money consideration, but only on the question of fitness in the person whom it is proposed to bury. That, consequently, a bargain between the vicar and the executor that the vicar shall be paid in money for giving his consent is illegal and without good consideration, and that the only sum that can be recovered is a customary fee, and that only in the Ecclesiastical Courts; and that this contract is therefore not enforceable in a Court of law. For this contention there is some countenance in the authorities, and particularly in the passage cited from *Gibson's Codex*, but without reviewing them it is sufficient to say that the current of authority is the other way, viz. the passages cited from *Andrews* v. *Cawthorne* (9), per Abney, J.; *Maidment* v. *Malpas* (8), per Sir W. Scott, and *Ex parte Blackmore* (6), per Littledale, J., referred to in *Prideaux's Churchwarden's Guide*, where the law is summed up.

These authorities may, perhaps, be reviewed elsewhere on some other occasion, but it would certainly be improper for us, sitting here without appeal, to run counter to them.

PIGOTT, B., concurred.

Attorneys—C. T. Phillips, for plaintiff; Bridger & Collins, for defendant.

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(7) Cro. Jac. 366.

(8) 1 Hag. Ec. 205, 208.

(9) Willes' Reports, 536, where Abney, J., says—"But when popery grew to its height and blind superstition had weakened and enervated the laity and emboldened the clergy to pillage the laity, then in the time of Pope Gregory 1st (vid. 1 *Gibson Cod.* 544), and soon after, other canons were made, that bishops, abbots, priests, and faithful laymen were permitted the honour of burial in the church itself, and all other parishioners in the churchyard, on a pretence that their relations and friends on the frequent view of their sepulchres would be moved to pray for the good of the departed souls. And as the parish priest by the canon was the sole judge of the merits of the dead and the fitness of burial in the church, and he would only determine who was a faithful layman, they only were judged faithful whose executor came up to the price of the priest, and they only were allowed burial in the church, and the poorer sort were buried in the churchyard. But in neither case was any fee claimed or pretended to be due for the celebration of the office. But in the first place as the church was the rector's freehold the payment was made in consideration of breaking the ground and floor, and the sum was contracted for, and in the latter case some small voluntary oblation was frequently made, and which by length of time has grown up in many parishes into a customary payment, and yet *Lyndwood*, Lib. 5. tit. 2. fo. 278, condemns it as Simony."

(10) 1 Str. 575.

sent. Is there any distinction
ı the present case and that of
r. *The London, Brighton and South*
ailway Company (4)?]
ɔ is not; but that case was cited
ment in *Fenner* v. *The London and*
Eastern Railway Company (2). The
f Queen's Bench in *Wayland* v. *The*
litan Railway Company (5) ex-
their adherence to their own de-
in preference to those of the
n Pleas, and held that medical
made under precisely similar cir-
ıces to the present were open to
ion.

. *White*, for the defendants in sup-
the rule, was not heard.

Curiam (6).—If we had to choose
ı the decisions of the Court of
ɜ Bench and those of the Court of
n Pleas, we should prefer the
We adhere to our own practice,
has always been in accordance
e rule laid down in *Cossey* v. *The*
, *Brighton and South Coast Railway*
ıy (4).

Rule absolute.

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s—Charles Gammon, for plaintiff; John-
, Farquhar & Leech, for defendants.

THE EXCHEQUER CHAMBER.]
eal from the Court of Exchequer.)

3. } KNOWLMAN *v.* BLUETT.

ıte of Frauds, 29 *Car.* 2. *c.* 3. *s.* 4—
ent not to be performed within One
Action upon an Executed Consider-
Action for Money paid.

defendant having had bastards by
intiff, a spinster, promised her ver-

Law J. Rep. (N.S.) C.P. 174; s. c. Law
.P. 146.
ıw Rep. Weekly Notes, 1874, p. 96.
ramwell, B.; Pigott, B.; Cleasby, B.; and
t, B., to whom the two reports were
by the defendants' counsel during the
t.

bally that so long as she would, at his request, maintain and educate the children he would pay her 300*l. per annum quarterly to keep them. An action having been brought, upon the promise, to recover the instalments, in respect of two years and a half during which the plaintiff had maintained and educated the children, it was objected that a memorandum in writing was required by the Statute of Frauds, s.* 4:— Held, *on appeal, that whether the agreement was within the statute or not, the action lay, being, in substance, for money paid at the defendant's request.*

Appeal by the defendant from a decision of the Court of Exchequer, reported at p. 29, where the facts are stated. Here it need only be said that the defendant verbally promised the plaintiff, before their separation, that as long as she continued to maintain and educate the children properly he would give her 300*l.* a year, in quarterly payments, to keep them. From the separation till 1870 he paid her 300*l.* a year quarterly, but after that refused to pay anything. Up to the trial, the plaintiff maintained and educated the children, and she gave evidence that she had always, from time to time, applied the quarterly sums received from the defendant to the care, maintenance and education of the children. In April, 1873, she brought this action, in respect of ten quarterly instalments due before suit.

The question for the Court of Appeal was whether the Court below ought to have granted the defendant a rule *nisi* for a nonsuit upon the ground that there was no memorandum in writing to satisfy the Statute of Frauds (1).

Arthur Charles (*Cole* and *Lopes* with him), for the appellant.—The Statute of Frauds, s. 4, requires a note in writing of such an agreement as the present—*Farrington* v. *Donohoe* (2).

[Blackburn, J.—I am inclined to think that since both parties contemplated that the agreement would last more than a

(1) The defendant did not appeal on the question of the power to amend the claim in the declaration.

(2) Irish Law Rep. 1 C.L. 675.

year it is within the statute, and that the plaintiff could not, without a note in writing, have brought an action founded upon an executory consideration; but this action is upon an executed consideration. ARCHIBALD, J.—What is the difference between the principle of the present case and *Thomas* v. *Fredericks* (3).]

In that case there was no statute prohibiting an action. But section 4 of the Statute of Frauds says, "no action shall be brought upon any agreement," &c. It has been held that where an agreement is required by the Statute of Frauds to be in writing, the mere fact that the action is upon an executed consideration does not take the case out of the statute—*Cocking* v. *Ward* (4), where the plaintiff had performed her part of the agreement, and the defendant had had the full benefit of it, and nothing remained to be done, except to pay money, yet the Court said, "the present contract, though executed on the part of the plaintiff, yet not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds." There, indeed, the Court held the action maintainable upon an account stated, but, in the present case, the action is upon the special contract, and there are no common money counts, nor any evidence of an account stated.

[BLACKBURN, J.—If in that case, Tindal, C.J., meant that the statute applied to actions upon an executed consideration, he seems to have changed his opinion a year after—See *Souch* v. *Strawbridge* (5). The present is really equivalent to an action for money paid at the defendant's request, and the declaration may be regarded as an expanded *indebitatus* count. Moreover, we have power to amend.]

If the plaintiff is to recover upon a *quantum meruit* the question of amount ought to have been left to the jury.

[GROVE, J.—You did not ask for that at the trial, but, by accepting leave to move, consented that the plaintiff should recover the whole of the annuity or nothing.]

Folkard (*St. Aubyn* with him), for the plaintiff, was not heard.

BLACKBURN, J.—We all think there ought to be no rule. The bargain between the parties originally was this: the defendant said, "If you will maintain and educate these children,"—and I have no doubt that the parties contemplated that the bargain would last for more than a year—"I will pay you for that purpose an annuity of 300*l*." That promise was never revoked, nor were the children withdrawn before the period in respect of which this action is brought, and the plaintiff was allowed to maintain and educate the children at the defendant's request, and upon the faith that the bargain would be fulfilled. Then it is said that, because the agreement was one which was not to be performed within one year, the defendant need not pay the plaintiff for what she has done at his request. If that were the law, it would be very unjust; but we all think the plaintiff might very well maintain the action on a count for money paid at the defendant's request for the maintenance and education of the children, and that it is no answer to say that the agreement was one that was not to be performed within a year.

KEATING, J.; MELLOR, J.; LUSH, J.; GROVE, J.; and ARCHIBALD, J., concurred.

Judgment affirmed.

Attorneys—Le Riche & Son, agents for Carter & Son, Torquay, for plaintiff; Wedlake & Letts, agents for Edmonds & Son, Plymouth, for defendant.

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(3) 10 Q.B. Rep. 775, 783; s. c. 16 Law J. Rep. (N.S.) Q.B. 393, 396.

(4) 1 Com. B. Rep. 858, 868; s. c. 15 Law J. Rep. (N.S.) C.P. 245, 248.

(5) 2 Com. B. Rep. 808; s. c. 15 Law J. Rep. (N.S.) C.P. 170.

1874. May 27. } WOOD *v.* WOAD AND OTHERS.

Action on the Case—Insurance Society—Rules—Expulsion of Member by Committee without hearing Defence—Damage—Insufficient Allegation of Fraud.

The declaration alleged that plaintiff was a member of a marine insurance association, formed for the purpose of mutually insuring and indemnifying the members thereof against losses and damages by perils of seas happening to their respective vessels entered in its books, upon deposit of 5l. per cent. of the sum insured, and upon other terms contained in the rules of the society; and that the plaintiff having deposited such sum, had a ship duly entered; that the defendants were the committee of the society, and one of the rules was that they should have entire control of its affairs, and "That if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member by directing the secretary to give such member notice in writing that the committee have excluded such member . . . and after the giving of such notice such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice;" that the plaintiff was entitled to receive, and, but for the grievances thereinafter mentioned, would have received, from the funds of the society an indemnity for any loss or damage to his ship by the perils of the sea during his membership. Breach, that the defendants, well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity . . . did wrongfully, collusively, and improperly expel the plaintiff from the society, on the alleged ground that his conduct was (in the terms of the rule) suspicious, or that he was from some other reason unworthy of remaining in the society, without any just, reasonable, or probable cause whatsoever for such expulsion, and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon, and without giving him any opportunity of being heard, and without in fact hearing the plaintiff or any person on his behalf in defence and vindication of his conduct. And that a few days after the expulsion his ship sustained damage, and, but for the expulsion, he would have been entitled to receive, and would have received a certain sum as indemnity for the damage, and that by reason of his expulsion he had lost the said sum:—

Held, *on demurrer, that the declaration was bad,—per* KELLY, C.B., *and* AMPHLETT, B., *because as the committee had not heard the plaintiff, nor given him an opportunity of being heard before them in his own defence, their act of expulsion was void, and he remained still a member of the society, and entitled to all his rights of membership, and, therefore, had not suffered the damage alleged. Per* CLEASBY, B., *because, even if a fraudulent expulsion would have been actionable, there was no allegation that the act of the defendants had been fraudulently done. Per* POLLOCK, B., *because the declaration omitting any distinct allegation of fraud, did not shew such a wrongful act as would be actionable without damage, and the expulsion being invalid, the damage laid had not occurred.*

Declaration that before, &c., the plaintiff was a member of a mutual marine insurance association, formed and established, and still established and carried on, for the purpose of mutually insuring and indemnifying the several members thereof against losses and damages by perils of seas happening to or done by their respective vessels entered and insured respectively by them in the books of the society, upon deposit with the treasurer of the society of a sum equal to 5*l.* per cent. on the amount of the sum for which such vessels should be insured, and upon other terms contained in the rules of the society; and the plaintiff as such member, and having deposited with the treasurer such sum, had a ship duly entered in the books upon the terms aforesaid. And the defendants were the committee of the society, and one of the rules was "That the management of the affairs of this society shall be at all times hereafter conducted by a committee of not less than nine persons (either members of the society or not), one of whom

shall be appointed president of the society. That such committee shall have the entire control of the funds, affairs and concerns of the society, and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it, and their determination shall be entered by the secretary in the books of the society, and be final and binding upon all parties, unless where they afterwards see cause to alter and do alter the same, provided that no member of the committee shall act as such in the settlement of his own loss . . . That if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member by directing the secretary to give to such member notice in writing that the committee have excluded such member from this society, and after the giving of such notice, such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice." And the plaintiff as such member of the society, and having deposited such sum, and having his ship entered in the books as aforesaid, was under the rules of the society entitled to receive, and but for the grievance hereinafter mentioned would have received from the funds of the society an indemnity for any loss or damage to his ship so entered by the perils of the sea during his membership. Breach, that the defendants, well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity to which he was so entitled, did wrongfully, collusively, and improperly expel the plaintiff from the society, on the alleged ground that his conduct was (in the terms of the rule) suspicious, or that he was for some other reason unworthy of remaining in the society, without any just, reasonable, or probable cause whatsoever for such expulsion, and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon by the committee, and without giving the plaintiff or any person on his behalf any opportunity whatsoever of being heard before them, and without in fact hearing the plaintiff or any person on his behalf in defence and vindication of the plaintiff's conduct as a member of the society with reference to the said ground of expulsion. And that before and at the time of his expulsion from the society he had a ship called the *Progress*, duly entered in the books, and had deposited with the treasurer such sum as aforesaid, and the ship sustained damage by the perils of the seas a few days after the expulsion of the plaintiff from the society, and but for the expulsion he would have been entitled to receive, and would have received 92*l.* 2*s.* 8*d.* from the funds of the society as indemnity for the damage so sustained, and that by reason of his expulsion he has lost the said sum of 92*l.* 2*s.* 8*d.*, and has been otherwise, by reason of the said wrong of the defendants, greatly damaged and injured.

Fifth plea. — That the defendants deemed the conduct of the plaintiff suspicious, and in the exercise of their power in that behalf given to them by the said rules, excluded him.

Sixth plea.—That they deemed that the plaintiff was unworthy of remaining in the society for other reasons than deeming his conduct suspicious.

Demurrer to the first count of the declaration (1), and joinder.

Demurrer to the fifth and sixth pleas (2), and joinder.

There were also issues of fact, which had been tried at Leeds before Pollock, B., who nonsuited the plaintiff on the ground that the declaration shewed no cause of action. A rule to set aside the nonsuit was subsequently obtained and argued, and judgment thereon was reserved until the argument of the demurrers which raised the same question as that arising on the rule.

Waddy (*Tennant* with him), for the defendants. — First. The declaration is

(1) On the ground that it shewed no cause of action.

(2) On the ground that the facts alleged were no answer to the plaintiff's cause of action in respect of his expulsion from the society without being heard in his defence.

bad, for no expulsion from the society is shewn upon the face of it. Secondly. The plaintiff was not insured. It does not appear that a binding agreement for insurance was entered into, for there is no allegation that a stamped policy was ever executed—*In re The London Marine Insurance Association, Smith's Case* (3); *Fisher* v. *The Liverpool Marine Insurance* (4). If he had been a member of the society, and were not insured, he could not have recovered for the damage to his ship, so his expulsion has done him no wrong.

[KELLY, C.B.—There is the general damage of his being unlawfully expelled having paid 5*l.* to become a member.]

He is in this dilemma—Either the defendants had power to expel him, and if so, there was no wrong in doing so, or they had not power, and therefore their act is a nullity, and he is not expelled. Moreover, they may have done the act alleged to be an expulsion improperly, and yet have but exercised their right. They were justified in expelling without hearing him. The object of the rules would be defeated if the Committee could only act on legal proof. The plaintiff has not ventured to allege that they did it fraudulently.

[AMPHLETT, B., referred to *Blisset* v. *Daniel* (5)].

The point arises also on the pleas.

Digby Seymour (*Lewers* with him), for the plaintiff.—The declaration discloses a duty, breach, and damage. In *Batterbury* v. *Vyse* (6) a declaration alleging "collusion" was held good, as it imputed fraud. Moreover, the word "contriving" here used has a like effect. The plaintiff, by paying his deposit, has borne the burthens, and therefore is entitled to the benefits of his membership in this society. The defendants rely on the power of exclusion given to the committee by the rules. But they are not to exclude a member without "deeming" him guilty of improper conduct. "Deeming" involves the exercise of a judicial discretion; but having held no enquiry, the committee have violated their discretionary duty. In the case of *The King* v. *The Chancellor, &c., of the University of Cambridge* (7) a *mandamus* had issued for the restoration of Richard Bentley to his academical degrees, of which he had been deprived by the university, and it was held that a return thereto, alleging a suspension or degradation of the party, but not stating that he was summoned to attend the proceedings, or made any defence thereto, was ill. Fortescue, J., in his judgment, said, "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also" (p. 567). The discretion exercised by the committee is not to be arbitrary, for, as we read in *Rooke's Case* (8), "Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit.*" In *Ex parte Ramshay* (9), Lord Campbell says that "The Chancellor has authority to remove a Judge of a County Court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused." This declaration discloses *a duty* on the committee to judge calmly and according to the laws of natural justice, by giving the suspected person an opportunity of being heard. There is damage even if the plaintiff has not been in fact expelled, for being a partner with the defendants, he could

(3) 38 Law J. Rep. (N.S.) Chanc. 681; s. c. Law Rep. 4 Chanc. App. 611.
(4) 42 Law J. Rep. (N.S.) Q.B. 224; s. c. Law Rep. 8 Q.B. 469.
(5) 10 Hare, 493.
(6) 2 Hurl. & C. 42; s. c. 32 Law J. Rep. (N.S.) Exch. 177.
(7) 1 Str. 557.
(8) 3 Rep. 100*a*.
(9) 18 Q.B. Rep. 173; s. c. 21 Law J. Rep. (N.S.) Q.B. 238.

not bring any action against them which would involve matters of account—2 *Lindley on Partnership*, 3rd edit. p. 908, and therefore would be driven to the Court of Chancery by the natural consequence of the defendants' acts — *Dixon* v. *Fawcus* (10), and as Crompton, J., there says, "Surely that is damage, whatever the result" (p. 139). And indeed, there is damage stated in the declaration, which alleges that "but for the expulsion he would have been entitled to receive and would have received" indemnity for the loss of his ship.

[KELLY, C.B.—But only under the insurance.]

No, by being on the books of the company. Either the act was void, and by the defendants fraudulently contriving to do it the plaintiff was injured, or it was not void, but fraudulently and improperly attempted, and by that he is injured.

[KELLY, C.B., referred to *Beaurain* v. *Scott* (11), where it was held that an action may be maintained against the Judge of an Ecclesiastical Court who excommunicates a party for refusing to obey an order which the Court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order. CLEASBY, B.—And the Judge may also be indicted: *Blackstone's Comm.* bk. 3, p. 101.]

Tennant replied, and cited *Hayman* v. *The Governors of Rugby School* (12).

KELLY, C.B.—But that from different points of view we have all come to the conclusion that this action is not maintainable, I should have desired time to consider the grounds on which my opinion that the defendants are entitled to judgment is founded. It appears that the plaintiff had become a member of an association or partnership, carried on by the copartners for the purpose of effecting marine insurances with the society on ships of which they might be possessed, and perhaps also for other purposes. Amongst the rules of the association were those set out in the record. [His Lordship read them.] Therefore the record shews that without any reason alleged or suggested—although I must not be understood to say that a body like this association are bound to give or suggest any reason for the decision they may arrive at—a committee formed of the necessary number of members held a meeting, and came to a decision "deeming" the conduct of the plaintiff suspicious or unworthy of the society, and accordingly gave him notice of that, and that he was to consider himself excluded from the society, and they did accordingly exclude him, and inform him that the society would be responsible for no claims for any losses of his ships. He now sues, treating this exclusion as a cause of action, and alleges damage which he claims by a count to which there is a demurrer. The question is, whether that count is sustainable. I am of opinion that it is not, but not at all on the ground that the act of the committee was in anywise lawful, it being alleged on the record that this act was done, and the plaintiff expelled without his having had an opportunity of appearing, or shewing that his conduct was without suspicion, and was not unworthy of his membership. I think that this committee were bound, before they came to the conclusion at which they arrived, and excluded the plaintiff, to give the plaintiff notice that they were about to consider the question, and bound to afford him an opportunity of defending himself against any charge made against him. So, if the case rested there, and but for the point arising on the record, to which I shall presently advert, I should have said that this was a wrongful act on the part of the defendants, and that the action was maintainable. But when we look at the act of expulsion itself, we find that it would, if valid, cause him to cease to be a member, and that the only damage he could possibly sustain would be that he lost some right, benefit, or privilege to which he would otherwise have been entitled under the articles of association. Therefore the damage depends entirely on the question whether, under those articles of association, he had ceased to be a member of the society, for if, having duly paid his 5*l.*, and entered the so-

(10) 8 E. & E. 537; s. c. 30 Law J. Rep. (N.S.) Q.B. 137.
(11) 3 Campb. 388.
(12) Law Rep. 18 Eq. 28.

ciety, he had not ceased to belong to it, and had lost his vessel, he would have been entitled to the benefit of the insurance. But in my judgment the act of expulsion, being unreasonable and unlawful, was void, and he remained a partner, and is at this moment entitled to enforce all his partnership rights, and to obtain for himself any benefits which he could claim as a partner, notwithstanding this sentence of expulsion. It has been argued with much force that, looking at the language of these articles, they are absolutely unconditional, and I quite agree that if the committee had honestly, rationally, lawfully, and properly exercised their powers under the articles, their decision, right or wrong, could not be questioned.

There would be no power in law to disturb their decision because they had proceeded on insufficient grounds, or even without grounds at all, if they honestly came, or alleged that they had honestly come to a determination that the conduct of the plaintiff was suspicious or unworthy.

But I am of opinion that, upon the principle of law that no one should be condemned unheard on any occasion of an enquiry resulting from alleged misconduct, without his having an opportunity of appearing, and defending himself, that this act of expulsion was ineffectual.

Many cases have been cited, in some of which the rule of law has been laid down in strong terms. The general rule, to which, however, there are some exceptions, such as that in *Copin* v. *Adamson* (13), lately before us, is that whether the enquiry be before a Court of justice, or body of persons invested with competent authority, the person charged should be heard. The rule is expressed in the case *In re Hammersmith Rent-charge* (14), by Parke, B., who, although dissentient from the judgment in that case, fortifies his statement of the above principle by the opinion of other Judges, and refers to a passage from a judgment of Bayley, J., where that learned Judge says, that he knows "of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard." Then, after some admirable reasoning upon *Capel* v. *Child* (15), from which the above extract is taken, Parke, B., says, "This is an extremely strong case, and shews how powerful the principle of justice is in all judicial proceedings: qui aliquid statuerit parte inauditâ alterâ, æquum licet statuerit, haud æquus fuit"—using the language of Seneca. I entirely adopt that decision and approve it. I next turn to *Blisset* v. *Daniel* (5), because it is a case nearly parallel to the present one. There articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares, to expel any partner by giving him notice in a certain form, and it was held that the power of expulsion might be exercised by two-thirds of the partners, without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion. Now, if it were necessary to consider the question whether the power was exercised here without any proper or possible cause, it *might* be that there is enough upon the record to shew that this expulsion was collusive and unlawful, but that is not the ground on which I prefer to rest the case, for the above judgment went further, and decided "that the power must be exercised with good faith, and not against the truth and honour of the contract," and "that the power was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners." The circumstances there are set forth with more detail than the record before us admits of, but we may suppose the present case to be most favourable to the committee, and that some complaint had been made to them, and they had enquired into it, and

(13) *Post*, p. 161.

(14) 4 Exch. Rep. 87; s. c. 19 Law J. Rep. (N.S.) Exch. 66.

(15) 2 Cr. & J. 588; s. c. 1 Law J. Rep. (N.S.) Exch. 205.

some facts had been shewn to them which might even indicate improper conduct on the part of the plaintiff, but, still, assuming all that, the above case is a decision that they ought to have given him an opportunity of stating his defence, and removing, if he could, the suspicion against him, and that it was improper to proceed in his absence. I think that authority is directly in point, and tends to establish, as a matter of law, that the committee were wholly unjustified in proceeding to expel the plaintiff from the benefits of the society. The decree in *Blisset* v. *Daniel* (5) was, that the notice of expulsion given to the plaintiff was void, and that he did not by virtue thereof cease to be a partner in the copartnership firm, and the Vice-Chancellor went on to say that the plaintiff was entitled to all the benefits of his partnership (p. 538). So here the plaintiff has not, by this notice of expulsion, which I hold to be absolutely void at law, ceased to be a member of, and so entitled to all the benefits of, the copartnership. But this action is founded entirely on the act of expulsion, and he claims damages, which he alleges he has sustained from that act. Yet he was just in the same position after it as he was the hour before, consequently, he has sustained no damage at law, and can maintain no action. As to *Beaurain* v. *Scott* (11), from my imperfect recollection of it, I was in hopes that it might turn out to be an authority for saying that the plaintiff might maintain his action for the wrongful act, although in contemplation of law he had sustained no damage at all. But, on looking at the facts there, we find that the act complained of was of itself an indictable offence (16), and, although the Court certainly held that as the sentence was pronounced by a Court having no jurisdiction to pass it, and was, therefore, void, the action was maintainable, their decision went upon the peculiar nature and high importance of the case, for the excommunication was read publicly during divine service in the parish church, and the plaintiff's name and fame were injuriously affected thereby. But this is a case of a totally different character, for here the notice of expulsion was sent by a committee only, and had no effect at all. It was mere waste paper, and if the plaintiff had been advised to say, "I think this is actually void, and I call on you my copartners to treat me as a member of the association, and to give me my rights as such," he would have been entitled so to do, and to enforce those rights, of which he was, and is, still possessed. With great regret I must declare this action not to be maintainable, and hold the demurrer good. For the same reasons I think the nonsuit is sustained also.

(16) See note at p. 392 of the report of that case.

CLEASBY, B.—I have come to the same conclusion, although not exactly on the same grounds. My reasons are not that there was no action of damages for a wrongful expulsion, for I should have thought that wherever there was an injury to a right there arose a cause of action, and that if this man, being a member of the society, was *de facto* excluded from his rights at the moment the notice was served on him, such exclusion was an injury entitling him to maintain the action. But, under the circumstances, I am not at all sure that the committee are liable to an action for the mode in which they perform their functions—either taking the case as being without fraud; or regarding it as coupled with fraud.

Even if the plaintiff *had* attended upon the inquiry before the committee, and been heard, his exclusion might possibly have been improper. I think the declaration is so framed as to cover both modes of complaint. Suppose, then, the committee are liable to an action if they do not give a man notice (to which point I think the case must really come). It seems that by one of the rules a matter might be referred to a committee of nine, either members or not. What are they to do? They are to have "entire control of the funds, affairs and concerns of the society, and shall determine upon the admission, rejection, and exclusion of any vessel insured, or proposed to be insured, by it, and their determination shall be entered by the secretary in the books of the society, and be final and binding upon all parties, unless where they afterwards see

fit to alter and do alter the same." Now, are they to be liable for each ship proposed for insurance and *bona fide* rejected by them, if the same be afterwards lost, for the irregular or negligent manner in which they may have proceeded? So, also, where they have rejected claims on loss, are they to be responsible in an action to each disappointed claimant? For be it remembered that we are not here dealing with the rights of a partner maintainable in Chancery, but only with his right to bring an action. In consequence of the peculiar nature of the society it was supposed that it was necessary for the committee to be empowered to act upon a very unsatisfactory ground, viz., suspicion which they may entertain, not on the real grounds of that suspicion. Now, I do not think the office they held exposed them to an action for *neglect*. But, dealing with the other part of the case, supposing this exclusion to have been done fraudulently, I should be loth to pronounce an opinion whether the committee are in a position to be exposed to such an action as this by every member of the society. But I have no hesitation in saying that the conclusion at which I have arrived is, that this declaration is intentionally framed, omitting the usual word "fraudulently," in order to save the plaintiff from the difficulty of proving fraud, and that the word "collusively," loosely used here, does not amount to an allegation of *mala fides* in the defendants. In the case of *Batterbury* v. *Vyse* (6) the alleged cause of action was, that it being a condition that the plaintiff should have the certificate of the architect before being paid, the defendant had prevented the architect from giving a certificate. There the specific act was charged that the certificate was collusively withheld on the ground of the condition, shewing it to be an act of a dishonest nature without any cause alleged whatever, for we may take it as a fact that the architect and the defendant combined together to refuse it. We should do right to hold that in an action against a body like this committee, the charge of fraud should be very specifically alleged, and I think that, on the form of the declaration, there is not a sufficient allegation of fraud to make it actionable.

POLLOCK, B.—I also am of opinion that the defendants are entitled to judgment on this demurrer. It involves most important principles of law, although many of them first principles. Now, in the first place, I think there is no force in the objection by the defendants that the plaintiff did not shew any right of action because he did not shew that his ship was insured, because I think that the statement that he had paid his money on becoming a member was sufficient to give him an interest. Nor do I think anything of the objection that this society was a co-partnership, because, although to enforce his right as member, he might have to go to the Court of Chancery, yet that is consistent with his right of action against these twenty defendants, supposing them guilty of such conduct as amounted to a legal cause of action. Then is there a legal cause of action? The declaration is as follows: [His Lordship read it]. Now, in the first place, it is conceded that the word *expel* must not be taken in the physical sense of turning the plaintiff out, but as equivalent to the word exclude. Although I hope I shall not be supposed to consider the conduct of the defendants towards the plaintiff, in simply meeting together and passing a resolution excluding him, as right and proper, yet whether that was so improper as to offend a nice sense of justice, or as to give him a right to apply to a Court of Equity, is one question; but whether their conduct would give him a legal right of action, is quite another. In my judgment the allegation of "wrongfully, improperly, and collusively expelling him" does not go to establish that which the plaintiff was bound to have established, but sought to avoid establishing by not using the word fraudulently. "Wrongfully" may be rejected, so likewise "improperly." "Collusively" is susceptible of a doubtful meaning, and, according to the rules of pleading, must be taken most strongly against the person using it, and read in its less injurious sense. I think, therefore, these

ords do not disclose a cause of action. But, next, supposing no physical expulsion took place, it merely amounts to this, viz., that the act was a void act, and then comes in the dilemma alluded to. I am sorry to differ from my brother Cleasby, but it seems to me doubtful whether there has been any *legal right infringed*, to use the terms employed by Lord Holt in *Ashby* v. *White* (17), so as to give a right of action. This is not one of those cases where an action lies without damage. Cases there are where an action will lie without damage, for conspiracy, as where one conspires if only for a moment, and the plaintiff may so frame a count as to recover in an action for that wrong. But this is not that case. The present plaintiff complains of his expulsion from a society, and this is like *Blisset* v. *Daniel* (5) and *Innis* v. *Wilds* (18), in which latter case the plaintiff was expelled from the Caledonian Society, and Lord Denman, C.J., ruled in effect that if the plaintiff had been expelled by a wrongful act, the action would lie, but that, as the resolution for his expulsion was altogether invalid by the want of notice previously given to him that the subject of his removal from the society was to be taken into consideration, the removal was altogether a void act, and that the plaintiff was still a member of the society. So, here, I think the defendants entitled to judgment on the demurrer.

As to the nonsuit, I should have been very careful not to prevent the hearing of the case if it ought to have been heard. But I think the declaration was framed with the design of presenting to the jury a question which ought never to have been brought before them, and instead of giving the plaintiff leave to amend, I thought it my duty to nonsuit, on the ground that the word "expel" was admitted not to mean a physical expulsion, and must be taken in a more lenient sense.

AMPHLETT, B. — I am of the same opinion, and should not add anything to what my learned brethren have said, but that, although we are agreed in that c clusion, there is some slight differenc to the grounds upon which we sever proceed. Therefore I will say a few wo to shew with what portion of the rema already made I concur, and the real b of my determination. Throughout argument it has appeared to me, and appears, that the question is this, whether the plaintiff has, by the act of defendant, ceased to be a member of partnership. If he has not, I do not th that by this mere *brutum fulmen* of committee any wrong has been done to h But if it can be shewn that the expul of the plaintiff from the society *has* b effected, and by fraudulent means, t the plaintiff has suffered great injury, would, in my opinion, on this declarat be entitled to damages. At first I thou it might be said, although my conclu is to the contrary, that the member the partnership had given the commi plenary powers to act for all, and w they came to a conclusion that plaintiff's conduct was suspicious, and was not fit to be a member, howe wrong, and possibly even fraudulent, conclusion of the committee might be *expulsion* was complete, and that he seek his remedy elsewhere, because I the allegation in the declaration have been sufficient, as, although th fraudulently has not been used, the are that the defendants *well know* premises, but wrongfully, collusiv improperly contriving to depr plaintiff of the benefit of the in did wrongfully, collusively an perly expel him.

But for the doubts express learned brethren, I could that if the expulsion was eff declaration would have b sufficient. But then the cas this: could it be said that, the allegations of this decl plaintiff had been collusiv without having had an o being heard, or having b think it is impossible to society could take any be fraud or improper conduc mittee, for I do not think established this committe

(17) Lord Raymond, 938; 2 Smith's L.C. (6th ed.) p. 227.

Car. & K. 257.

for this purpose. Then the question is, whether they were justified, under any circumstances, in removing the plaintiff by "deeming" his conduct suspicious, without giving him an opportunity of explaining before they came to their conclusion. Now, the decision, which recommends to my sense of justice, and arrived at after great consideration, in the case of *Blisset* v. *Daniel* (5) was, that where there was an absolute power in two-thirds of a partnership to exclude without any cause shewn at all, that power must be exercised in good faith, and it was there held that they ought to have given the plaintiff an opportunity of being heard for this reason, viz., that one man might have gone behind the plaintiff's back and have prejudiced the minds of the others, and if the plaintiff had had an opportunity of being heard he might have removed that impression. So here, if the committee had called the plaintiff before them, and although not able to tell him about the evidence that he was unworthy, yet if, after hearing him (although without having proof against him), they came to a *bona fide* conclusion, they would have been entitled to expel. But, according to the allegations in this declaration, they never gave him that opportunity, and I have no doubt that the plaintiff (if the facts in the declaration were proved) by going into a Court of Equity, would be restored to his rights. If that be so, what damage has he sustained? He has not ceased to be a member, he has all his rights of membership, and is he, merely because they have done something illegal, to come to this Court and ask for damages? Damages for what? For the mere *attempt* to remove him, which was ineffectual. It appears to me, also, that very great inconvenience would be the result of trying the question,—whether he was expelled or not, in the absence of all the other partners who are entitled to have it decided, and if this action continued we should be trying that question behind their backs. This I say, because in many cases the Courts have refused to entertain such matters on that very ground, viz., that if it appeared that complete justice could not be done in the Courts of law, those Courts have said that the action should not be allowed. If the present action could be maintained, what should we arrive at? Take the case of *Blisset* v. *Daniel* (5), it would surprise lawyers to be told that not only could the plaintiff there get relief by falling back on equity, but also, according to Mr. Seymour's argument, that he could retain damages acquired in this Court. I think here, however, that a Court of Equity would hold that the plaintiff is still a member of the society, and entitled to all his rights. Therefore he has sustained no damage, and the demurrer should be allowed.

Judgment for the defendants.

Attorneys—W. Ely, agent for F. Summers, Hull, for the plaintiff; Williamson, Hill & Co., for the defendants.

1874. April 29. May 4, 8.* } COPIN *v.* ADAMSON. THE SAME *v.* STRAHAN.

Foreign Judgment — Shareholder in Foreign Company—Articles of Association —Elected Domicile—Service of Process—Liability of English Subject to Proceedings taken abroad in his Absence.

Should the law of a foreign country be that shareholders of a company there established are subject to the provisions in the articles of association, then, by taking shares in such a company, the articles of association of which provide that all disputes shall be submitted to the jurisdiction of a tribunal in such country, and that a shareholder shall, in certain events, elect a domicile within the jurisdiction whereat process shall be served, or, in default, that such election shall be made for him, an English subject, neither resident, nor domiciled in the foreign country, becomes bound by legal proceedings there in a suit against him for calls, if process has been duly served at a domicile elected for him under the provision aforesaid, although he may have had no notice or knowledge of such proceedings; for he has contracted to be bound thereby, and an

Decided in Easter Term.

action may be maintained in this country upon a judgment recovered against him in such suit.

But (KELLY, C.B., *dissentiente*) *his mere membership in such company does not render him subject to the general law of the foreign country so as to be bound by similar provisions for the election of a domicile upon his default which are contained in that law, and thereby liable to an action here upon a foreign judgment recovered under the above-mentioned circumstances.*

Declaration upon a judgment recovered in the empire of France, in a suit depending between the now plaintiff as definitive assignee of the bankruptcy of the Société de Commerce de France, with liability limited, and the now defendant, in the Court of the Tribunal of Commerce of the Department of Seine, being a Court of the said empire duly holden and having jurisdiction in that behalf.

Plea—That the suit was commenced, according to the laws then in force in the empire of France, by process and summons, and that the defendant was not, at the time of the commencement thereof, or at any time thenceforward previous to the recovery of the judgment, resident or domiciled within the jurisdiction of the Court, nor is the defendant a native of France, and he was not at any time before the recovery of the said judgment served with any process or summons in the suit, nor did the defendant appear therein, nor had he before the recovery of the judgment any notice or knowledge of any process or summons, or of any proceedings in the suit.

Replication—1. That before the commencement of the suit in which the judgment was recovered, the defendant became and was the lawful holder of divers, to wit, sixty shares of and in a certain company then lawfully established and existing in the country of France, called the Société de Commerce de France, being the same in the declaration mentioned, having its seat and place of business and legal domicile at Paris, in the department of the Seine, and within the jurisdiction of the Court of the Tribunal of Commerce of the Department in the declaration mentioned; and the defendant thereby then became and was by the law of France subject to all the liabilities, rights, and privileges attaching or belonging to the holders of shares in the company, and in particular to the regulations, conditions and stipulations contained in the statutes or articles of association of the company; and by the statutes or articles of association of the company, it was, at the time of the defendant's becoming a shareholder therein, and ever since has been and still is, amongst other things, provided and agreed that all disputes which might arise during the existence of the company or during its liquidation, whether between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves with respect to the affairs of the company, should be submitted to the jurisdiction of the competent tribunal of the Department of the Seine, and that every shareholder who should provoke a contest of this nature must elect a domicile at Paris, and that, in default of election of domicile, that election is made of full right at the office of the Imperial Procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses or notices of process should be effectually and validly served at the domicile formally or impliedly chosen. That, after the defendant had become a shareholder in the company, and whilst he continued such shareholder, the company became and was duly declared bankrupt according to the laws of France in that behalf, and the plaintiff was duly appointed assignee of and in the bankruptcy of the company, and, according to the law of France, the whole amount unpaid upon the shares held by the defendant in the company thereupon became immediately due and payable by the defendant to the plaintiff as such assignee, and a large sum of money was then unpaid upon the shares, and the defendant made default in the payment of the same to the plaintiff, and became liable, according to the law of France, to be sued by the plaintiff, as such assignee, for the amount, and provoked a contest within the meaning of the statutes or articles of association of

the said company, and the defendant had not then, nor at any time theretofore or thereafter up to the time of the recovery of the judgment hereinafter mentioned, formally elected a domicile at Paris, nor anywhere else within France, nor given notice of such election to the company nor to the plaintiff, but had wholly neglected and omitted so to do, and thereupon the plaintiff, for the recovery of the amount so due by the defendant to him, did afterwards duly and according to the law of France and the practice of the Court of Tribunal of Commerce of the Department of the Seine, being a Court of competent jurisdiction in that behalf, cause to be issued out of the Court a summons or precept addressed to the defendant, whereby the defendant was summoned to appear in the Court at a day and time therein named, to answer the plaintiff as such assignee in an action or claim for the sum of 18,000f., the same being a demand in respect of the amount then remaining unpaid upon the shares held by the defendant in the company, which summons the plaintiff then and long before the recovery of the judgment in the declaration mentioned, duly caused to be left, served and delivered for the defendant, at the office of the Imperial Procurator of the Civil Tribunal of the Department of the Seine, being the department in which the office of the society is situated; and that, by the law of France, the said office was the implied domicile of election of the defendant for the purpose of such service, and that the summons of the plaintiff in the action or proceedings, and the service thereof, was in all respects regular and valid according to the law of France and practice of the Court, and then amounted to and was, according to the law of France, notice to the defendant of such summons and proceedings, the defendant then having his real and actual domicile out of the country of France, to wit, in England; and that the defendant then was, according to the law of France, bound to appear in the Court at the time mentioned in the summons for the purpose therein mentioned. And the defendant did not appear in the Court according to the exigency of the summons, whereupon the Judge of the Court, according to the law of France and the practice of the Court, granted default against the defendant for not appearing, and such proceedings were thereupon had, that the plaintiff recovered judgment in the declaration mentioned, and the judgment so recovered then was and still is, according to the law of France, regular, valid, conclusive and binding upon the defendant and the plaintiff, and not in any respect impeachable by the parties thereto, or either of them, or otherwise howsoever.

2. The like, stating the liability of the plaintiff and the proceedings against him to be, "according to the law of France," but omitting the reference to the articles or statutes of the company.

Demurrers and joinder.

[The pleadings were the same in both actions.]

Benjamin (*Holl* and *S. Hastings* with him), for the plaintiff in the first action (1), cited *The New Brunswick and Canada Railway and Land Company* (*Limited*) v. *Conybeare* (2), and *The Bank of Australasia* v. *Harding* (3).

H. Matthews and *R. E. Webster*, for the defendant Adamson.—This French judgment, obtained without the knowledge of the defendant, cannot be enforced by action here. The point was much discussed in the recent cases of *Godard* v. *Gray* (4), and *Schibsby* v. *Westenholz* (5). The latter decides that "a judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in an English Court, where

(1) Issues of fact joined on these pleadings in *Copin* v. *Adamson* had been tried before Kelly, C.B., at Guildhall, in the sittings after Hilary Term, and a rule for a new trial had been afterwards obtained, against which cause was shewn simultaneously with the argument of the demurrers. It is, however, unnecessary to report the arguments on the points raised by the rule.

(2) 9 H.L. Cas. 711; s. c. 31 Law J. Rep. (N.S.) Chanc. 297.

(3) 9 Com. B. Rep. 661; s. c. 19 Law J. Rep. (N.S.) C.P. 345.

(4) 40 Law J. Rep. (N.S.) Q.B. 62; s. c. Law Rep. 6 Q.B. 139.

(5) 40 Law J. Rep. (N.S.) Q.B. 73; s. c. Law Rep. 6 Q.B. 155.

the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained, for there existed nothing imposing on the defendant any duty to obey the judgment." He must, in fact, owe allegiance, either perfect or temporary, to the country wherein the judgment is obtained. There must be a duty of submission on his part. *Agreeing* to be bound by a foreign Court does not create such a duty of obedience to the judgment as that required by *Schibsby* v. *Westenholz* (5). Allegiance, which is the foundation of this duty, is not created by contract. Moreover, there was no express agreement to submit to the foreign jurisdiction; but reliance is placed on the effect of notice of the Articles. Assuming an agreement therefrom to accept substituted service, *Schibsby* v. *Westenholz* (5) is an authority for saying that, even if there had been actual service, yet the defendant would not have been bound. In *Valée* v. *Dumergue* (6) an election of domicile was made by the defendant. The mere fact of taking shares has not the same effect.

French, for the defendant Strahan.—The first replication alloges only a contract attaching, by the law of France, after the shares were taken, and not any express contract. There is no averment that the shares were taken in France.

[KELLY, C.B.—Strike out every statement about the law of France, and you still leave a good replication.]

The plaintiff must shew facts bringing the defendant within the French law.

[PER CURIAM.—Is not the taker of shares in an English company bound by the articles of association?]

Only by virtue of a clause to be found in every Joint Stock Company Act, but not otherwise. The mere holding of property in France, or trading there, does not subject an Englishman to French jurisdiction. Upon the pleadings, the Court can assume that the scrip may have been sold in the market without any possibility of the defendant getting knowledge of these articles, and there is nothing to [illegible] that he is bound by them. In neither *The Bank of Australasia* v. *Nias* (7) nor *The Bank of Australasia* v. *Harding* (3) is there anything to shew that a man, by merely becoming a shareholder in a foreign company, lets in the whole body of foreign law against him.

[PIGOTT, B.—But one may contract to do so.]

If he consent to the jurisdiction of a foreign Court, he does so only as he would to the jurisdiction of an arbitrator, and the judgment is but an award, impeachable on every ground upon which an award may be attacked. The plaintiff has, however, declared on it as a judgment. He cited *Meuss* v. *Thellusson* (8).

Holl, for the plaintiff in the second action, in support of the replications.—Both replications are good. They shew that, by the articles of association, the defendant was bound to elect a domicile, or, in default, was bound by proceedings taken according to the law of France. He took shares in a company carrying on business in France, and governed by French law. The contract thereby created was to be performed in France; and the law of the country where a contract is made or is to be performed, furnishes the rules for expounding the nature and extent of its obligations—*Fergusson* v. *Fyffe* (9). If the contract were to be governed by the law of the country in which the transferee of the shares might be, the liabilities created would be of a varied and shifting kind, and the business of the company could not be carried on. Suppose the defendants were to shew that certain notice was be given before a call could be made the law of France, and no such notice were given, would he not rightly that the company were unable to recover the amount of the call? By what can this contract be governed save that of France, for the English law is applicable to a French company?

[AMPHLETT, B.—In *Schibsby* v. *Westenholz* (5), Blackburn, J., appears to that, when you sue here, not up

* Exch. Rep. 290; s. c. 18 Law J. Rep. Exch. 398.

(7) 16 Q.B. Rep. 717; s. c. 20 Law (N.S.) Q.B. 284.

(8) 8 Exch Rep. 638; s. c. 22 Law (N.S.) Exch. 239.

(9) 8 Cl. & F. 121.

h contract, but on a French judg- this Court will look to see if that nent were properly obtained.]

e decision in that case was that if oreign Court had jurisdiction, the sh Court will assume that the judg- was properly obtained, unless it r to have been got by fraud, or contrary to natural justice; and er, that, if the foreign Court has iction by consent, they will as- the judgment to have been pro- obtained. The defendant has d to be bound by such provisions e law of France as are applic- to the company in which he has shares. *Vallee* v. *Dumergue* (6) is ly in point.

LLY, C.B.—There must be judgment e plaintiff. [His Lordship stated the ings.] The question arises whether efendant, being a shareholder in this n company, is bound by the law of e in relation to all claims, liabilities, actions, matters, and suits arising f or connected with this company,— ner, taking it as admitted on the d that he is not a French subject, he never was domiciled or resident ance, nay, perhaps never in France, subject to the law of France and d by all the articles of association? und by the law of France, then, as yndic had clearly a right to recover um which was due to the company, by the law of France, that demand be enforced as soon as there is a nent well obtained and lawfully pro- ed by the French tribunal, there is efence to this action. If by the law ance or by the articles of association became liable, the fact that he was subject of, nor resident in France material. The question is purely a r of law; and before I proceed to with the authorities, I think it right ate what I consider to be the law cable to the points raised on both ations by the demurrers. I appre- that it is now established to be the of this country that one who be- s a shareholder in a foreign com- and thereby a member of that any—such company existing in a foreign country, and subject in all things to the law of that country—himself thereby becomes subject to the law of that country (and to the articles or constitution of the company, construed and interpreted according to the law of the country) in all things, and as to all matters, and all questions existing, or arising in relation to, or connected with the acts, and affairs, and the rights, and the liabilities of such company, and its members, severally or collectively. And if that company, by the law of the country in which it exists, or by the articles of its constitution, is subject to the jurisdiction of a particular Court within that country, so also is each shareholder a member subject to its jurisdiction in all cases in relation to, or connected with such company.

Now with respect to the authorities. It was contended for the defendant in the first place, on the authority of *Schibsby* v. *Westenholz* (5), that he, not being a native or subject of France, not being, therefore, subject to the law of France, not being domiciled, or resident in France, and not having notice, or knowledge of the commencement, or prosecution of the suit to judgment there, is not bound. In that case it was, however, merely held "that the judgment obtained in default of appearance against a defendant cannot be enforced in an English Court, where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained, for there existed nothing imposing on the defendant any duty to obey the judgment." But on those last words it is material to observe that what Blackburn, J., said, though merely *obiter dictum*, is entitled to great weight; and for myself I do not hesitate to hold that the law is accurately laid down, although on points which did not directly arise in that case. "We think," said the learned Judge, "some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been,

at the time when the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case."

And it is to be observed that, in *Schibsby* v. *Westenholz* (5), there was no fact found which imposed on the defendant the duty of obeying that judgment, and we must ascertain in what that case essentially differs from this. That was not a case where the defendant was alleged to be bound by reason of his having become a shareholder in a foreign company which existed only under the laws of a foreign country, but a case of simple contract between the plaintiff and defendant for the supply and delivery of a quantity of merchandise—a common case of an order given by a gentleman in this country to a dealer in wines residing abroad, and of the commodity being delivered in England. There is nothing in the making of a contract by a person in this country with another in France which renders the Englishman subject to the laws of France; and that is right, for it is competent to the French merchant to bring an action—not in France but here—against the customer who has broken his contract. But we have to consider what is the law applicable—not to a mere contract for the purchase and sale of goods, or ordinary mercantile contract,—but to the question arising out of certain transactions and claims of right on the one hand and resistance on the other, in the case of a foreign company, existing only in a foreign country, and subject only to the laws of that country.

Now it appears upon the record that the defendant had, in fact and in law, duly become a shareholder of the company, and the question is whether, when he has thus become a shareholder in a foreign company existing in a foreign country, located there, and subjected to the laws of that country, he, by the law of England, becomes subject to the laws and jurisdiction of the foreign country, so that by the constitution of the company or law of the country according to which the proceedings are carried on, he is within the jurisdiction of its tribunals.

There are clear and decisive authorities governing the case, and the first to which it is necessary to refer—and which appears, in fact, quite decisive of the present case—is that of *The Bank of Australasia* v. *Harding* (3). Now what does the present defendant contend to make out that he is not a shareholder? Why that, not being resident in France, he does not owe allegiance, not being subject to its laws. In that case it was held that "the members resident in England of a company formed for the purpose of carrying on business in a place out of England are bound in respect of the transactions of that company by the law of the country in which the business is carried on." Here the defendant became a shareholder in a company "formed for the purpose of carrying on business" in France, and, I may add, existing in France, and there only, and became bound by the law of France, "in which the business was carried on." Now let us look at the facts, and see if this case is not stronger than that one.

It appeared Harding was sued on a judgment against him in the colony of Australia. There was a company in Australia of which he had become a member; but he was not an Australian, nor resident in, nor subject to the laws of Australia, unless by becoming a shareholder. The company was a banking company established by a colonial Act, which may be assumed to have been obtained at the request of the members of the company, and by which it was provided that one member might be sued instead of the whole body, and execution issued against the property of the other members of that body. "But," say Wilde, C.J., "while giving this benefit t the company, the Act provides that shall not vary the rights or the liabiliti

of the parties. Now independently of the colonial Act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment," p. 685. That goes clearly to shew that, although he had never been there, if by the law of the colony any one member might be sued for the debt of any other member, he might have been sued in any of these Courts for any demand against him as a member of that company. Judgment having been obtained against the chairman of the company in a Court of the colony, the question was whether the defendant was liable here in an action on that judgment. He made the defence which the present defendant makes, saying, "True, if I had been a native of that colony, and domiciled there, I should have been subject to its laws; but, although I became a member of that company as a shareholder, I am not subject to the laws of the colony." What was the answer? The Court said, "By becoming a member of that company you made yourself liable to the laws of the colony, and bring yourself within the jurisdiction of the Courts, and liable to the proceedings there taken, and if the proceedings there taken against you are such as to bind you, although you are not there, and judgment is got, you are liable to an action on that judgment here." Cresswell, J., says, "I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial Act. He must therefore be regarded" (as a consenting party to everything done by the company pursuant to the articles, or in conformity with the law of the colony, and) "as having agreed that suits upon contracts entered into by the company might be brought against the chairman, and that the chairman should for all purposes represent him in such actions," p. 687. Observe what that decision amounts to. The defendant there was never served with process at all, nor knew of it. The process had been served on the chairman who was in that colony, and service of the process on the chairman being good and lawful, according to the law and usage of the country and constitution of the company, was service on the defendant, although the latter never heard of the proceedings and never had been in that country. "Being his own appointed agent, he had notice of the proceedings. If he had been resident in the colony he could not have made himself party to the action, or in any manner personally interfered in the proceedings." And Talfourd, J., giving judgment, says the "plea states that the defendant was never resident in New South Wales, and had no notice of the proceedings. The answer to that is, that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there to be regulated by the law of the colony." It is impossible for a case to be more directly in point than that. *The Bank of Australasia* v. *Nias* (7) is to the same effect. But there is one more case to which reference should be made, viz. *Vallée* v. *Dumergue* (6)—an action on a French judgment. The defendant pleaded "that he was not, during the accruing of the cause of action or any part of the proceedings, nor from thence hitherto, resident in France or within the jurisdiction of the Court, nor subject to the laws of France; that he was never served with any process or notice whatever; nor had he any notice whatever of any proceedings in the action; nor did he appear in Court, or have any opportunity of defending himself against the claim, and the proceedings were taken in his absence, and without his knowledge, privity and consent." There was a replication "that the defendant became a shareholder in a certain company in France" (exactly as in the present case) "subject to all the liabilities and rights attaching thereto. That the defendant was resident in England, and by reason thereof it became necessary, by the law of France, for the defendant to elect a domicile in France, at which the directors of the company

and therefore he became bound and liable by the law of France and under the articles of the company to elect a domicile. He did not do so and by the law of France the syndic of the company became entitled to elect a domicile for him, and it became his, the syndic's, duty to demand and recover the sums of money due from and payable by him. The syndic elected a domicile at the office of the procurator, and there served process which, by the law of France, the articles of association, and the authority of the cases I have cited, is good service on him, and entitled the plaintiff to judgment, and by the law of this country to sue on this judgment.

Under these circumstances I am clearly of opinion that this action is maintainable and that the plea on the record altogether fails.

AMPHLETT, B.—A very important question arises in this case involving the liability of English subjects residing here to be subject to the jurisdiction of the tribunals of a foreign country. The question arises on the two replications, and, upon the first of them, I come at once to the conclusion that from the actual contract entered into by the English subject, as there stated, he was bound to have his rights adjudicated upon by a foreign tribunal. But on the second, the opinion of my brother Pigott and myself is that, although the contract will be governed by French law, it must be interpreted by an English tribunal, and is not in any way subject to the jurisdiction of the French Court. This is a point of very little importance, because in *Adamson's Case* (10) it appears that the first replication is proved, and I cannot much doubt that the first replication will be made out in the case of Strahan also in which the same point will arise. But I am told that the parties desire our judgment. I am therefore bound, on that ground and because my brother Pigott and I think the case involves important principles of law, to give the reasons why we very unwillingly do not concur with the Lord Chief Baron on the question as to the demurrer to the second replication. Before I go minutely into the case, I venture to state what are the principles applicable to it. The learned counsel for the plaintiff seemed to think they had made out a case in favour of the plaintiff as soon as they had satisfied us that the rights and obligations of the defendants were to be settled according to the principles of French law. But I think they lost sight of another question, viz., whether an English subject, though he may have entered into a foreign contract to be governed by foreign law, has made himself subject to the jurisdiction of the foreign Court. That point has often been before the Courts of this country, and the principle, as far as I can find it to be established, is as follows:—First. If he is a subject of the foreign country he is bound, not only to have the contract construed by foreign law, but would be bound to submit to the decision of the tribunals of that country, or if, as my brother Blackburn said in *Schibsby* v. *Westenholz* (5), at p. 161, he resided in the country at the time the suit commenced, he might be considered to owe temporary allegiance, and would be bound by the law and procedure of that country. So "if at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we *should be inclined*," says that learned Judge, "to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued." But I cannot find any opinion to the effect that an Engish subject who has never been in France is bound by the law of France, merely because he has made a contract which is to be interpreted according to the law of France. I can find no opinion expressed by my brother Blackburn to that effect. Another case put by my brother Blackburn is that of a tribunal selected by the plaintiff as the one in which he would sue, in which case he could not afterwards say that the judgment of that tribunal was not binding upon him. And another case is put as to an English subject made defendant in a French action, who appears and defends himself, when it may be a question whether in that case also he might not be bound. Independently, however, of that question, a second may

arise, and this is the ground on which, according to my view, the first replication may be supported. I take it that a man may agree with another with whom he contracts, that their rights and liabilities under the contract shall be determined according to foreign law and tribunals, and if they do so agree, then that it would not be through allegiance, but their contract, that they would be bound by the law and tribunals of that foreign country. That being so, let me advert to the facts and circumstances of the case on the first replication. [His Lordship stated the facts set out therein.] It was first argued for the defendants that, although there was an article to that effect regulating the company, the defendant never had notice of any such article. No doubt it was not alleged in the replication he had any such notice, but I do not hesitate to say that a person who enters into a partnership must, according even to English law, be taken to have notice of the articles, and I think that the English Courts would necessarily imply that he had such notice, from the very fact of his becoming a shareholder. The objection that the defendant is an Englishman, not domiciled or resident in France, seems to me answered by the agreement which he is alleged to have entered into, that all questions should be decided by French tribunals. I thoroughly agree with what my Lord has said as to the first replication. Now, as to the second replication [his Lordship stated it], it was argued at the bar, and has received the sanction of the Lord Chief Baron, that the plaintiff need not resort to the articles; that according to French law the members of the company were bound to elect a domicile, and that, in default, such election would be made for them at a public office, and that they would be bound by proceedings served thereat. I am unable to discover a single case which has gone so far as to lay down that proposition, and, as much has been said about the inconvenience of a contrary conclusion, I would point out the inconveniences which would result from saying that where an Englishman here buys a share in a foreign company, and has no notice of any articles at all, nor has bound himself by any articles, that he necessarily, by becoming a member, becomes bound by any decision of the foreign tribunals which may affect his interests. For example,—Here the defendant became a member of the company, and in the law of France there appears to be a reasonable stipulation that the shareholder should elect a domicile at which he may be served with process, or a domicile may be elected for him, at which process may be served. Suppose a provision that if he had not elected a domicile he must pay double. Then although he had no notice of the articles, he might, taking the view to which I am opposed, be held bound by that provision. We cannot ignore the fact that the French law is as perfect as our own, a good system admirably administered. But in this country it is not the same thing, and if told, when on the Stock Exchange buying shares in an Egyptian, Turkish, or even a Chinese Company, that one would be bound by judgments obtained in Egypt, Turkey or China, and that an action might be brought against one on it in this country the argument *ab inconvenienti* would strongly contradict the proposition.

There is, as I have observed, no case going so far. Two, however, are said to establish the proposition. First, *The Bank of Australasia* v. *Harding* (3), which seems a very strong authority in support of the first replication, but does not go the least way to support the second; for there the company's powers, rights and liabilities were defined by a local Act of legislation by which power was given to creditors obtaining judgment against a shareholder who was bound by the local Act; and on looking into the case it will be seen that all the Judges in discussing the question proceeded on the principle I have enunciated, but not a word falls from them saying that if there were *no* local Act and merely a general law of the colony, which might be different from our law, the parties would be bound by such general law. Wilde, C.J., says that the first count stated "that the defendant was a member of a banking company acting under a colonial statute; a statute which may be assumed to have been obtained *at the request* of the parties," p. 685; and

Cresswell, J.—"I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the Colonial Act," p. 687. The reliance there placed on that circumstance seems to shew that if there had been no such consent they would not have been held so bound.

The other case of *Vallée* v. *Dumergue* (6), seems a very strong authority in support of the first replication, but almost as strong against the second. There, shares in a French company became vested in the defendant, and therefore, according to French law, on accepting those shares he was bound to elect a domicile for the execution of the instrument destined for the purpose of carrying out and regulating the rights of the company. He did elect a domicile and gave notice thereof to the plaintiffs. So he was aware of what the French law required, and had complied with its requisitions. He left the country, they gave notice which never reached him, and they got judgment which was sued upon here; and Alderson, B., said—"The defendant states he was not served with any process, which clearly means, not actually served, and then adds, nor had he any notice whatever of the said proceedings; adding afterwards, that he had not any knowledge or notice whatsoever of them. All these averments point to actual notice alone. Now, if this be so, the replication is not an argumentative denial of this notice, but consisted of a statement of facts which shew that by the agreement to which the defendant has become a party, no such notice need be given to him, and that the plea which is in substance, that the circumstances under which the judgment was obtained were contrary to natural justice, cannot be supported; for it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed even though he may not have had actual notice of them," p. 302-3. It appears to me that the decision of the learned Judge proceeded on the fact that something more had been done than the defendant merely taking shares in a foreign company, and that he had done something to agree that he should be bound by all proceedings. Therefore, I think the demurrer to the second replication ought to be allowed; and I am requested by my brother Pigott to say that he also entertains that view.

Judgment for the plaintiff on the first, and for the defendants on the second demurrer in each case.

Attorneys—Deane & Chubb, for the plaintiff; Rowland Miller, for the defendant Adamson; Argles & Rawlins, for the defendant Strachan.

(In the Second Division of the Court.)

1874. June 4, 9. { THE WESTERN COUNTIES MANURE COMPANY *v.* LAWES' CHEMICAL MANURE COMPANY.

Defamation—Disparagement of a Tradesman's Wares—Action for Special Damage caused by the Publication of Falsehood.

To publish of a tradesman falsely and without lawful occasion, that the goods in which he trades are inferior in quality to similar goods in which his rivals trade, is actionable if special damage results.— Young *v.* Macrae *distinguished.*

Declaration—that at the time of the committing, &c., the plaintiffs carried on business as, amongst other things, manufacturers and sellers of artificial manures, and had upon sale certain artificial manures, and the defendants also carried on business as manufacturers and sellers of artificial manures, and had on sale certain artificial manures. That the defendants, well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their said business, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and

sellers of artificial manures, and of and concerning them in the way of their said business the words following—

"Chemical Laboratory, University of Glasgow, January 29, 1873.

"Dear Sir,—I enclose herewith analysis of your four samples of manure which differ much in quality. They are all mixtures, and do not consist of bones and acid alone. No. 2" (meaning thereby the defendants' artificial manures), "is much the best and seems to contain some kind of phosphatic guano. No. 4" (meaning thereby the plaintiffs' said artificial manures), "appears to contain a considerable quantity of coprolites, and is altogether an article of low quality, and ought to be the cheapest of the four. The other two are fair articles, and may be usefully employed. It is not easy for me to put an exact value upon the samples, as the prices charged for manures in different parts of the country differ to an extraordinary extent. I know places where No. 2" (meaning the defendants' said artificial manures), "would be sold at about 8*l.* per ton; others where 7*l.* would be its price. I may state, however, the relative values thus. Suppose the price charged for No. 2" (meaning the defendants' said artificial manures), "to be 8*l.* per ton, then No. 1 should be worth 7*l.*, No. 3, 5*l.* 10*s.*, and No. 4" (meaning the plaintiffs' said artificial manures), "5*l.* Of course these must be taken as approximation only, and may be modified by the nature of the bargain, but they should be in these proportions.

"I am, dear Sir, yours truly,
"Thomas Anderson.

"J. Moon, Esq., Secretary to the Devon and Cornwall Chamber of Agriculture."

(Here followed Professor Anderson's analysis purporting to give the proportion of biphosphate of lime, soluble and insoluble phosphates, and ammonia contained respectively in the manures of the plaintiffs, the defendants, and two other manufacturers.)

Meaning thereby that the said artificial manures so manufactured, sold and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants, whereas in truth and in fact the said artificial manures so manufactured, sold and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants (special damage was then alleged).

Demurrer and joinder.

Arthur Charles, for the plaintiffs (on June 4).—The words complained of, and especially the statement that the plaintiffs' manures are "altogether an article of low quality," are a reflection upon the character of the plaintiffs in the way of their business, and if so are clearly actionable—*Harman* v. *Delany* (1). If they amount only to a reflection upon the character of the plaintiffs' wares they are not strictly a libel, but the action lies, being analogous to an action for slander of title, which, in the words of Tindal, C.J., in *Malachy* v. *Soper* (2), "is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiffs' title." To support such an action special damage is necessary, and it is here averred. This is the distinction between the present case and *Evans* v. *Harlow* (3), upon which the defendants will rely. In that case it was held that the false and malicious publication in a newspaper of language—which (as interpreted by the Court) meant only that the tallow syphons sold by the plaintiff did not answer their purpose—was not actionable, no special damage being alleged; but it was conceded in argument, and was implied in the judgment of Patteson, J., that special damage would make it actionable. The defendants will rely also on *Young* v. *Macrae* (4), where a "false and malicious" publication of a circular comparing the quality of the oil sold by the plaintiffs with that sold by the defendant, followed by special damage, was held not actionable. But the *ratio decidendi* was that "false" may have meant only that what was pub-

(1) 2 Str. 898.
(2) 3 Bing. N.C. 371; s. c. 6 Law J. Rep. (N.S.) C.P. 32.
(3) 5 Q.B. Rep. 624, 633; s. c. 13 Law J. Rep. (N.S.) Q.B. 120, 122.

lished about the defendant's oil was untrue, and not that there was anything untrue in what was published about the plaintiffs' oil. Had the latter meaning been intended the action would (in the opinion of Cockburn, C.J.) have lain. In the present case it is distinctly alleged that a falsehood has been published about the quality of the plaintiffs' wares.

C. Bowen, for the defendants.—There is no decision that such a declaration as the present is good, and *Young* v. *Macrae* (4) (which is substantially identical with the present case) is a decision that it is not actionable to publish a false and malicious statement that the goods in which the plaintiffs' trade are inferior to the goods of other tradesmen, though it cause special damage. The expressions in that case relied on by the plaintiffs are *obiter dicta*, and both Cockburn, C.J., and Blackburn, J. (5) seem to have limited them to the case of a defendant who knows that his statement is false. The present declaration does not aver any *scienter* in the defendants. The action of slander of title is not analogous, for that affects the plaintiffs' property. To support the action there must be a reflection on the plaintiffs' character as tradesmen, as in *Burnett* v. *Wells* (6). In no case has a reflection on a tradesman's goods alone been held actionable. The present is only a puff by a tradesman of his own wares. The malicious publication of an untruth about another person, followed by special damage, is not of itself actionable—*Miller* v. *David* (7). A lie is not actionable unless it injures some right, or unless there is a legal obligation to tell the truth arising from the relationship between the parties, as in the case of vendor and vendee.

[BRAMWELL, B.—There may be no legal obligation to tell the truth, because there is no obligation to speak at all. But if a man does speak, is there not a legal obligation not to tell an untruth?]

Cur. adv. vult.

(4) 3 B. & S. 264, 269; s.c. 32 Law J. Rep. (N.S.) Q.B. 6, 8.
(5) 3 B. & S. 271; s.c. 32 Law J. Rep. (N.S.) Q.B. 8.
(6) 12 Mod. 420.
(7) 43 Law J. Rep. (N.S.) C.P. 84.

The following judgments were given on the 9th of June.

BRAMWELL, B.—In this case our judgment must be for the plaintiffs. The case may be shortly stated thus: The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this, that it was an article of low quality, and ought to be the cheapest of the four of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue. But having been published, as it is said, of and concerning the plaintiffs' manufacture and trade, the declaration goes on, "meaning thereby that the said artificial manures so manufactured, sold and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable in my judgment is the allegation that follows—"Whereas in truth and in fact the said artificial manures so manufactured, sold and traded in by the plaintiffs, were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants, and by reason of the premises" certain persons who, if they had not been told that which was untrue, would have continued to deal with the plaintiff, ceased to deal with him. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture which is comparatively disparaging of that manufac-

ture; which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and maliciously, which possibly may mean nothing more than that it was made falsely and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary (which I do not think it is), it is alleged here.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young* v. *Macrae* (4). When that is examined it will be found to be entirely distinguishable. The disparaging statement there was not said to be untrue; it was only said generally that the libel was untrue. On the general principle, therefore, that an untrue statement about a tradesman's goods to their comparative disparagement, published without lawful occasion and causing him special damage, is actionable, we give our judgment for the plaintiffs.

Pollock, B.—I agree that our judgment should be for the plaintiffs. This case no doubt involves first principles. On the one hand the law is strongly against the invention of any new rights of action, but on the other, where a wrong has actually been suffered by a person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim, "ubi jus ibi remedium." It seems to me the present case comes within that rule.

This is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of was written. I think that makes no distinction. The difference between a written or verbal statement of the kind now complained of and an ordinary case of defamation is very clearly pointed out by Tindal, C.J., in his judgment in *Malachy* v. *Soper* (2). It is, I think, in the nature rather of an action of slander of title.

The only question that seems to arise is, What is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language concerning the plaintiffs' goods which is not only false, but is such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur, it seems to me a good cause of action is disclosed.

With reference to *Malachy* v. *Soper* (2) and *Evans* v. *Harlow* (3), I would only observe that in those cases there was no allegation of special damage. In *Young* v. *Macrae* (4), Cockburn, C.J., in his judgment supposes a case very like the present, and seems to imply that an action would lie if such a case should arise.

Judgment for plaintiffs.

Attorneys—Harris, agent for Kelly, Plymouth, for plaintiffs; Bower & Cotton, agents for Hall & Ganion, Manchester, for defendants.

(*In the Second Division of the Court.*)

1874. May 4, 7. June 25. } ANDREWS *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF RYDE.

Corporation—Corporate Borough—Contract by Corporation acting as the Local Board—Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 24.

The Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 24—*which enacts that in corporate boroughs the local boards "shall be the mayor, aldermen, and burgesses acting by the council"—does not make the local board a new and separate body, but in substance enacts that in corporate boroughs the corporation shall be the local board; and though in making contracts the name and*

style of the corporation "acting as the local board" is used, the corporation is the essential body and contracting party and may be sued as such on the contracts.

The plaintiff having brought this action to recover 194*l.* 5*s.* for work and labour performed by him as a professional valuer and witness for the defendants, a special case was stated under a Judge's order; judgment to be entered for the plaintiff for the amount claimed, or for the defendants, according to the opinion of the Court, who were to draw inferences of fact as a jury.

[The material facts are sufficiently stated in the judgment.]

Cole (*Michael* with him) on May 4 and 7, for the plaintiff, cited *Nowell* v. *The Mayor, &c., of Worcester* (1).

Manisty, for the defendants.—The only contract (if any) was made either with the sub-committee of the local board, or with the individuals who passed the resolution to employ the plaintiff, and the action should have been against the local board as such or the corporation "acting as the local board;" though even that action would have been defeated for several reasons, one of which is that the local board had no power to purchase the gas works or employ the plaintiff. At all events the corporation have a good defence, for they made no contract with the plaintiff. If the plaintiff recovers, his execution will be satisfied out of funds belonging to the corporation, not applicable to such purposes.

Cole replied.

Cur. adv. vult.

The judgment of the Court (2) was (on June 25) read by

POLLOCK, B.—The plaintiff in this action sued the corporation of Ryde for work and labour as a professional witness.

Several objections were raised by the defendants to the maintenance of the action. The most substantial of these was that the defendants had never contracted with the plaintiff, and that his remedy, if any, was against the Local Board of Health for Ryde.

The reasons for and the manner of the plaintiff's employment were as follows. The defendants are a municipal corporation by virtue of a charter of incorporation, dated the 23rd of July, 1868, and on the 15th of December, 1868, acquired all the rights of the "Ryde Commissioners" who acted under the Ryde Improvement Act, 1854, and who in October, 1859, had adopted the Local Government Act, 1858; the effect of which was that the powers and duties of carrying the Ryde Improvement Act and the Local Government Act into execution were vested in the mayor, aldermen and burgesses of the borough of Ryde.

One of the powers given to the Ryde Improvement Commissioners by the Act of 1854, was the right to purchase the property of a gas company, which supplied the town of Ryde with gas, and which was registered under the 7 & 8 Vict. c. 110. By the Ryde Gas Act, 1866, further powers were given to the Gas Company, and the right of the Improvement Commissioners was preserved, provided it was exercised within five years.

In February, 1871, the town council of the borough of Ryde, being desirous of purchasing the property of the Gas Company, gave notice to the company, calling on them to give particulars of their estate, and the amount they claimed. The Gas Company sent in their claim, and the corporation proceeded, under the Lands Clauses Act, to appoint an arbitrator. The Gas Company appointed their arbitrator, and these two appointed an umpire. In all these proceedings, however, the corporation appear to have misapprehended their true position, and to have acted not in the name of the corporation of Ryde, but in that of the corporation of Ryde acting as the local board, and hence all the steps leading to the arbitration, as the notices to the company and the appointment of arbitrator were given and made, and were described on the minutes of the corporation as being done, by the corporation "acting as the local board," and "by order of the said board."

Arbitrators and an umpire having been appointed, the next step taken was at a

(1) 9 Exch. Rep. 457, 466; s. c. 23 Law J. Rep (N.S.) Exch. 139.

(2) Bramwell, B., and Pollock, B.

special meeting of the council of the borough acting as the local board, which was held on the 24th of April, 1871. At this meeting what was called the seal of the board was affixed to the appointment of a Mr. Stevenson, "as valuer, on behalf of the Corporation." It is not stated in the case that this seal was any other than the corporate seal of the borough, and, for the reasons presently given, we assume that it was the corporate seal. Mr. Stevenson from this time acted as valuer in the arbitration, but further witnesses being required to support his valuation, at a meeting of the sub-committee of the local board, held on the 16th of June, 1871, when Mr. Stevenson attended, the clerk was directed to retain counsel, and it was resolved that the plaintiff and four other professional gentlemen should be selected as witnesses to support Mr. Stevenson's valuation. In accordance with this resolution, the plaintiff was instructed by Mr. Stevenson, but no appointment was ever made under seal. During the arbitration the plaintiff attended and gave evidence, and the amount of his charges is admitted.

Under these circumstances, it seems clear that the employment of the plaintiff was *de facto* by the corporation acting as the local board, and the only question is whether the corporation and the local board can for this purpose be treated as independent bodies, so as to enable the corporation successfully to contend that the plaintiff, having been retained by, and rendered services to the corporation acting as the local board, his remedy must be against the local board, or specifically against the corporation acting as the local board. There would be great force in this contention if it could be shewn that the effect of the statute, by which alone the local board is created, was to establish a separate body. This, however, does not seem to be the case. The provision of the Local Government Act, 1858 (21 & 22 Vict. c. 98. s. 24), is as follows:—"The duty of carrying into execution this Act shall be vested in a local board, and such local board shall be,—

"1. In corporate boroughs the Mayor, aldermen and burgesses acting by the council."

This does not create a new and separate body or provide for an independent seal or independent power of contracting, but in substance enacts that in corporate boroughs the corporation shall be the local board; and if so, then, whether in contracting the name and style of the corporation is used or that of the corporation acting as the local board, the essential body and contracting party is the corporation; or, to put the proposition in another form, the local board has no existence, and there could be no contract with them unless by the local board is intended the corporation, who, according to the Act, are the local board.

Under these circumstances we think that, though the local board was erroneously mentioned, the contract in substance was with the corporation, and therefore that they are properly made defendants in this action.

The case of *Nowell* v. *The Mayor of Worcester* (1), to which we were referred by the plaintiff's counsel, is not a direct authority in support of this view, because there the corporation had contracted with the plaintiff under the corporate seal, but the judgment of the Court, and especially that of the Lord Chief Baron, when he says, "The statute, in forming this body into a local board of health, intended that they should contract as a municipal corporation," accords in principle with the view we now take.

The conclusion at which we have arrived renders it unnecessary to consider objections which were raised against the plaintiff upon the hypothesis that the cause of action and judgment ought to be looked upon as arising against and binding upon the local board, treating it as a body having an existence other than that of the corporation, and therefore we do not further refer to them. For the reasons given our judgment is for the plaintiff.

Judgment for plaintiff.

Attorney—Hacon, for plaintiff; Davies, Campbell, Reeves & Hooper, for defendants.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Exchequer.*)

1874. June 20. { RICHE *v.* THE ASHBURY RAILWAY CARRIAGE AND IRON COMPANY, LIMITED.

Company, Limited — Memorandum of Association—Contract beyond Scope of—Ultra Vires—Ratification—Assent of Shareholders—Companies Act, 1862 (25 & 26 *Vict. c.* 89).

The directors of a limited liability company incorporated under the Companies Act, 1862, *entered, on behalf of the company, into contracts with R. which were ultra vires and beyond the scope of the memorandum of association :—*

Held, *per* BLACKBURN, J., BRETT, J., *and* GROVE, J. (*affirming the judgment of the Court of Exchequer*), *that as the contracts, although unauthorised, were not expressly or impliedly prohibited by the memorandum or statute, they were capable of ratification by the unanimous shareholders.*

Per ARCHIBALD, J., KEATING, J., *and* QUAIN, J. (*dissentientibus*), *that the contracts being ultra vires of the company were incapable of ratification.*

ERROR from a judgment of the Court of Exchequer in favour of the plaintiff upon a Special Case stated by an arbitrator in an action brought to recover damages for breach of certain contracts entered into with the plaintiff by the directors of the defendants' company, and which were, on his part, said to have been ratified by the shareholders, but were, on their part, alleged to be *ultra vires*.

The facts of the case sufficiently appear in the following summary (1).

The defendants are a limited company incorporated, in September, 1862, by the name of the Ashbury Railway Carriage Company, under the Companies Act, 1862. By the 3rd clause of their memorandum of association, the objects of the company are thus stated.

"3. The objects for which the company is established are, to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals, or other material, and to buy and sell any such materials on commission or as agents."

By article 4 of the articles of association it is provided that "an extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." No special resolution was ever passed in the terms of that article, and there has been therefore no modification or extension of the objects of the company as set forth in the memorandum of association.

It appears by the articles of association that the company had purchased of John Ashbury the business carried on by him at Openshaw and Ardwick, in the county of Lancashire, which business was the building of railway carriages and waggons, and the making of turn-tables, points, crossings, and roofs, but it had never been extended to the construction of railways, or the supply of money for such construction.

By the agreement John Ashbury engaged to accept the office of managing director of the company for the space of one year at least. The company having been thus constituted, it appeared that on the 14th of March, 1864, the Belgian Government had granted to Messrs. Gillon & Baertson (subjects of Belgium) a provisional concession (which afterwards became absolute) for the construction of a line of railway in Belgium, from Antwerp to Tournai, which it was expected would be continued to Douai, in France, with the option of taking a further concession of such part of the line to Douai as would be within the Belgian frontier. The concessionaires had power to transfer the concession to a third party.

By the terms of the concession the sum of 20,000*l.* was to be deposited as caution money. Of this sum the concessionaires had, before the month of January, 1865, deposited 1,000*l.* They had

(1) Taken from the judgment of Archibald, J.

having accepted the functions of a director of the proposed Société Anonyme, undertook, when that society was finally constituted, to accept and sign the agreement in the name of the Ashbury Company, so as to make it binding. It may be as well to mention here that the Société Anonyme was afterwards, on the 27th of October, 1865, duly constituted, that Messrs. Riche Brothers declared that they accepted the contract for construction of the line, and that the contract B was approved and ratified on behalf of the society.

The contract C purported to be made between the Ashbury Company, represented by Mr. James Ashbury, their assistant managing director, on the one part, and Messrs. Riche Brothers on the other part. After reciting the concession and its transfer, and the agreement between Riche Brothers and Messrs. Gillon & Baertson, of the 28th of April, 1863, it proceeds to define the terms as between the Messrs. Riche Brothers and the Ashbury Company, on which the former are to construct the railway, and the manner in which payments are to be made by that company to the Société Anonyme, for the benefit of Messrs. Riche Brothers.

By this agreement the Ashbury Company undertake to supply the fixed and rolling stock of the said intended railway (thus liberating Messrs. Riche Brothers' firm from so doing), and to make payments at certain agreed rates to the Société Anonyme for the benefit of Messrs. Riche Brothers.

By contract D, purporting to be made between Riche Brothers and the Ashbury Company, the latter re-conveyed to Messrs. Riche Brothers the contract for the rolling stock, in consideration of deductions to be made from the amount to be paid by the Ashbury Company to the Société Anonyme.

The reasons for this modification of the arrangements are explained in paragraph 13 of the case (2).

On the signature of these contracts, Mr. James Ashbury paid over the 20,000*l.*, as stipulated, and a subscription was made, in the name of the Ashbury Company, of 60,000*l.* towards the required capital of the Société Anonyme.

Mr. James Ashbury, on his return, made, on the 8th of February, 1865, a written report to a board meeting of what had been done. The report was approved and confirmed by the board, and, together with a guarantee of a company called the Plant Company (to which it is not necessary to make any further reference), and the contract with Messrs. Riche Brothers, was ordered to be registered and preserved in the office of the company at Openshaw.

At this stage, the board of directors of the Ashbury Company, entertaining doubts as to their power to bind the company by such contracts, proposed to transfer the liability and advantage of these contracts to some other company existing or to be formed for the purpose; but before this scheme had made much, if any, progress, it was suspended or abandoned.

In the months of July, August, and September, 1865, the plaintiff made the necessary plans and surveys for constructing the line of railway, and Mr. McCandlish was appointed by the directors of the Ashbury Company chief engineer of the line, and was afterwards on the 4th of October, 1865, accredited by them to the plaintiff as the engineer with whom he might arrange all details, and by whom his plans were, if necessary, to be approved.

Early in October, some modification of the existing agreement being deemed necessary the board of directors of the Ashbury Company sent Sir Cusack Roney

(2) Par. 13. "The reason for the arrangement contained in D, as stated by the said Mr. James Ashbury to his directors, was that the Minister would not allow the proposed rolling stock for the time to enter Belgium free of duty, and that the proposed prices for such rolling stock would therefore not be such as would leave a profit to the defendants, and that he therefore proposed to Messrs. Riche Frères that they should manufacture their own stock, or sublet it in Belgium, and pay the defendants for the profit they would have had if the plant had been constructed at Openshaw. Ultimately the arrangement was that Messrs. Riche should provide the stock and take all responsibility thereon, and that the Ashbury Company should receive as compensation the sum of 20,000*l.* in shares at par, such shares, of course, bearing no interest during construction,"

d Mr. Tahourdin, their solicitor, over Brussels with authority from the ›ard to make final arrangements in ›lation to the contracts of the 30th of anuary, 1865; and on the 14th of Oc- ober, 1865, Sir Cusack Roney, in the ıame, and professing to act as the agent of the Ashbury Company, entered into the contracts referred to in the Special Case, as marked X, Y, and Z.

Contract X purports to be made between Messrs. Gillon & Baertson of the first part, the Ashbury Company of the second part, and Messrs. Riche Brothers of the third part. It has reference mainly to the stipulation in the former contract with regard to the option to take the concession from Tournai to Douai, which it modifies to some extent, as to the period during which the option of the defendants' company to accept or decline the concession is to be exercised. The material parts of it, with reference to the questions in this case, are, that it provides that the conventions of the contract of the 30th of January, 1865, as to the Antwerp and Tournai section of the line, are to be strictly maintained, except that the Ashbury Company are to appoint three instead of two commissioners of the Société Anonyme, as originally stipulated.

The contract Y was an additional or supplemental agreement to the contract B, modifying the quantities of work and the distribution of the cost of construction, in consequence of changes in the statutes of the Société Anonyme, required by the Belgian government.

The contract Z purports to be made between the Ashbury Company, represented by Sir Cusack Roney, on the one hand, and Messrs. Riche Brothers, on the other. After reciting the contracts of the 30th of January, 1865, and that it had been agreed that the capital of the Société Anonyme for the Antwerp and Tournai Railway, which was to be 32,760,000 francs, should be represented by 55,000 bonds, at 3 per cent. on a capital of 500 francs, reckoned at 250 francs, and by 38,020 shares of 500 francs each, and a wish to modify the agreement between the Ashbury Company and Riche Brothers, it is substituted as a final settlement of the rights and liabilities of the Ashbury Company and Messrs. Riche.

After articles in substance binding the Ashbury Company to complete the Société Anonyme, and binding Messrs. Riche Brothers to carry out the construction of the line, in accordance with the conditions already settled between them and the proposed Société Anonyme, it is declared that Messrs. Riche Brothers have accepted the contract only after having secured to themselves and obtained the co-operation of the Ashbury Company, who have bound themselves to supply them with the funds necessary for the carrying out of their undertaking, and the Ashbury Company bind themselves to pay into the funds of the Société Anonyme an amount in cash of 15,316,000 francs in exchange for the 55,000 bonds, taken at the rate of 250 francs each, part of the intended capital of the proposed Société Anonyme, and 3,132 shares taken at par, such payments to be effected gradually in the proportion of the payments that were to be made to Riche Brothers, and in such a manner that the latter should always receive from the Société Anonyme an amount of 15,316 francs, in cash upon a total certificate of 32,760 francs, and thus in the same ratio.

There are also provisions in the contract relating to the Douai section of the line in the event of the concession being claimed and accepted by the Ashbury Company, but it is not necessary to make any further reference to them.

Engagements somewhat similar to those which were entered into with reference to the Belgian concession had also been entered into by the directors of the Ashbury Company in regard to a concession, in Spain, of a line of railway called the Madrid, Placentia, and Malpartida Railway, upon which large advances had been made by the directors out of the funds of the Ashbury Company. In neither case was there any ultimate contract binding the Ashbury Company to supply any fixed or rolling stock, and in the case of the Belgian contracts, the substance of the arrangements entered into was that the Ashbury Company were to supply the funds for the construction of the line.

The plaintiff having, as already men-

tioned, made the necessary plans and surveys for constructing the line of railway, proceeded, after the 14th of October, 1865, to construct the line, and entered into several contracts with other persons for that purpose.

In respect of this work, pay-sheets were sent to the Société Anonyme, approved and countersigned by Mr. McCandlish, as engineer, and the proper proportion of each pay-sheet was paid in cash into the treasury of the Société Anonyme by the directors of the Ashbury Company in the name of the company.

In October, 1865, the board appear to have been advised that the agreements were *ultra vires* of the directors, and not binding on the company, and that the 26,000*l.* could not be recovered back; and thereupon a scheme for the transfer of the concession was revived by the directors, and a company was projected for the purpose of taking over the contracts, to be called the Antwerp, Tournai, and Douai Railway Contract Company, Limited.

The first information with reference to these Belgian contracts which appears to have been given to the shareholders generally of the Ashbury Company was at the third annual general meeting of the company on the 5th of December, 1865.

That meeting was convened by a circular of the 27th of November, 1865, in which the business to be transacted was stated to be, *inter alia*, "to declare a dividend payable out of the balance as shewn by the balance-sheet sent therewith."

The balance-sheet referred to was made up to the 30th of September, 1865, and on the credit side were the following items:—

"Advances on contracts—

	£	s.	d.
"Madras, Placentia, and Malpartida Railway . . .	41,338	11	10
Anvers, Douai, and Tournai Railway	27,191	14	8"

At this meeting it appeared that these Belgian and Spanish contracts were the subject of strong observations, and that the chairman gave the meeting to understand that the item in respect of the Belgian contract would not appear again in the accounts, it being then considered that it would be taken over by the Antwerp, &c., Contract Company (3).

A resolution was passed at this meeting in these terms, namely, "That the accounts now read be approved and adopted," and a dividend for the year was declared out of the balance.

On the 20th of December, 1866, an extraordinary general meeting of the Ashbury Company was held, at which a committee of shareholders was appointed "to enquire into the past proceedings and present position of the company, and the best means of conducting its business for the future, with power to take such legal advice as they might deem desirable, and report to an early meeting of the shareholders."

The committee proceeded with the enquiry referred to them, and prepared a report; and, at an extraordinary meeting of the shareholders, held on the 1st of May, 1867, the report was read, and ordered to be entered on the minutes of the company. The report gives the history of the Belgian contracts, and the various steps taken by the directors in regard to them, together with observations on the advances in respect of the enterprise appearing in the balance-sheet of the 30th of September, 1865; and states, in substance, that the committee had been advised that the contracts were *ultra vires*, and that the shareholders were not bound by anything that had subsequently passed, but that the directors were liable to replace the moneys of the company which had been misapplied on the impeached transactions. The report, however, in conclusion, recommends an endeavour to effect an amicable settlement with the directors, without having recourse to legal proceedings. Three of the shareholders were thereupon deputed by the meeting to confer with the directors, with the view of an agreement being arrived at on the matters in dispute.

On the 14th of May, 1867, the fifth annual meeting of the company was held.

(3) This appeared from the report of the Committee of Investigation referred to below, which was printed in the Appendix to the Special Case.

This meeting was convened by a circular to the shareholders stating, among other objects of the meeting, as follows—That it was convened "to receive, consider, and, if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting of the company held on the 1st of May, instant, to confer with the directors with the view to an agreement being arrived at on matters in dispute."

At this meeting a balance-sheet was presented, made up to the 30th of September, 1866, shewing, on the credit side, advances on the Spanish and Belgian contracts in precisely the same form as that appearing on the balance-sheet of the previous year. Mr. Hulse, one of the deputation appointed to confer with the directors with respect to these items, reported the result of a conference with the directors, and it was resolved that the following recommendation of the deputation be received and adopted, viz.—

"That having reference to the proceedings at the annual meeting of shareholders in the year 1865 in regard to the intention of the directors and other parties taking over the Antwerp, Tournai, and Douai Railway Concession Contract, and having reference also to the anticipated loss on the said contract, and also on the amount advanced by the Ashbury Company for the Madrid, Placentia, and Malpartida Railway Concession Contract, and the differences that have arisen in regard to the legality of these items of expenditure appearing in the Ashbury Company's accounts, it is for the interests of the company that the following arrangement should be accepted, and that the same be accepted accordingly, and that it be referred to the solicitors of the company to carry it out in such way as counsel shall advise.

"1st. Messrs. James Ashbury, B. Whitworth, M.P., F. A. Fynney, Alfred Pick, James Holden, Thomas Hodson, John Whitehead, jun., W. A. Cunningham, Thomas Vickers, the executor of John Ashbury and George Wood, by themselves or their nominees, hereinafter called the purchasers, to purchase from the Ashbury Company for the sum of *l.*, to be paid by four equal half-yearly instalments secured by promissory notes, without interest, any estate or interest which the company may have in the Antwerp, Tournai, and Douai Concession Contract, and the Madrid, Placentia, and Malpartida Concession Contract, on which the company may have paid, sums amounting together to the sum of *l.* All interest due by the Spanish Government on the Malpartida contract advance to belong to the Ashbury Company to this date.

"2ndly. The Ashbury Company to take any legal proceedings in enforcing the claims or defending any actions or otherwise in relation to the said businesses which may be required in the name of the Ashbury Company, but at the expense of the said purchasers who are to indemnify the Ashbury Company against all claims and liabilities which have arisen or may hereafter arise in connection with the said concession contracts or either of them, or which may be incurred in using the name of the company."

Subject to this resolution, the balance sheet and accounts for the year ending the 30th of September, 1866, were approved and adopted, an alteration being made in the balance-sheet by omitting the amount of the advance on the Spanish contracts, and changing the entry as to the advance on the Antwerp and Tournai contract into the following form, viz.—

"Advance on contracts, viz.:—

"Madrid, Placentia, and Malpartida Railway, and Anvers, Douai, and Tournai Railway, taken as per resolution of shareholders, May 14th, 1867.	£27,705 0 3."

It was resolved also that the shareholders who formed the deputation should superintend the completion of the proposed agreement.

On the 24th of December, 1867, the sixth annual meeting of the company was held.

This meeting was convened by a circular to the shareholders, stating that, among other things, the meeting was held to transact the following business, viz., "to consider and, if so determined,

to sanction a certain contract which has been entered into by the company with the directors thereof, in pursuance of a resolution passed at the last annual meeting of the company, held on the 14th of May, 1867."

At this meeting it seems tolerably clear that all the shareholders did not attend, but it must be presumed that the circular was sent to all. The deputation reported the terms of the agreement entered into with the directors, which was in the form of an indenture purporting to be made between the Ashbury Company, of the first part, and certain directors and shareholders of the company, therein described as the purchasers, of the second part, and is set out at p. 110 of the appendix to the Special Case (4).

(4) This indenture was made the 24th of December, 1867.

After reciting that the company had been engaged in negotiations and transactions connected with the Belgian and Spanish railways in question, and with the Antwerp, &c., Contract Company, in the course of which the company had made large advances, which appeared in the accounts submitted to the general meeting of the company as amounting, in 1865, to 68,530*l.* 6*s.* 6*d.*, but which had been reduced, in 1866, to 62,380*l.* 6*s.* 2*d.*; and that the company had been advised that all negotiations and transactions on its behalf or on its account, with respect to the said railways, were *ultra vires*, and that the company was not bound thereby, and that the company in fact disclaimed all liability and obligation in respect thereto, and had required the parties of the second part (being or representing the directors of the company who entered into such negotiations and transactions on the part of the company) to take upon themselves all the contracts and liabilities arising out of or connected with, or consequent upon, such negotiations and transactions, and to indemnify the company therefrom as thereinafter provided; and that with a view to the future satisfactory working of the affairs of the company, certain proposals, having for their object a settlement of all disputes and differences in relation to or arising out of the matters aforesaid, were made to a special meeting of the company, held on the 14th of May, 1867 (reciting the proposals and their adoption, and that it was referred to the solicitors of the company to carry them out in such way as counsel should advise); and that since the date of the meeting certain arrangements had been made between the company and the *purchasers*, under which 13,938*l.* 13*s.* 1½*d.* had been paid by the purchasers to the company in discharge and settlement of one half of the sum of 27,705*l.* 0*s.* 3*d.*, and of all claims for interest which either of the parties had upon the others in respect of the several monetary transactions arising out of the matters thereinbefore mentioned up to the 30th of September, 1867.

It was witnessed that, in pursuance of the resolution and arrangements, and in consideration of the agreement thereinafter entered into and the promissory notes to be given by the purchasers, the company agreed with the purchasers as follows—

1. That the company would, at the request and expense of the parties requiring the same, make, do, and execute all such assignments, acts, matters and things as the purchasers respectively or their counsel might reasonably require and advise for assigning to and vesting in the purchasers and their respective executors and administrators, in proportion to the amounts to be paid by them respectively upon the said promissory notes, all the rights, claims, estates, interest and benefit of every description which the company had or was supposed to have upon or in respect of or in relation to the said Spanish and Belgian railways respectively, or the concessions thereof respectively, or the fixed or rolling plant thereof respectively and the deposits, caution moneys and other sums and interest or dividends made or paid or accrued, or thereafter to accrue in relation thereto or connected therewith, and all contracts and securities for the same, and the benefit of all sub-contracts which had been made or expressed to be made in connection therewith with governments or companies or individuals.

2. That the purchasers should be considered as having been let into possession of the purchased property on the 30th of September, 1866.

By the two following clauses the purchasers agreed, on the execution of the indentures by the company, to make and deliver to the company their respective promissory notes for the respective sums set opposite to their names in the schedule, and (in the same proportion) to indemnify, and save harmless, the company and their property and effects from and against all the obligations of every description which had been entered into or undertaken by the company or any of its directors or agents in respect of and arising out of the contracts and premises agreed to be assigned, or upon the use of the company's name in pursuance of the following clauses—

6. That the company should, at the costs and risks of the purchasers, allow its name to be used as plaintiff or defendant, as the case might require, in or about any actions, suits or other proceedings which might be commenced or prosecuted in relation to the premises.

7. That nothing therein contained should be construed, deemed or taken to be an admission by the company that all or any of the negotiations and transactions thereinbefore mentioned were legally binding on the company, or to preclude

The resolution of the 14th of May, 1867, for the settlement of the differences between the directors and the company was

sanctioned and confirmed, and it was resolved that the agreement reported, which had been entered into in pursuance of that resolution, should be adopted and confirmed, and that the seal of the company should be affixed thereto.

The balance-sheet made up to the 30th of September, 1867, was also adopted with this modification, that the entry which stood previously, "Advances on contract, 25,783*l.* 7*s.* 4*d.*," was directed to stand thus on the credit side of the account—"Advances to be refunded, in accordance with a resolution passed at a meeting of shareholders on the 14th of May, 1867, 27,705*l.* 0*s.* 3*d.*" The seal of the company was accordingly affixed to the indenture, which was also duly executed by the other parties to it.

The Court was empowered to draw inferences of fact; and the question for decision was whether the plaintiff was entitled to recover from the defendants any damages in respect of the above matters. If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiff for such sum as shall be assessed by the arbitrator, subject to the directions which the Court should give as to the principles on which such damages are to be assessed, together with the costs of suit. If otherwise, for the defendant with costs.

In the Court below the case was argued (on the 3rd and 5th of June, 1872) by *Benjamin* (with him *C. Pollock*, *H. Giffard* and *W. G. Harrison*) argued for the plaintiff; and *Sir J. B. Karslake* (with him *Watkin Williams* and *Cohen*) for the defendants.

Cur. adv. vult.

The Court of Exchequer (on the 25th of November, 1872), gave the following judgments.

CHANNELL, B.—The question which we have to decide is, whether the incorporated partnership, sued under the name of the Ashbury Railway Carriage and Iron Company, limited, is bound by a contract entered into in its name with the plaintiff.

The question is one to be determined, in my opinion, by the application to the case of the appropriate principles of the law of agency.

In some of the earlier cases quoted in the argument, in which questions were discussed relating to contracts *ultra vires* of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities, that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity by their individual consent to contracts not authorised by the memorandum of association, or other like instrument, by which the constitution of the company is defined. The objection to such a contract is not that it is illegal, and therefore unenforceable, but simply that it is unauthorised by the body whom it purports to bind. If, therefore, the shareholders of the company knowingly hold out their directors as authorised to make, on their behalf, particular contracts, the company will be bound by those contracts, notwithstanding that they are not within the powers expressly conferred on the directors for binding the company. Persons dealing with such companies and their directors are, however, in this respect, in a different position from persons dealing with ordinary trading partnerships, that they are taken to know that the directors' powers are likely to be limited, and that they are bound to read the deed of settlement or articles of association limiting the directors' authority. They are not, however, bound to do more: see *The Royal British Bank* v. *Turquand* (5), *Totterdell* v. *Fareham Brick Company*

the company from maintaining and alleging that such negotiations and transactions were *ultra vires*, if they should be advised so to do, in any proceedings at law or in equity which might be taken, commenced or prosecuted against the company in respect of the said negotiations and transactions or any of them.

(5) 6 E. & B. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317.

(6) and other cases; and where an act may be brought within the powers of the directors by the compliance with certain formalities, they are entitled to assume that all such formalities have been complied with, and are not bound to enquire into the fact. There is one other point to be noticed, which I quite agree it is important should not be lost sight of, viz., that the shareholders are entitled to assume (unless they are informed to the contrary) that their directors are managing the company in accordance with their powers.

Now, to apply these principles to the case before us. The first question that arises is, whether the contract sued on was one within the actual authority of the directors, that is to say, whether it related to business authorised by the memorandum of association. Now, as to this, I am forced to come to the conclusion that it did not. The only words within which it can come are "the business of mechanical engineers and general contractors." In this expression I think the word "contractor" must be taken to have its popular sense of a man who contracts for the execution of engineering works or the like; and if I could see, looking at the whole of the contracts entered into by the directors of this company in reference to the Belgian railway, that the main object of the scheme was to contract for the construction of the railway or for the supply of its rolling stock, and that what may be called the financing agreements were subsidiary and incidental to the attainment of this main object, then I might be inclined to think that the whole of the scheme might come within the business of "general contractors." It is clear, however, that the company were to have nothing to do with the construction of any works for the supply of any rolling stock. They were merely to enter into a financial speculation, the present plaintiff (or his then firm) occupying the position which would be popularly described as that of "contractor" to the line. Even if the negotiations which took place ineffectually with reference to the defendants supplying the rolling stock had resulted in an arrangement for their doing so, it would rather seem that this contract would have been incidental to the main scheme of the financial speculation, rather than that the latter would have been incidental to the former. It is, I think, impossible to hold that the expression "general contractor" authorised any such contract whatever. I therefore arrive at the conclusion that the directors had no actual authority to bind the company by the contract sued on at the time when they entered into it. It follows also, from the principles already referred to, that the plaintiff ought to have known of this want of authority, and that if he did not know, he was, at all events at the time of entering into the contract, in no better position than if he had known in fact.

It is, however, argued that the articles of association contemplate the extension of the company's business by special resolution, and whether or not such a resolution had been passed was a matter into which the plaintiff was not bound to enquire, according to the doctrine of *The Royal British Bank* v. *Turquand* (5). I am, however, unable to adopt this argument, at all events to the full extent to which it was pressed upon us. The provision in the articles is that an extension of the company's business beyond the objects already specified shall take place only by a special resolution. A special resolution must be registered in the same place as the articles are registered. Therefore to a person searching at the registry, this provision rather amounts to notice that there has *not* been any extension of the company's business, than that there *has* been.

I do not think, then, that the plaintiff, at the time when this contract was entered into with him, and when he was supposed to know what the registered documents relating to the company would tell him as to the limitation of the directors' authority, was entitled to say that, as between himself and the defendants, the contract was binding upon the defendants. It may, however, have become so subsequently, by what afterwards took place; and in considering the effect of

(6) 35 Law J. Rep. (N.S.) 278; s. c. Law Rep. 1 C.P. 674.

ıe subsequent conduct of the defend- ,nt company and shareholders, it is, perhaps, of some importance to remember that the plaintiff must be taken to know that, according to the constitution of the company, means were provided for formally extending the business of the company so as to include the contract with him.

I now come to the question whether the conduct of the shareholders constituting the defendant company has not made the contract binding upon the company. This question turns upon the amount of knowledge which the shareholders had of the matter. If the shareholders knew that the directors had entered into this contract on behalf of the company, and that the directors and the plaintiff were continuing to act upon the contract as though it were binding upon the company, then it was, in my judgment, necessary for them to repudiate the contract at once if they meant to do so at all, and to communicate this repudiation to the plaintiff. If they did not do so, but knowingly permitted their directors, and the engineer appointed by them, to deal with the plaintiff as their authorised agents, they in effect held out the directors and the engineer as authorised by them, and have thereby made themselves liable. It may well be that a person who learns that a contract has been made on his behalf by an authorised agent with a third party is, as my brother Bramwell says, not under any legal duty to inform the third party of the want of authority. But this can only be so where the unauthorised agent has ceased his unauthorised acting. If he continues to act as agent to the knowledge of the supposed principal, and without any repudiation by him, the principal must be taken, in my opinion, to have accredited and held out the agent as authorised to represent him, and then the acts of the agent done in affirmance or part performance of the contract after such holding out must be taken to be the acts of the principal, so that he thereby becomes bound to the third party on the contract, as if he had himself acted on it. In such a case the party so becoming liable might not lose his right to complain of his agent having exceeded his actual authority. He would merely be bound to the third party by means of his having permitted the agent so to act with ostensible authority.

Now let us see what took place in the present case. It seems that the directors, after entering into the contracts in question, were advised that the company was not bound by them, owing to their being *ultra vires*, but that the 26,000*l.* paid upon the contracts could not be recovered back. In this view of the case, a simple repudiation of the contracts would have involved a loss of 26,000*l.* Doubtless for the purpose of avoiding this loss, a scheme was set on foot for transferring the contracts to a new company to be formed for the purpose. Prospectuses of this proposed company, with an accompanying circular letter, were circulated by the directors amongst the shareholders of the defendant company. Then a balance sheet was circulated shewing advances to have been made on account of these contracts. I quite agree that this balance sheet contains nothing which necessarily disclosed to the shareholders that the advances had been made in respect of *ultra vires* contracts, and if this balance sheet were the only evidence of knowledge on the part of the shareholders, would be difficult to say that knowled could be inferred.

As regards the shareholders who tended the meeting of the 5th of De ber, 1865, however, it is not all. It s that at that meeting the Belgian tracts were the subject of strong vations, and that the directors, under the impression that the new werp, &c., Company would take o contracts, led the meeting to belie the item would not appear in counts again; that the meeting w fied with this explanation, and dividend upon the assumption 26,000*l.* was an available asset nominal value. That dividend wards received by all the sh Now remembering that these come from documents of the company, and that no expl been offered by them as to th it is difficult to avoid drawi ence that what passed at

was this: that objection was taken to these contracts on the ground of their not being legitimately within the scope of the company's business; that this fact was therefore then communicated to all the shareholders present, even if they did not know it before; that the scheme of forming a new company (of which the shareholders had already been advised by circular) for the very object of taking over these contracts, was also known; and that the shareholders present sanctioned the course proposed by the directors, of endeavouring to get the new company to take the contracts, and in the meanwhile of continuing to act upon them. Now it may well be, as suggested by the counsel who advised the committee of investigation, that the course taken at this meeting would not have the effect of absolving the directors from liability for misappropriating the moneys of the company. I think, however, that so far as the shareholders present at that meeting are concerned, their sanction to the directors to transfer the contracts clearly amounts to an adoption of them as between themselves and the plaintiff. Transferring the contracts to others presupposes an election to take them in the first instance themselves, and not to treat them as wholly void or invalid. The shareholders were not entitled to try their chance of getting a favourable price for these contracts, and then, after having failed to do so, to turn round and repudiate them as wholly invalid.

If, therefore, the shareholders present at this meeting were authorised to bind the company by adopting these contracts, I should have no doubt but they had done so. It is, however, clear that they could not do so. The meeting was only authorised to bind the absent shareholders in matters relating to the business of the company, and in its capacity of a general meeting of the company could no more bind the absent shareholders by undertaking new business than the directors could. In order to bind the defendant company it is necessary that every member of the company should, with knowledge of the excess of authority on the part of the directors, have so conducted himself as to entitle the plaintiff to assume that he assented to what was being done.

If, however, any member, knowing what was going on, chose to absent himself from the meeting, and leave it to the more active members to decide what was the best course to take, he is, in my judgment, as much bound by their action or inaction as if he had attended the meeting himself. Neither is it, in my judgment, incumbent on the plaintiff to shew by particular evidence knowledge on the part of every individual shareholder. If he shews general knowledge amongst the shareholders, he makes a *prima facie* case, and throws upon the defendants the burden of shewing that there were any shareholders who did not know. In *The Phosphate of Lime Company* v. *Green* (7), all the Judges noticed the fact that no shareholder was called to say that he did not know. I agree with their remarks as to the importance of that, and think they are applicable to the present case. Here no explanation whatever is given on the part of the defendants. We are told there are few shareholders in the company, and we are not even told that there were any shareholders in the company on the 5th of December, 1865, who did not attend the meeting. If it were necessary I should of course draw the inference that there were other shareholders; but the matter being left entirely to inference, I arrive at the conclusion, in the absence of any evidence to the contrary on the part of the defendants, that the shareholders generally were informed of all that the meeting was informed of. The statement as to the prospectus and circular letter relating to the Antwerp Company seems to me important. It is true that the gentlemen advising the company did not think that these communications so fully disclosed the state of affairs, especially as regards the personal liability of the directors, as to make the conduct of the meeting amount to an absolution of the conduct of the directors. Neither do I think it did. The view I take of all the facts is this: that the shareholders generally were aware that contracts had been entered into not within the scope of the com-

(7) Law Rep. 7 C.P. 43.

pany's business, and that the directors proposed to get out of the difficulty, not by at once repudiating the contracts and informing the parties to them that they were void, but by continuing to act upon them as valid until they could transfer them to another company, which they proposed to do as soon as possible; that the shareholders were content to look to the directors for their indemnification in case of loss, leaving them to take what they considered the best course of getting out of the difficulty.

By this course of conduct the shareholders, in my opinion, permitted the directors to hold themselves out to the plaintiff as authorised to bind the company, and thereby they conferred upon the directors what is sometimes called an implied authority, but more accurately an ostensible authority, to bind the company. The directors did undoubtedly so act upon the contracts as to affirm them and make them binding if their acts could do so; and thereby, as it seems to me, the company became bound.

It may be said that the principle of ostensible authority cannot apply, because the plaintiff must be taken to know the limitation of the directors' actual authority. That reasoning, however, is not, I think, sound; because, when the proposition is once established, as it clearly is by the cases, that an *ultra vires* contract may be adopted and made binding on a company in its corporate capacity by the individual assent of all the members, it follows that the plaintiff must be taken to know that the limit of the directors' authority may be removed by such assent, and a more extended authority be conferred upon them. In cases, therefore, where the individual members of a company assent to the directors assuming a larger authority than that conferred upon them by the original constitution of the company, a person dealing with the directors is entitled to say that the company is bound by acts done within the larger authority. I am therefore of opinion that our judgment should be for the plaintiff.

Bramwell, B.—I am very clearly of opinion that the contracts of the 30th of January, 1865, and of the 14th of October, 1865, were *ultra vires* of the defendant company's directors. The substance of these contracts was this: Gillon and Baertsoen had obtained the right to make a railway in Belgium. This right the defendants' directors supposed to be valuable to its owners, that is to say, the line could be constructed for a certain sum, and a Société Anonyme could be constituted, with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the defendant company, and, to do so, purchased the concession. This was their main object. But the plaintiff held a contract with the concessionaires to construct the line, and to accomplish the directors' object it was necessary or desirable, or they thought it was, that they should agree with the plaintiff that the defendants should constitute a Société Anonyme; and as the plaintiff went on with the work, the defendants should pay into the hands of the société proportionate funds. (The further contract entered into in the defendants' name, called D, is of no importance to this case.) The directors accordingly entered into two contracts in the defendants' name; one with the concessionaires to purchase the concession, the other with the plaintiff to furnish the Société Anonyme with funds, the latter contract being auxiliary to the former. They paid the concessionaires 26,000*l.*, part of the price. Now whatever may be the meaning of "carrying on the business of mechanical engineers and general contractors," to my mind it clearly does not include the making of either of these contracts. It could only be held to do so by holding that the words "general contractors" authorised generally the making of any contract, and this they certainly do not.

Then it was said, that by clause 4 of the articles of association an extension of the defendants' business may take place in pursuance of a special resolution; that, therefore, the directors had a conditional power to enter into any contract; and that the plaintiff was not bound to enquire into the internal proceedings of the company, and that, if necessary, it was to be assumed, or presumed, that such special

resolution had been passed. Ably as this was put, I am of opinion it is untenable. The special resolution is not an internal proceeding. It must be registered equally with the memorandum of association. It, in effect, becomes part of it, and must as much be noticed by persons dealing with the company. If none is registered, that is notice to every one that none exists, if indeed there is none. There is no more a presumption to be made that it exists than it is to be presumed that articles of association exist different to those registered. So far I am glad to think I agree with my brother Channell.

I think, therefore, the question is reduced to this, was the contract with the plaintiff ratified? If it was, it was between the 5th of December, 1865, and May, 1866. On this the facts are as follows: In November, 1865, a balance sheet was sent to the shareholders. That shewed to all who received it that there had been advances on contracts, Madrid, Placentia and Malpartida Railway, 41,338*l.* 11*s.* 10*d.*; Anvers, Douai and Tournai Railway, 27,191*l.* 14*s.* 8*d.*; those sums were treated as assets of the company. The 27,191*l.* 14*s.* 8*d.* was the 26,000*l.* paid to the concessionaires and interest. In truth, that sum was not an asset; it never was to come back to the defendants. The true asset was the concession purchased; its value should have appeared on that side, and the obligations on account of it on the other. I am imputing no fraud; it might be a convenient way of stating the account. But it certainly did not disclose the truth, and though it might put a cautious shareholder on enquiry, it certainly did not shew an *ultra vires* contract; for there might have been a contract *intra vires* on which advances to that amount might have been made. But at the meeting, we must take it, the truth appeared. Possibly only so much as was necessary to explain those items, namely, that the concessionaires had been paid 26,000*l.*, whatever may be the explanation of the other item. But I think, and as a juryman find in favour of the plaintiff, that the meeting was told not only of that, but of the contract with the plaintiff. Then what did the meeting? They objected to what had been done. They objected to the contract of purchase. They objected to their money being so laid out, and we must take it they objected to further outlay, namely, to further payments to the concessionaires, and, if they knew of it, to further, indeed to any, payments to the Société Anonyme, for I believe none had been made under the contract with the plaintiff.

But the directors seemed to think that the Antwerp, &c., Contract Company would take over the Belgian contract; and the chairman gave the meeting to expect that it would not again appear in the account, that is to say, that instead of that item appearing as an asset, or instead of its appearing that the company were owners of the concession as an asset, and liable on the purchase of it *per contra*, the transaction would disappear from the accounts, and either the accounts would shew 27,191*l.* 14*s.* 8*d.* more cash, or some other asset purchased therewith. And so the meeting did nothing, but approved and adopted the accounts. Now this approving and adopting the accounts is only a recognition that they are accurately stated, and on correct principles; for example, that the figures are right, and that it is right to take the debts owing to a certain amount, making no, or no greater deduction than made, if any, for bad debts. But it is no approval of the transaction shewn in the accounts.

Now when the facts were disclosed at the meeting, the shareholders had a right to object to the contract purchasing the concession, and to the defendants being bound by it, to require that no further outlay should take place on it, and that the directors should at once replace the 27,191*l.* 14*s.* 8*d.* The shareholders did not insist that the directors should replace the 27,191*l.* 14*s.* 8*d.* at once, they let that stand over, reserving their claim on the directors. This is manifest, for afterwards, when called on, the directors admitted their liability, and never pretended that their accounts had been approved or ratified at that meeting. But though the shareholders did not insist on the immediate replacement of the 27,191*l.* 14*s.* 8*d.*, it is obvious, as I have said, that they did object to the contract purchasing the concession, and to the defendants being bound by it, and

did object to further outlay on it. For if they did not do so, if they in any way ratified the contract, how could they afterwards call on the directors to replace the 27,191*l.* 14*s.* 8*d.*? Yet what took place on this occasion, which was a refusal to recognise the purchase of the concession, is nevertheless said to be a ratification of it, and of the contract with the plaintiff now sued on; for there is no other ratification. The stipulated moneys indeed, until May, were paid into the Société Anonyme, but by the directors, not by the company. This is in effect stated, and appears in this way, that no such payments appear in the defendants' accounts. Then McCandlish, the engineer, continued to act; but he was appointed by the directors, and should have been removed by them. So, also, the secretary wrote, declining, on behalf of the company, to purchase the Douai concession if obtained; no doubt speaking as though the bargain was binding; but he also was acting by order of the directors and not of the company. In short, what was done after the meeting of the 5th of December was done by the directors, not by, nor by the authority of, the defendants, the company, or the shareholders, and if done in the company's name was as much *ultra vires* as the original contract.

It occurred to me that there might be a duty in the shareholders to warn the parties to the contracts they repudiated that they did so repudiate, and that their not doing so was a standing by which estopped them. But that is not so. It might be safe, prudent and benevolent to do so, but it cannot be a legal duty. If A. and B. are partners as hatters, and A. buys wine as for the firm, deliverable at a future time, and pays partly on account out of the partnership funds, B., on discovering it, is entitled to require the money to be replaced, and that no further partnership funds shall be applied in that way; and he would do well to inform the seller of the wine. But he is not bound to do so any more than though he had never heard of A. before A. pledged their joint names. A. is bound at once to tell the seller of B.'s repudiation of the contract, and if he does not, commits a further fraud on him, as did the directors here if they continued to represent to the plaintiff that they had authority to make these contracts. I cannot see in these facts any holding out or permitting the belief in the existence of a state of things, precluding them from denying they are parties to this contract. The utmost they authorised was a transfer to a purchaser of the concession. No payment to the plaintiff was authorised by or in the name of the company.

But it is argued in the clear and forcible judgment of my brother Channell, that the shareholders, by permitting the directors to act as they would have to act in transferring the concession to the Antwerp Company, allowed the directors to hold out the defendant company as owners of the concession. But supposing that to be so, a person is only bound by a holding out where the person to whom that holding out has been made has acted on the supposed state of things so held out. But in this case nothing would be held out till the transfer of the concession took place, and at that moment the defendants would hold out, perhaps that they had been, but at that moment ceased to be, owners of the concession. But then on this the plaintiff never could and never did act. Suppose that the shareholders had passed a resolution that when the directors found a purchaser for the concession, the defendant company would execute a conveyance of it, how would that be any holding out, or the authorising of any holding out, to the plaintiff or any one else of anything contrary to the true state of facts? Yet what took place at the meeting of shareholders is not more than this, nor so much. Further, there is no evidence of the plaintiff acting upon any such supposed holding out.

But suppose there was a ratification of the contract for the purchase of the concession, either actually, or by holding out, or authorising the holding out, that the company were its owners; and suppose the contract with the plaintiff was known to the shareholders at the meeting of the 5th of December, what is there to shew a ratification of the contract with the plaintiff to finance or pay money to the Société Anonyme? Absolutely nothing. It does not follow as a consequence of ratifying the contract with the concessionaires.

The benefit of the purchase might have been obtained, though the contract with the plaintiff was repudiated. For if the public had taken to the shares and paid up the appointed capital, the Société Anonyme could have paid the plaintiff, and the line would have been made, and so the profit of the purchase of the concession obtained. On these considerations there seems to me no ratification by the shareholders at that meeting followed by the subsequent matters.

But assuming that the shareholders there, as far as in them lay ratified the contract, how are the other shareholders bound? To bind the company all the shareholders must be bound; all must ratify. If A. and B. are partners, B.'s ratification is necessary to a contract *ultra vires* of A.; and would be if the partnership consisted of A. and B. and fifty others, and the other fifty ratified, but B. refused.—See per Lord Cranworth in *Spackman* v. *Evans* (8). What evidence is there here that the shareholders not present at the meeting ratified the contract with the plaintiff? To my mind, none. I quite agree with the authorities cited. I should be bound by them if I did not; but I do. Compare, however, this case with the words of my late brother Willes in the *Phosphate of Lime Company* v. *Green* (7). That was indeed a case in which the only question was, was there evidence to support a verdict? But he laid down a rule by which I am content to be governed. He said—"The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition; in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances." I agree. Can it be said here that the shareholders have ratified the contracts, including that with the plaintiff, with full knowledge of the character of the act to be adopted? Assume the shareholders at the meeting of the 5th of December knew of the contract with the plaintiff. Assume they ratified it. How is the full or any knowledge of the absent shareholders shewn? It is clear there were other shareholders than those present. How does any ratification by them appear? Assuming the balance-sheets were calculated to put them upon enquiry, which would have led to knowledge, how does it appear there were such enquiries? If I am to find this as a fact I refuse to do so, as I do not believe it. No one really believes it. If there was not a ratification and adoption with such full knowledge of the act to be adopted, where is the evidence of the adoption, "with intention to adopt it at all events and under whatever circumstances," either by the shareholders at large, or even by those at the meeting? To my mind there is neither evidence of any such adoption or of any such intention. As to the facts of that case, Mr. Justice Willes' review of the facts from the above sentence to the end of the paragraph at p. 59 should be read. It seems that the transaction objected to was nearly four years old when objected to, and that for three years the shareholders had been receiving dividends on the footing of it. He says, and I agree, it would be a waste of time to refer to authorities to shew that one who chooses to adopt the benefit of a transaction ought to be bound by it. I rely also on the other judgments in that case. My brothers Keating and Brett both refer to dividends having been received on the footing of the transaction. So, also, I rely on the opinion of Lord Cairns, so felicitously expressed in *Evans* v. *Smallcombe* (9). He says—"My Lords, in my opinion lapse of time alone certainly would not make valid that which at the beginning was invalid; and in this case if the defence of Mr. Smallcombe were to rest merely upon the lapse of time, I apprehend that defence would fail. But your Lordships have to consider not merely the question of lapse of time; you have to consider what was the knowledge possessed by the company at large, that is to say, by the shareholders

(8) 37 Law J. Rep. (N.S.) Chanc. 752; s. c. Law Rep. 3 H.L. 191.

(9) 37 Law J. Rep. (N.S.) Chanc. 793, 795, 796; s. c. Law Rep. 3 H.L. 253.

in the company at large, of the Chippenham arrangement, and what was the knowledge possessed by the company of what was being done under the Chippenham arrangement." And afterwards, at p. 256—"My Lords, I only desire to add one word with regard to a phrase which I think, in matters of this kind, is sometimes somewhat misapplied, namely, the phrase 'acquiescence.' If by 'acquiescence' is meant a course of conduct which amounts to active and intelligent consent, I think it very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. But what I think is the real question to be looked at in any case of this kind is this: had the shareholders notice of the way in which the affairs of the company were being conducted, and its property was being managed, and of the rights and interests which were being created with regard to the stock of the company? If they had that notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given, although it might well be that any remedy to which they would originally have been entitled against the executive of the company for any breach of duty on their part might be unaffected even by lapse of time." Had the shareholders in this company notice of the way in which its affairs were being conducted? Were they content not to oppose those acts which they knew were every day being done?" So Lord Cranworth, at p. 258—"I think it was obvious from the balance-sheets, and so that the absent shareholders must have known that the directors had gone on acting on the assumption that they were at liberty to allow shareholders to retire on the terms indicated in the circular of the 2nd of November, 1848, even after the time originally contemplated had been suffered to pass."

As I said before, if, to decide for the plaintiff, I am to find a ratification, either of the contract for the concession or of that with the plaintiff, and either by the shareholders at the meeting or by the whole body, I cannot so decide. I am satisfied no such thing was intended, and I see no reason for holding there has been any negligence, standing by, acquiescence or quiescence in the shareholders to bind them. As to the argument that the non-attending shareholders make those who attend their agents to consent and ratify, I cannot agree with it. I can see no duty in the absent shareholders to attend; no fault to find with their absence. There is some ground for such a contention where the *ultra vires* objection appears on the accounts and reports, but none, as it seems to me, where it does not so appear.

I cannot help saying that though this particular defence may be unbecoming, if the directors are the real defendants, it is one of a character which should be entertained without prejudice. If A. and B. are partners, and A. enters into a contract in their name without authority to bind B., I cannot see why B. may not in all honour and honesty object to be bound, though his objection may enure for the benefit of A. One or two innocent persons have been injured by A.; why should the partner bear the loss? Suppose they were not partners at all, the case is the same in principle. And so is the case of a joint-stock company, where the shareholders and the Legislature do their best to restrict the powers of the directors, yet where it is always urged that it is dishonest of them not to acquiesce in any excess of authority. I concur in the opinion of Lord Cranworth in *Houldsworth* v. *Evans* (10), who says—"That it is a most essential proposition, to be rigidly enforced, that in these joint-stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, unless in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do." And as to this particular case, it is quite

(10) 37 Law J. Rep. (N.S.) Chanc. 800, 807 s. c. Law Rep. 3 H.L. 276.

possible that the directors did not know their want of authority, and that the plaintiff, though a foreigner, knew as much or as little about it as the directors did, and that the latter are only seeking to avoid bearing the whole loss of a common mistake. In my opinion the defendants are entitled to judgment.

MARTIN, B.—The plaintiff is the surviving partner of a firm of railway contractors at Brussels. The defendants are the Ashbury Railway Carriage and Iron Company (Limited), incorporated under the Companies Act, 1872. The action is to recover damages for breach of a contract, dated the 30th of January, 1865, supplemented by another contract, dated the 14th of October, 1865, and the only question to be decided by us is, whether the company are liable to be sued upon these contracts.

The circumstances are these: In March, 1864, the Belgian government had granted to Messrs. Gillon, of Brussels, a concession for making a railway from Antwerp to Tournai, which was expected to be continued to Douai, in France. 4,000*l.* was deposited in part-deposit of caution-money, and 16,000*l.* more was to be deposited upon the concession being made absolute, which was done on the 3rd of February, 1865. In January, 1865, Mr. James Ashbury, the assistant managing director of the defendants, was sent by the directors to Brussels to carry out a negotiation, as the agent of the defendants, with respect to the concession, and was provided by the directors with 26,000*l.* for the purpose. The result was that he purchased the concession from Messrs. Gillon for 26,000*l.*, and entered into the contract first above-mentioned with the plaintiff's firm, who had previously made a contract with Messrs. Gillon, as sub-contractors, to make the railway. In order to carry out the transaction four contracts were entered into by Mr. James Ashbury, all dated the 30th of January, 1865, but it does not seem to me necessary to encumber the judgment with entering into their minute details, as they appear to have been in part made in order to comply with the law of Belgium; and it is sufficient to state that the defendants were declared to be purchasers and assignees of the concession, and, by the contract of the 30th of January with the plaintiff's firm (who undertook to make the line), the defendants contracted to provide them with the necessary cash for the carrying out of the undertaking.

In July, August and September, 1865, the plaintiff's firm made the necessary plans and surveys for constructing the line, and on the 14th of October, 1865, Mr. McCandlish was accredited by the directors to the plaintiff's firm as the engineer with whom they were to arrange all details, and by whom the plans were to be approved. In October, 1865, the directors sent over Sir Cusack Roney and Mr. Tahourdin, their solicitor, to Brussels to make final arrangements in relation to the contracts, and Sir Cusack Roney, being duly authorised by the directors to act as the agent of the defendants, upon the 14th of October entered into three supplemental contracts. It also seems to me not necessary to refer more particularly to these contracts, and that it is sufficient to state that by agreement with the plaintiff's firm the defendants were to pay into a company called the Société Anonyme (which company by the law of Belgium was necessary to carry out the transaction) 15,000,000 francs in such manner that the plaintiff's firm should always receive from the Société Anonyme an amount of 15,316 francs in cash upon a certificate of the engineer that 32,760 francs were earned, and so on in the same ratio. The plaintiff's firm proceeded to construct the line, and entered into several contracts with other persons for the purpose. They sent to the Société Anonyme pay-sheets approved and countersigned by Mr. McCandlish, and the proper proportion of each pay-sheet was paid in cash to the Société Anonyme by the directors in the names of the defendants, in accordance with the provisions of the contracts, and was by them paid to the plaintiff's firm. This continued until the month of May, 1866, when the directors gave notice to the plaintiff that they repudiated further performance of the contracts on the ground that they were *ultra vires*. In consequence this action was brought.

By the memorandum and articles of association the company was established "to make and sell, or lease on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines, minerals, land and buildings; to purchase and sell, as merchants, timber, coal, metals, and other material, and to buy and sell any such material on commission or as agents." And by article 4 of the articles of association "an extension of the company's business beyond or for any other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." It was argued on behalf of the defendants that the purchase of the concession of the Antwerp, Tournai and Douai Railway was not an object within the scope of the memorandum of association, and that there was no special resolution authorising it, and that, if this were so, the contract with the plaintiff's firm did not bind the defendants. The contrary was contended for on behalf of the plaintiff; but with the view I take of the case it is not necessary to give an opinion upon this point; for, assuming the contracts not to have been binding upon the defendants *ab initio*, I think they have ratified and are bound by them.

The authorities hereafter mentioned, both at law and in equity, establish that the shareholders in a joint-stock company may ratify a contract made by the directors, although such contract was *ultra vires*, or beyond the authority of the directors to make; and in my opinion, if the evidence shews that in December, 1865, the company, by which I mean the body of shareholders other than the directors, had notice of these contracts, and that the plaintiff's firm were actually engaged in making the railway, and expending their labour and capital upon it, sending in certificates from week to week, and receiving payment of half the amount of their certified debt; and the company for nearly five months, *i.e.* from December to May (during all which time the work was going on), forbore from giving notice to the plaintiff's firm that they would not take to the contracts, but stood by with the knowledge that the plaintiff's firm were acting under the belief that they were the contracting parties, in my opinion the company are bound and are liable to be sued upon the contracts.

The law upon the subject is clear and well established, both in Courts of law and equity. There is no older rule of law than that if a contract be made on behalf of a man who has given no authority to make it, but who afterwards adopts and ratifies it, he is bound by it. The rule is a maxim to be found in Co. Litt.—"Omnis ratihabitio retrotrahitur, et mandato equiparatur." Co. Litt. 207 a. This rule has been applied to joint-stock companies. It was agreed to be the law in *Spackman* v. *Evans* (8), and although the majority of their Lordships were then of opinion that a ratification was not proved in point of fact, all concurred as to the law. Lord St. Leonards and Lord Romilly differed from the majority, and Lord St. Leonards said that in his opinion it was enough to shew that the shareholders had the means of knowledge, and that if means of knowledge existed, notice ought to be imputed. Lord Cairns said that the question was, had the shareholders notice of the way in which the affairs of the company were being conducted and its property managed, and of the rights and interests which were being created with regard to the stock of the company? If they had that notice, and did not oppose these acts, they were bound. There are other cases in Equity to the same effect. In the case of *The Phosphate of Lime Company* v. *Green* (7) the same principle was upheld. Mr. Justice Willes fully adopted it. Mr. Justice Brett, in reference to the objection that all the shareholders were not proved to be parties to the alleged ratification, said at p. 63—"It is impossible to prove that every shareholder had notice, or such a knowledge of the facts as amounts to notice. It is sufficient to shew that facts were made known to the shareholders, the effect of which they might or ought to have inquired into, and to which the

ought to have objected at the time, unless they intended to adopt the transaction."

This is in my opinion a sound exposition of the law, and the question is, whether on the 5th of December, 1865, the shareholders of the company (other than the directors) had not notice of the contracts with the plaintiff's firm, and whether the shareholders not present, but who might and perhaps ought to have been present, must not have imputed to them such notice, and whether, by abstaining from giving any notice to the plaintiff, or his firm, that they objected to the contracts, for so long a period as five months, they having knowledge, or means of knowledge, that the plaintiff, or his firm, were during this period actually performing their part of the contract by making the line under the superintendence of Mr. McCandlish, they are not estopped from denying their liability.

The question is one much more of fact for a jury than of law; and what we have to decide is, what would be the right verdict upon a right direction? The material facts are these—The contract of the 30th of January, 1865, is made "between the limited liability company, the Ashbury Railway Carriage and Iron Company, of Manchester, represented by Mr. James Ashbury, their assistant managing director, of the one part, and Messrs. Riche Brothers, contractors of public works, residing at Brussels, of the other part."

The contract of the 14th of October is made "between the Ashbury Railway Carriage and Iron Company (Limited), having their seat at Manchester, represented here (Brussels) by Sir C. P. Roney, on the one hand, and Messrs. Riche Brothers, contractors of public works, resident at Brussels, on the other hand." The contracts are therefore in express words made by the company, the defendants.

The next fact is, that the annual general meeting of the company was held on the 5th of December, 1865, and on the 27th of November, a notice of it was sent to all the shareholders, in which was contained the following clause: "The meeting will also be required to declare a dividend payable out of the balance as shewn in the balance-sheet sent herewith." The balance-sheet on the credit side, headed "Property and Assets," contains the following, amongst other items: "Advances on contracts, Madrid, Placentia and Malpartida Railway, 41,338*l.* 11*s.* 10*d.*; Anvers, Douai and Tournai Railway, 27,191*l.* 14*s.* 8*d.*" The sum of 27,191*l.* 14*s.* 8*d.* is the 26,000*l.* with which Mr. James Ashbury was furnished to buy, and with which he bought, the concession from Messrs. Gillon, and interest upon it. At this general meeting a report of the directors was read, recommending a dividend equal to near 14*l.* per cent. per annum, and the secretary read the balance-sheet, which is stated to be and is certified by David Chadwick, the auditor. Whereupon it was moved and seconded, and resolved unanimously "that the report and accounts now read be approved and adopted."

Now, assuming that this was the only evidence in the case, what would it prove? It would prove that the body of shareholders were made acquainted, on the 27th of November, with the fact that a sum of money had been advanced on a contract in respect of the Anvers, Tournai and Douai Railway, amounting to many thousand pounds; and that on the 5th of December, at a general meeting, they had approved and adopted the account which contained and included it (they having had notice of it for upwards of a week before), and voted a dividend of 14*l.* per cent. to themselves upon the footing of the general account. Now, if they approved and adopted the payment of 26,000*l.* to Messrs. Gillon, being the purchase-money of the concession, they of necessity must have approved of and adopted the purchase; and if they did so, they must, as it seems to me, also have approved and adopted the contract with the plaintiff's firm, which was part and parcel of the same transaction.

It is not necessary to allude to what further inferences might be reasonably drawn from the resolution of the general meeting of the 5th of December, 1865, as much light is thrown upon the matter by what occurred consequent upon two extraordinary meetings of the company, one held upon the 20th of December, 1866, and another upon the 1st of May, 1867. At the meeting of the

20th of December, 1866, a committee was appointed to enquire into the proceedings of the company, and to report; and at the meeting of the 1st of May, 1867, the committee made their report. From this it appears that, so early as February, 1865, Mr. James Ashbury made a written report to the directors of the Belgian contracts, and "that the original contract with the plaintiff's firm was ordered to be registered and preserved at the office of the company." It also appears from the report that the Belgian contract was made the subject of strong observations at the meeting of December, 1865, and that, in consequence of what the chairman said, the meeting was given reason to expect the item of 27,191*l.* 14*s.* 8*d.* (the Antwerp and Tournai item) would not appear in the account again. From this evidence I draw the conclusion, first, that the shareholders knew of the purchase of the concession from Messrs. Gillon; secondly, that they knew of the contract with the plaintiff's firm which was registered at the office; and, thirdly, that they knew of Mr. McCandlish having been sent over to Belgium, and that the plaintiff's firm were actually engaged and occupied in the making of the line; and I am as satisfied as I can be of anything, that a jury would come to the same conclusion from the same evidence. Suppose the plaintiff to have brought an action for work and labour done during the period between the 5th of December, 1865, and May, 1866, during which time the defendants knew that the plaintiff was under the belief that he was doing the work upon their credit, but during which time they abstained from communicating to him that they dissented from the contract, in my opinion the case would be what is called an undefended cause. In more than one of the cases before cited, much stress was laid upon the circumstance that no shareholder was called to prove that he did not know of the disputed contract. In the present case there are not very many shareholders, and not one was called to prove that he did not know all that occurred at the general meeting on the 5th of December, 1865. I have only to add that if I were on a jury, upon the evidence in this case, I would find a verdict for the plaintiff, upon the ground that it was the duty of a shareholder who, on the 5th of December, 1865, desired to dissent from and put an end to the contract with the plaintiff, to communicate such dissent to him, and stop the expenditure of his labour and capital upon the making of the line.

The directors and the other shareholders continued for some time to dispute with each other over the Belgian and Spanish contracts, and the result was, that by a deed of the 24th of December, 1867, the matter was arranged, the directors becoming the purchasers of the interest of the company in the two lines, the Spanish and the Belgian, and agreeing to pay 27,705*l.* 0*s.* 3*d.* for the estate and interest which the defendants had in them. There is a covenant in this deed that the directors shall indemnify the defendants against the obligations, of every description, which had been entered into by the Ashbury Company, or any of its directors or agents, in respect of these contracts, so that in the event of the defendants being compelled to pay damages, they will be entitled to be recouped by the directors.

That the directors would be liable upon the contracts sued on there can be no doubt; and it does seem extraordinary, they being solvent and affluent men, that they should not have taken upon themselves the defence to this action upon its merits, if there be any, and prevented the appearance at least of what seems to me an unjust repudiation.

Judgment for the plaintiff.

In the Court of Error (on the 21st, 22nd, 23rd, and 25th of June),

Watkin Williams (with him *Sir J. B. Karslake* and *Cohen*) argued for the defendants.—The contracts sued upon were altogether *ultra vires.*

First, the directors had no authority to make them.

[PER CURIAM.—We think that is so.]

Secondly, the company as a body was not authorised to enter into any such agreements. Therefore if all the shareholders had affixed the seal of the company to them on the date at which they are alleged

to have been executed, the contracts would, nevertheless, be null and void.

Thirdly, assuming them not to be absolutely void in their inception, they were never ratified and adopted by the shareholders, or at least by the shareholders who were absent from the meeting when the alleged ratification took place. And the deed of 1867 did not, in fact, operate as a ratification, but declared in terms that the contracts were *ultra vires*.

Fourthly, the ratification, if any, being after repudiation communicated to the plaintiff was too late.

By the Companies Act, 1862, section 6, seven or more persons may, by subscribing a memorandum of association and otherwise complying with the Act in respect of registration, form an incorporated company. Section 8 prescribes that the memorandum shall contain *inter alia*, the objects for which the company is to be established; section 12 prohibits the alteration of the memorandum; section 18 states the effect of registration to be the creation of a body corporate having perpetual succession and a common seal. Everything done by that body which is not strictly within their powers as regulated by the memorandum of association, is void.

[BRETT, J.—Would one clause *ultra vires* vitiate an entire contract?]

Possibly not, for it would be struck out or ignored if the rest were valid. There is a broad distinction between matters beyond the capacity of the company and matters merely beyond the powers of the directors; and research will discover no case in which it has been held that a company could ratify and adopt that which they were not empowered by the memorandum of association to originally undertake. Yet clause 4 in these articles professes to confer on the company a power which the Act of Parliament denies them. Section 12 of the Companies Act is conclusive. The creditors of the company are interested in preventing the directors from dissipating the funds in uncontemplated ways—*The Society of Practical Knowledge* v. *Abbott* (11). "No majority of shareholders, however large, could sanction the misapplication of this portion of the capital. A single dissentient voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful."—*Bagshaw* v. *The Eastern Union Railway Company* (12), per Sir James Wigram, V.C. The reason is the prejudice to creditors which would result.

[BLACKBURN, J.—The Judges said that the Act prevented such misapplication.]

In *Colman* v. *The Eastern Counties Railway Company* (13), the directors of a railway proposed to guarantee certain profits, and secure the capital of a steam packet company, who were to act in connection with the railway. But it was held that such a transaction was not within their powers, Langdale, M.R., saying that "to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation was a thing which according to the terms of their Act they had not a right to do" (p. 17). The decision in *The Mayor of Norwich* v. *The Norfolk Railway Company* (14) is adverse to the present argument, but the learned Judges differed, and the opinion of Erle, J., is in favour of the defendants here, and he says, with respect to an incorporated company, that "a contract for a purpose unconnected with the purpose of incorporation is, or may result in, an application of the funds to a purpose unconnected with the purpose of incorporation, and is therefore held to be prohibited and void." See also *The East Anglian Railways Company* v. *The Eastern Counties Railway Company* (15).

[BLACKBURN, J. — Those Acts were passed for public, and not merely for trading purposes. The subsequent case of *Macgregor* v. *The Dover Railway Company* (16) shews in what sense the Judges

(11) 2 Beav. 559.

(12) 7 Hare, 114, 129; s. c. 18 Law J. Rep. (N.S.) Chanc. 193.

(13) 10 Beav. 1; s. c. 16 Law J. Rep. (N.S.) Chanc. 73.

(14) 4 E. & B. 397; s. c. 24 Law J. Rep. (N.S.) Q.B. 105, p. 413.

(15) 11 Com. B. Rep. 775; s. c. 21 Law J. Rep. (N.S.) C.P. 23.

(16) 18 Q.B. Rep. 618; s. c. 22 Law J. Rep. (N.S.) Q.B. 69.

used the word "illegal," namely, as equivalent to *malum prohibitum.*]

"Illegal" and "unauthorised" are controvertible terms.

[BLACKBURN, J.—The Companies Acts regulate what everyone might do before them, whereas the Railway Acts empower the doing of that which nobody could previously do.]

In *Ernest* v. *Nicholls* (17) Lord Wensleydale, after explaining the principles of law upon which the liability of joint stock companies is to be decided says that the stipulations of the deed which restrict and regulate the powers of the directors "are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else" (p. 429). It is said in *The Royal British Bank* v. *Turquand* (5) that "the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement," per Jervis, C.J., p. 332. In *Spackman* v. *Evans* (8) and *Evans* v. *Smallcombe* (9) directors of a company had agreed with a shareholder to let him retire, which the company would clearly have allowed, Lord Westbury, L.C., having, however, decided that the arrangement was a fraud (18), the House of Lords, on appeal, upheld the judgment.

[BLACKBURN, J. — But were unanimously of opinion that the arrangement was *bona fide.*]

Lord Romilly, M.R., said, "that to hold the striking the name of Mr. Spackman off the register by the directors, and the forfeiture of his shares, to be a transaction in itself *ipso facto* void, would be to overrule a long series of settled authorities. . . . . Of course if this company had bought mines or entered into a contract to set up a steam-packet business, this would have been simply void, and would not have bound the company or anyone, because they could do nothing that was *beyond* the objects of the company," and that the result of the cases is, "that the directors are the agents of the company, that the company are not bound by any acts done by them for objects which the company has no power to entertain, and that these are the only acts which, if the directors do, are *ipso facto* void" (p. 244). And see per Lord Colonsay, p. 247. *The Phosphate of Lime Company* v. *Green* (7) is relied on *contra*, but that has a bearing only on the question of acquiescence, as far as the present case is concerned. There might be nothing to prevent that company altering the *articles* of association at a general meeting, and declaring, for instance, that the company should buy its own shares, but there is a vast distinction between provisions affecting the dealings of the members of the company *inter se*, and the governing provisions of the *memorandum* of Association, which fixes and defines the object of the company as regards the world at large, and which, therefore, may not be altered.—*Lindley on Partnership* (ed. 1873), vol. 1, p. 262.

[He then contended that on account of the express reservation in the deed of 1867 as to the right to insist upon the invalidity of the contracts, the instrument could not operate as a ratification; that the facts and dates shewed no unanimous ratification by all the shareholders; that the resolution was unregistered; and that after the company had repudiated the contract and informed the plaintiff thereof, any ratification by the shareholders would be ineffectual. The arguments on these points sufficiently appear from the judgments of the Court.]

Benjamin (with him *W. G. Harrison*), for the plaintiff.—First, the contract was within the scope of the memorandum, the objects for which the company was incorporated being, *inter alia*, to carry "on the business of mechanical engineers and general contractors;" the making of railways is peculiarly the business of general contractors. [PER CURIAM.—Those words are limited by the others used in the clause.] Secondly, if the act of the directors were *ultra vires*, the

(17) 6 H. of L. Cases, 401.
(18) 34 Law J. Rep. (N.S.) Chanc. 321.

company must, under the circumstances, be assumed to have assented to the purchase, and are therefore bound—*In re the British Provident Assurance Society* (*Lane's Case*) (19). They have so conducted themselves as to hold out the directors as authorised to make these contracts—*Ramazotti* v. *Bowring* (20). It is evident from *Ayres* v. *The South Australian Banking Company* (21) that such an agreement, though beyond or contrary to the deed of incorporation, is not void, but voidable only. By section 9 of the Companies Act, 1867 (30 & 31 Vict. c. 131), a company may by special resolution so far modify the conditions of its memorandum of association, if authorised so to do, by its regulations as originally framed, or as altered by special resolution, as to reduce its capital. The shareholders must have a right to assent to anything not illegal. A company incorporated by statute is entitled to make all contracts connected with the purposes of its incorporation not expressly or by necessary implication prohibited; all such contracts are *prima facie* valid; and it lies upon the company seeking to repudiate a contract to shew that it is prohibited, not upon the opposite party to shew that it is authorised; per Willes, J., and Blackburn, J., in *Taylor* v. *The Chichester and Midhurst Railway Company* (22).

[BLACKBURN, J., referred to *Macgregor* v. *The Dover and Deal Railway Company* (16)].

The case, perhaps, nearest the present is *Agar* v. *The Athenæum Life Assurance Company* (23), where it was held that it is no defence to an action against a joint-stock company upon a debenture sealed with their common seal that the borrowing of the money thereby secured was not sanctioned by a resolution of an extraordinary meeting of shareholders pursuant to the provisions of the deed of settlement.

Thirdly, there has been a ratification on the part of the shareholders. They having knowledge or the means of knowledge of the arrangement, adopted and acquiesced in it—*The Phosphate of Lime Company* v. *Green* (7). In the *Agriculturists' Cattle Assurance Company Cases* (24), *Spackman* v. *Evans* (8), &c., the deed of association gave no power to the company to purchase its own shares, yet a shareholder was held bound by the arrangement there made. The transactions relating to these large sums of money must have become known to all the shareholders from the accounts, resolutions and circulars, or at least would suffice to put them upon enquiry, and any member who did not choose to avail himself of the opportunities for becoming fully acquainted with the affairs cannot set up his ignorance now. Ratification is an act independent of words. It is said that the special resolution was not registered, and therefore did not amount to notice, but the Act does not declare that if unregistered it shall not be binding. The deed itself is an absolute ratification, and the clause insisting that the contract was *ultra vires* may be discarded as ineffectual to deprive the instrument of its effect. Lastly, the plaintiff did not act upon the repudiation, and therefore the ratification was in time. Ratification of an agent's act does not require to be communicated to the person who has dealt with the agent, but at once renders valid that which was previously unauthorised.

[QUAIN, J.—The plaintiff had his election to abide by or rescind the contracts before the ratification.]

But he who has an election may remain quiescent unless the opposite party's position is thereby altered. See *Clough* v. *The London and North Western Railway Company* (25) and *Morison* v. *The Universal Marine Insurance Company* (26). The

(19) 1 De Gex, J. & S. 504; s. c. 33 Law J. Rep. (N.S.) Chanc. 84.

(20) 7 Com. B. Rep. N.S. 857; s. c. 29 Law J. Rep. (N.S.) C.P. 30.

(21) 40 Law J. Rep. (N.S.) P.C. 22; s. c. Law Rep. 3 P.C. 548.

(22) 36 Law J. Rep. (N.S.) Exch. 201: s. c. Law Rep. 2 Exch. 356.

(23) 3 Com. B. Rep. N.S. 725; s. c. 27 Law J. Rep. (N.S.) C.P. 95.

(24) 37 Law J. Rep. (N.S.) Chanc. 793; s. c. Law Rep. 3 E. & I. App. 171.

(25) 41 Law J. Rep. (N.S.) Exch. 17; s. c. Law Rep. 7 Exch. 26.

(26) 42 Law J. Rep. (N.S.) Exch. 17 (Ex. Ch.) 115; s. c. Law Rep. 8 Exch. 40.

company would not deprive themselves of the power of ratification by communicating to the plaintiff their previous repudiation. So long as he insisted upon the contracts the defendants were entitled to ratify—*Soames* v. *Spencer* (27), *Bird* v. *Brown* (28).

Watkin Williams replied.

Cur. adv. vult.

The following judgments were delivered on the 20th of June, 1874:—

BLACKBURN, J. (29).—The Ashbury Company are a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89). The memorandum of association states (as was required by the 8th section of the Act), the object for which the company is established. It is set out in the appendix to the case, page 15. The articles of association are also set out in the appendix. Those which it is material to notice are at pp. 20, 6, 15 to 23. I do not think it necessary to set these out. It is sufficient to refer to the pages where they are printed at length.

Up to a certain extent I believe there is no doubt as to the effect of the incorporation of a company under the Companies Act of 1862. The company is a corporation, and it is a partnership for trading purposes, for the objects for which the company is established. And by the articles in this case, as in almost all others, the management of the company's business is confided exclusively to a board of directors. And I apprehend that it is clear that this board have the same authority to bind the company in the managing the company's business that a partner or manager in an ordinary partnership, established at common law for the same objects, would have to bind the firm; an authority which to be valid must be exercised in cases within the scope of the ordinary business and transactions of the firm: see *Storey on Partnership*, ss. 110, 111, 112, 113. If the board in a joint-stock company, or a partner in a common law partnership, make a contract beyond their authority, it does not bind the company in the one case, or the firm in the other. This is only applying the general law as to principal and agent to the particular case of a board acting as agents for an incorporated company. So far I believe there is no difference of opinion.

But if a partner in a firm established under the common law, professes to bind his firm to an extent beyond his authority, the other members of the firm, though not bound by his unauthorised contract, may adopt and ratify it, and if they do the firm is bound.

It is obvious that in many cases it may be judicious to adopt an unauthorised contract and make the best of it. In many others it may be injudicious so to do. On that each individual partner must form his own opinion. And as the partners do not confer on each other authority to ratify contracts which they did not give each other authority to make, the ratification, to bind the firm, must be shewn to be made by the authority of each individual partner. No majority of partners, however great, can bind the minority. If even one partner does not ratify, then, though all the rest agree, the firm is not bound. This, again, is only applying the general law of agency to the particular case of a partner acting as agent for the firm.

The question on which there is doubt and difficulty is,—whether, in the case of a company incorporated under the Companies Act, 1862, the unanimous shareholders can ratify a contract made in the name of the company, but beyond the authority of those who made it? That question must ultimately depend on the true construction of the Act of Parliament. Had the Legislature thought fit to enact, in clear language, either that all contracts made by or on behalf of a company, incorporated under the Act, beyond the scope of the objects for which it was established, should be absolutely void, or expressly to enact that contracts, though beyond the scope of those objects, should be valid if either previously authorised, or subsequently ratified by all the shareholders, our task would simply

(27) 1 Dowl. & Ry. 32.

(28) 4 Exch. Rep. 786; s. c. 19 Law. J. Rep. (N.S.) Exch. 154.

(29) Brett, J., and Grove, J., concurred in this judgment.

be to carry out that expressed intention of the Legislature. But there is no express enactment either one way or the other in the Act of Parliament, and we must therefore interpret the Act for ourselves.

I will endeavour to do so later, but I now proceed to shew how, in fact, the question arises in the present case. The board entered into contracts called in the case contracts A, B, C and D, and in October, 1865, entered into further contracts, called in the case X, Y and Z, modifying those. If those six contracts had been such that the board of directors had authority to make them on behalf of the company, the plaintiff would clearly be entitled to recover. But I think that, looking at those contracts as a whole, they are not within the scope of the objects for which the company was established, as disclosed in the memorandum of association. I do not enter on this part of the subject, as it is fully, and, to my mind, satisfactorily disposed of by Barons Bramwell and Channell in their judgments below, and by my brother Archibald in his judgment in this case, which I have perused, and I believe there is not any difference of opinion on that part of the case amongst the Judges in the Court of Error.

I think, and start with the assumption, that the company was not in October, 1865, bound by those contracts, though entered into by the board in its name, on the ground that the board had exceeded its authority. But it is contended that the whole of the shareholders in the company have ratified the contracts. And whether or no that ratification is made out is a question of fact which we have to decide on the statements in the case, with power to draw inferences.

I think we have much reason to complain of the way in which the case is stated on this point; and I have had some doubt whether we ought not to send down the case to be re-stated. But on the whole I think enough appears to lead me to find this fact in favour of the plaintiff.

It appears that the board of directors had advanced on the contracts, and on some Spanish contracts of a similar kind, a large sum of money. In their balance-sheet, dated the 30th of September, 1865, they take credit, amongst other items, for

"Advances on Contracts.

	£.	s.	d.
Madrid, Placentia and Malpartida Railway	41,338	11	6
Anvers, Douai and Tournai .	27,191	14	8"

and this balance sheet was circulated amongst the shareholders. At the annual meeting, held on the 5th of December, 1865, a dividend of 14 per cent. was declared, and was, no doubt, accepted by every shareholder. Now, if I could see that the entry in the balance-sheet, above quoted, should have conveyed to the mind of an ordinary shareholder that the board had entered into contracts *ultra vires* with the Belgian Railway, and that the large dividend declared was earned in part out of these unauthorised contracts, I should have no hesitation in drawing the conclusion that the acceptance of that dividend did amount to a ratification of those unauthorised contracts, whatever they might be.

But though the large item thus vaguely described might lead a good man of business to ask for explanation, I do not think it would convey to the mind of an ordinary shareholder any such information as to justify me in drawing the inference that each such shareholder adopted the transactions with the Belgian Railway, knowing them to be beyond the authority of the board.

Before the next annual meeting of the company times had changed. Instead of a flourishing report, and a dividend of 14 per cent., a circular was sent, informing the shareholders that the meeting would be held *pro forma*, and adjourned to a day of which notice would be given. It was, in fact, ultimately held on the 14th of May, 1867. This circular was sent in consequence of a resolution passed at a special general meeting, held on the 20th of December, 1866, at which a committee was appointed to enquire, and report at an early meeting of the shareholders.

I draw the inference of fact that the circular was duly sent; and I further think that every shareholder who received such a circular must now have been

aware that something was wrong, and has himself only to blame if, after this, he failed to learn what was the report of the committee of inquiry.

That report was presented at an extraordinary meeting of the company, held on the 1st of May, 1867.

It incidentally refers to negotiations between the board and some individuals, directors and shareholders, and to the circulation among the shareholders of a prospectus and circular letter.

These are matters which might or might not be material if we knew what they were, which the case as drawn does not tell us. But this much is obvious to anyone who reads the report, that the board had entered into contracts in Belgium which the committee were advised were beyond the authority of the board. That under those contracts a large sum belonging to the company had been advanced in Belgium which, as the committee were advised, could not be recovered back from the Belgians. That the committee thought the directors might be made personally liable in Chancery, and that proposals had been made for a compromise between the directors and the company on the basis of a transfer of the liability and advantage of these contracts.

And the committee wind up their report by saying that "looking at the important interests involved, and the extent to which they would be jeopardised by proceedings in Chancery extending over a considerable period, they would recommend the shareholders to endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings."

At the meeting of the 1st of May, 1867, a committee was accordingly appointed "to confer with the directors with the view to an agreement being arrived at on the matters in dispute."

On the 14th of May, 1867, the general meeting, adjourned *pro forma* in December, 1866, was convened by a circular letter mentioning among the agenda—

"To receive, consider, and if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting held on the 1st of May instant to confer with the directors with a view to an agreement being arrived at on matters in dispute."

The balance-sheet which accompanied this circular shewed a loss, and the directors' report, also accompanying it, declared that there was no dividend. These are matters intelligible to, and likely to rouse attention in the dullest and most careless of shareholders. I certainly, therefore, feel justified in saying that there is a *prima facie* case that every shareholder knew what it was proposed to do. I do not say that it is conclusive. A shareholder might have been dangerously ill during the whole of these six months, so as to be incapable of attending to business, and other exceptional cases might exist. But the defendants have a strong interest in proving that there was even one shareholder who did not know what was going to be considered, or who afterwards disapproved of what was actually done, and they have made no attempt to prove it.

At the meeting held on the 14th of May, 1867, a resolution was come to.

The sale to the purchasers of the company's interest in the contracts does of necessity involve in it a ratification of those contracts, and if the purchasers were solvent persons, which, at all events, they were believed to be, it was very much for the interest of the company that such a sale should be made. I am, therefore, not surprised at finding that those who defend the action have been unable to find a single shareholder to give evidence that he did not assent to or, even now, disapproves of that sale. I draw the inference of fact that each individual did assent to it.

In the circular letter convening the next general annual meeting, held on the 24th of December, 1867, among the agenda was "to consider and, if so determined, to sanction a contract which has been entered into by the company with the directors thereof in pursuance of a resolution passed at the last annual meeting, held on the 14th of May, 1867."

At this meeting a formal indenture was produced. By the first clause, the Ashbury Company assigns to the purchasers

all benefits which the company has, or is supposed to have, in the Belgian railways, and all contracts, and the benefits of all sub-contracts that have been made, or expressed to be made, in connection therewith. And by the sixth clause the company are to allow their name to be used by the purchasers either as plaintiff or defendant.

By the last clause it is agreed that nothing shall preclude the company from maintaining that such contracts are *ultra vires*. This last clause may be effectual as between the company and the purchasers, and may, therefore, avail the company in any future proceedings against them for breach of trust; but it cannot, in my opinion, prevent the operation of the deed as a ratification of the contracts.

I think that it is not competent for a person, in whose name a contract has been made without authority, to sell the benefit and advantage of that contract, and to authorise the purchasers to sue in his name in order to obtain that benefit, if the contracts should prove advantageous, and at the same time to reserve power to repudiate the contract if it prove a losing contract.

I think that the act of selling the contract is an unequivocal act of election to ratify and adopt it, and that election being once made it is determined for ever.

At the meeting a formal resolution was passed that the seal of the company should be affixed to this indenture, which was accordingly done.

It was argued before us that all this came too late, because, as is stated in the case, early in May, 1866, the directors of the company repudiated all further performance of the above contracts, on the ground that they were *ultra vires*, and my brother Bramwell, in his judgment below, seems to adopt this view, as he says, "If it was ratified it was between December 5, 1865, and May, 1866."

I, however, do not agree in this. I think that when the plaintiff thus had notice from the directors that they had exceeded their authority and that the company were not bound, the plaintiff might, if he pleased, have declared himself no longer bound; and I think that if he had done so, a ratification would have come too late to bind him.

But he did not do so; and as long as he continued insisting on the contract as a binding one, the company might adopt the contract if for their benefit. This, I think, is clear on principle, and the case of *Soames* v. *Spencer* (27), cited in the argument, is an authority in support of it.

It seems to me, therefore, that in this case there has, in fact, been a complete and deliberate ratification of this contract, under the seal of the company, affixed to the ratification in pursuance of the resolutions of two successive meetings of the company convened for the express purpose; and that, as a fact, there is no shareholder in a position to object to that ratification, every one either having previously assented to that ratification or subsequently approved of it.

I do not think it is sufficiently made out that there was any ratification before 1867, but then there was a complete one. I have only further to observe that there is a technical difficulty as to binding a body corporate at law otherwise than by its seal. I should require further consideration before I decided that a ratification by each individual of the whole shareholders, even at law, must be inoperative unless declared by it under its seal; and I should also require further consideration before I decided whether, at law, it was competent for the corporation to set up as a defence that the seal was affixed without the assent of every one of the shareholders; but on the view I take of the facts neither question arises in this case. I therefore come to the conclusion that if, in any case, a company formed under the Companies Act, 1862, can ratify a contract made beyond the scope of the objects for which it is formed, this company has done so.

If this view of the facts is correct it becomes necessary to decide the question of law, namely, whether a corporation constituted under the Companies Act, 1862, can, even under seal, bind itself in its corporate capacity, by a contract for objects beyond the scope of those specified in its memorandum of association as the objects for which it is established. My late brother Channell, in his judgment in

the case below, says—"In some of the earlier cases quoted in the argument in which questions were discussed relating to contracts *ultra vires* of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity, by their individual assent to contracts not authorised by the memorandum of association or other like instrument by which the constitution of the company is defined. The objection to such a contract is not that it is illegal and therefore unenforceable, but simply that it is unauthorised by the body whom it purports to bind."

The more recent authorities referred to are, I presume, the three cases of *Spackman* v. *Evans* (8), *Evans* v. *Smallcombe* (9), and *Houldsworth* v. *Evans* (10), decided in the House of Lords in 1868, and *The Phosphate of Lime Company* v. *Green* (7), decided in the Court of Common Pleas in 1871.

In the cases in the House of Lords the company had been incorporated under the Act 7 & 8 Vict. c. 110. In the case in the Court of Common Pleas the company was incorporated under the present Act of 1862.

It is, I think, too much to say that these cases clearly settle the point. Instead of saying that these cases clearly settle that the law is as my brother Channell says, I only say that I think them authorities to that effect, and that I think such is the law. With this slight alteration I agree entirely with what is above quoted.

I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified.

But it is of great importance when we come to construe a statute creating a corporation to consider what would be the incidents at common law conferred on a corporation created by a charter.

The leading authority on this subject is the case of *Sutton's Hospital* (30). There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict (31), by which the king incorporated the first governors of the Charterhouse, and expressly provided, first, that they should have power to purchase, &c., take as well goods, chattels, &c., as lands; secondly, to sue and be sued; thirdly, to have a common seal, "whereby the same corporation shall or may seal any manner of instrument touching the said corporation and the manor, lands, &c., thereto belonging, or in anywise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, &c., of the said incorporation or any estate, &c., shall be conveyed, &c., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereinafter expressed, and not otherwise." The king, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbade any alienation except by lease. But the resolution of the Court, as reported by Coke, 30 b, was that "when a corporation is duly created all other incidents are *tacite* annexed . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, first, by the same, to have authority, ability and capacity to purchase, but no clause is added that

(30) 10 Co. Rep. 1.
(31) 10 Co. Rep. 10 b.

they may alien, &c., and it need not, for it is incidental; secondly, to sue and be sued, implead and be impleaded; thirdly, to have a seal, &c., that is also declaratory, for when they are incorporated they may make or use what seal they will; fourthly, to restrain them from alienating or demising, but in a certain form; that is an ordinance testifying the king's desire, but it is but a precept and doth not bind in law."

This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the king, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.

If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by *sci. fa.* in the name of the Crown to repeal the letters patent creating the corporation. See *The Queen* v. *The Eastern Archipelago Company* (32). But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation.

I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be—Does the statute creating the corporation, by express provision, or by necessary implication, shew an intention in the Legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is—Does the statute creating the corporation, by express provision, or necessary implication, shew an intention in the Legislature to prohibit, and so avoid the making of, a contract of this particular kind?

I think this is the real question, and for that I refer to the judgment of Parke, B., in *The South Yorkshire Railway Company* v. *The Great Northern Railway Company* (33), and the various other cases cited by my late brother Willes and myself in *Taylor* v. *The Chichester and Midhurst Railway Company* (22).

And when we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke says, "It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law:" 2 Inst. 200. Affirmative words may, no doubt, be used so as to imply a negative (see Plowden, Com. 113), but I take it the general principle is that thus laid down by Cresswell, J., in *The Eastern Archipelago Company* v. *The Queen* (34): "That to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain."

I now come to consider the construction of the Act of 1862, under which the present company is formed. The sections of the Act of 1862 bearing on the present case seem to me to be only sections 6, 8, 9, 10 and 12.

By section 6 of the Act of 1862, any seven persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability.

(32) 2 E. & B. 857; s. c. 22 Law J. Rep. (N.S.) Q.B. 196.

(33) 9 Exch. Rep. 55, 84; s. c. 22 Law J. Rep. (N.S.) Exch. 305.

(34) 2 E. & B. 888; s. c. 23 Law J. Rep. (N.S.) Q.B. 82.

Sections 8, 9 and 10 provide that the memorandum of association shall contain the objects for which the proposed company is to be established.

Section 12 provides that the company may make certain specified alterations in the memorandum of association, not including a change in the objects for which the company is to be established, and then, in express negative words, provides that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association."

The objects of the proposed company must, therefore, always remain the same; and that has, I think, two important effects. First. I think that if the company, as a body, propose to do anything beyond these objects, any one dissentient shareholder (who has not precluded himself from doing so) may prevent it from doing so.

Secondly. No person can be entitled to fix the company, with a contract made by the board for any purpose beyond those objects, on the ground that the board had an ostensible or apparent authority to make contracts of that kind, but must, in order to fix the company, at least prove an actual authority given to the board to make the particular contract he seeks to enforce.

Now, if I thought that it was at common law an incident to a corporation that its capacity should be limited to the extent conferred on it by the instrument creating it, I should agree that the capacity of a company incorporated under the Act of 1862 was limited to the objects in the memorandum of association. But if I am right in the opinion which I have already expressed, that the general power of contracting is an incident to a corporation which it requires an indication of intention in the Legislature to take away, I see no such indication here. There are not even affirmative words, those used in section 25 of 7 & 8 Vict. c. 110, to which I shall now refer, having been (I presume advisedly) not repeated.

The 7 & 8 Vict. c. 110. s. 25, enacts that from the date of the certificate the shareholders shall be incorporated "by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this Act and of such deed as aforesaid." And then express powers are given to the company to enter into contracts for any "necessary purpose of the company."

I think if the question was whether the Legislature had conferred on a corporation created under this Act capacity to enter into contracts beyond the provisions of the deed, there could be only one answer. The Legislature did not confer such capacity.

But if the question be, as I apprehend it is, whether the Legislature have indicated an intention to take away the power of contracting which at common law would be incident to a body corporate, and not merely to limit the authority of the managing body and the majority of the shareholders to bind the minority, but also to prohibit and make illegal contracts made by the body corporate in such a manner that they would be binding on the body if incorporated at common law, I think the answer should be the other way. There certainly is ground for suspecting that the person who framed the Act 7 & 8 Vict. c. 110, thought that the corporation would have no other powers than those thus expressly given to it, and perhaps meant to restrict its powers accordingly, but when we remember the canon of construction that affirmative words do not take away the common law right, I think he has not used words sufficient to effect such a purpose. It would be different if negative words had been used, and it had been said that the company should not do any other acts than those necessary for the purpose for which it is formed.

The two Acts, 7 & 8 Vict. c. 110, and the Act of 1862, are so much *in pari materia* that if it had been settled by judicial construction that a company under the 7 & 8 Vict. c. 110, was forbidden to make any contract for objects beyond those specified in the deed, I should endeavour to put the same construction on the Act of 1862, unless the change in the language shewed an intention in the Legislature to alter the law.

There are many dicta in Courts of Equity worthy of great respect which

indicate an opinion not only that such acts are beyond the authority of the board, or even of a majority of the shareholders, but also that they are beyond the capacity of the company though unanimous.

These are worthy of great attention; but I can find no case in which it has been decided that a contract so made or ratified by the whole company that it would have bound the company in its corporate capacity (but for the provisions of the statute), has, either at law or in equity, been held void on account of the provisions of that Act. And I think that the three cases already referred to of *Spackman* v. *Evans* (8), *Evans* v. *Smallcombe* (9), and *Houldsworth* v. *Evans* (10), all decided in the House of Lords, are at least authorities for the contrary doctrine.

The question in all three cases was, whether a person who had many years ago *de facto* retired from the company under an arrangement made with the directors was still a shareholder in point of law, and therefore ought to be put on the list of contributories.

In all three cases it was agreed that it was beyond the competence of the board of directors, or even of a majority of the shareholders, to allow such a retirement. In *Spackman's Case* (8) the majority of the Lords, Lords Cranworth, Chelmsford and Colonsay, thought it not proved that the whole body of shareholders had ratified the arrangement under which Spackman went out, and consequently he was retained on the list of contributories, Lord St. Leonards and Lord Romilly dissenting.

In *Smallcombe's Case* (9) the majority of the Lords, Lord Cairns and Lord Cranworth, thought it was sufficiently proved that all the shareholders had ratified the arrangement under which Mr. Smallcombe went out, and consequently he was removed from the list of contributories, Lord Chelmsford dissenting.

In *Houldsworth* v. *Evans* (10) the majority of the Lords (Lord Cairns and Lord Chelmsford) thought it not sufficiently proved that the arrangement under which he retired was brought to the notice of all the shareholders, and consequently he was retained on the list of contributories, Lord Cranworth dissenting.

The differences of opinion, though chiefly on the questions of fact, were sufficient to secure that the cases should be very carefully considered, and consequently all that is said in them is of high authority.

In the first of the cases, *Spackman* v. *Evans* (8), all the Lords who formed the majority based their decisions on the absence of satisfactory proof that the arrangement was ratified by all the shareholders. Lord Cranworth says, p. 190: "The act of the directors in cancelling the shares of the appellant, though not warranted by the deed of settlement, would be valid if it was either previously authorised or subsequently ratified by all the shareholders." And at p. 194 he says: "Looking at all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular, that is, knew that they were acts not authorised by the deed and not done in pursuance of the notice given to every shareholder by the circular of the 4th of November, 1848."

It certainly seems to me that when using this language Lord Cranworth had in his mind the words of the 25th section of 7 & 8 Vict. c. 110, previously quoted, and meant to express an opinion that the acts of the directors not authorised by the provisions of the deed were illegal in them, but were capable of ratification by the corporation. Lord Chelmsford also says, p. 234: "It is quite clear that to render valid an act of the directors of the company which is *ultra vires* the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz., the acquiescence of each and every member of the company."

Lord Colonsay also dwells on the absence of proof of knowledge on the part of the shareholders, though I do not think his language indicates so strongly that he thought that this if proved would have been decisive in Spackman's favour.

In the subsequent case of *Evans* v.

Smallcombe (9) Lord Cairns says, speaking of *Spackman* v. *Evans* (8): "I apprehend I am correct in stating that it was the opinion of the majority of your Lordships in that case; indeed, I think it was the opinion of all your Lordships who were present, that looking to that arrangement, which has been called throughout in this case the Chippenham arrangement, it would have been competent for any shareholder in the company to object within a reasonable time to that arrangement, that the arrangement was one which was *ultra vires* of the directors, and which, if supported at all, could only be supported by reason of the consent or acquiescence of all the shareholders in the company, or by the proof of such a state of facts as would lead to the reasonable inference that there had been that consent or that acquiescence."

These cases, decided in the House of Lords, are binding on us as far as they go. I agree that they do not precisely decide the very question before us. In the first place, they were decisions as to a company incorporated under 7 & 8 Vict. c. 110, which differs in its language from the Act of 1862. It seems to me that the difference in the wording of the two Acts is such that it is more plausible to say that the 7 & 8 Vict. c. 110, is prohibitive, than to say that the Act of 1862 is so. In the next place, the question raised was, whether a particular person was to be inserted on the list of contributories, which, as pointed out by Lord St. Leonards, is an equitable question, and in a Court of Equity the distinction between the body corporate and the whole of the individuals who, in the aggregate, form that body corporate, is not so important as in a Court of law. The present question is a purely legal one, viz., whether the body corporate is bound by this contract. But I take it that the question—whether the statute 7 & 8 Vict. c. 110, rendered a proceeding beyond the provisions of the deed illegal, that is, *malum prohibitum*, is the same in equity as at law. The act, illegal in that sense, could no more be adopted and set up in equity than at law; and I therefore apprehend these cases do decide conclusively that an arrangement such as that come to in *Evans* v. *Smallcombe* (9) was not forbidden by the statute 7 & 8 Vict. c. 110.

It was argued by the counsel for the defendants before us that the object there was to enable one of the partners to retire, which might have been done consistently with the provisions of the deed in some other way; and perhaps that it fell within the general power given to companies in the twelfth sub-section of section 25, viz., "to perform all other Acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do." Lord Romilly, who was one of the dissentient minority in *Spackman* v. *Evans* (8), says: "Of course, if this company had bought mines, or entered into a contract to set up a steam-packet business, this would have been simply void, and would not have bound the company or any one, because they could do nothing that was beyond the objects of the company;" which may be construed as indicating that he had some such distinction in his mind. I think, however, when looked at with the context, he must be understood as merely saying that the arrangement was voidable, not void, standing good till some one entitled to do so took steps to avoid it, whilst such an act as he supposed would be void till affirmatively ratified. With this exception I have looked through the opinions delivered in the House of Lords without finding anything to indicate that such a distinction was in the mind of any one of the noble and learned Lords; and I think that we should hardly be following out the *ratio decidendi* of the majority of the House of Lords if we acted on such a distinction.

I do not think we can properly enter on the consideration of what it would have been politic in the Legislature to enact. If we could do so, I think much might be said on both sides.

I am impressed with the hardship on incoming shareholders, who, it is said, have a right to believe that the company is carrying on the business for which it is formed and no other. And though, of course, if the property of the company has been already squandered on unautho-

rised transactions or embezzled, the incoming shareholder must bear that loss; yet it is hard on him to be made liable to a contract beyond the objects of the company, even though that contract must by supposition have been ratified by the outgoing shareholders through whom he derives title.

On the other hand, it may often happen that when the shareholders first learn that the unauthorised contract has been made, their capital may be already so inextricably engaged in it that to stop the contract would be certain ruin, and to go on would give a very fair prospect of extricating themselves without much loss, perhaps with profit.

And the recent cases in the House of Lords shew what very great hardships may fall on third persons if a transaction is always to be held void, though ratified by the whole shareholders.

And I do not see any risk of a company practically carrying on business for other objects than those named in the memorandum.

The difficulty of obtaining the assent of all shareholders, and of proving that it had been obtained, is so great that no sensible man would trust to that and deal with the company on those terms.

But I do not think that we can ask what ought to have been enacted by the Legislature. Our duty is to declare what has been actually enacted.

And I think, for the reasons I have above given, that in this case the unanimous shareholders have in fact assented to the ratification under the seal of the company of this contract; and that such a ratification, at all events, makes the contract binding on the company in its corporate capacity. I think, therefore, that the judgment of the Court below should be affirmed.

My brothers Brett and Grove agree in this judgment. And as this Court is equally divided, the judgment appealed against must be affirmed.

ARCHIBALD, J. (35)—This is an action by the plaintiff, as surviving partner in the firm of Riche Brothers, railway contractors, domiciled at Brussels, to recover from the defendants damages for the breach of certain contracts of the 30th of January and the 14th of October, 1865.

The case comes before us on error from the Court of Exchequer. The facts are set out in a Special Case and appendix, the Court having power to draw inferences of fact; and the question submitted is, whether the plaintiff is entitled to recover any damages from the defendants? The judgment of the Court below was in favour of the plaintiff, the majority of the Court being of opinion that the question should be answered in the affirmative.

[The learned Judge then narrated the facts as set forth, *ante*, p. 177, and said]—

I have thought it expedient to state thus fully the circumstances under which these contracts were entered into, as they are found, or are to be inferred from the facts stated in the Special Case, and the substance of such of their provisions as are important, because the manner in which the contracts are connected may have a material bearing upon the question how far, if not originally binding on the Ashbury Company, they have been rendered so by the subsequent conduct of the shareholders—[His Lordship then proceeded as follows]—

Under these circumstances it was contended before us, on behalf of the defendants, first, that the contracts with the plaintiff were *ultra vires* of the directors of the Ashbury Company; secondly, that they were incapable of ratification by the shareholders, so as to render them binding on the company in its corporate character; thirdly, that, if not incapable of ratification, they were not, in fact, ratified and rendered binding.

As regards the first of these contentions, we intimated during the argument our opinion that the Belgian contracts were in excess of the powers of the directors, and beyond the scope of the memorandum of association—*Taylor* v. *The Chichester and Midhurst Railway Company* (22). I agree entirely with my brother Bramwell in his observations on the language of the memorandum of association to the effect that the words "carry on the business of

(35) Keating, J., and Quain, J., concurred in this judgment.

mechanical engineers and general contractors" cannot be held to authorise generally the making of any contract whatever. They must, having regard to the context, be restrained to contracts for the execution by the company, or their servants, or agents, of mechanical engineering works, or other like works, and cannot be extended to such contracts as those in question.

The history of the formation of the company, though perhaps not admissible for the purpose of construing the memorandum, shews that such contracts were never contemplated; for the business purchased, which had been carried on by Mr. John Ashbury at Openshaw and Ardwick, had never been extended to the construction of railways, or to agreements of a "financing" description.

As regards the second point, namely, that the contracts were incapable of ratification by the shareholders so as to render them binding on the company in its corporate character, it was argued on behalf of the defendants that the contracts in question were so entirely beyond the competency of the company, that if every shareholder had agreed to them, and the corporate seal had been affixed to them, they would nevertheless have been invalid, and this was said to result from the true construction and effect of the Companies Act, 1862, under which the company was constituted. In support of this proposition it was contended that the contracts in question being beyond the scope of the memorandum of association were impliedly forbidden by the provisions of the 4th, 8th and 12th sections of the Act; that although within certain limits provision is, by the conjoint effect of sections 12, 13 and 50, made for changes or modifications of the conditions contained in the memorandum of association in pursuance of a special resolution, yet that the power to change or modify the conditions of the memorandum is limited to the increase or the consolidation of the capital, or its division into shares or its conversion into paid-up shares or stock, or by section 13 to a change, with the approval of the Board of Trade, of the name of the company; and that the fourth of the company's articles of association, therefore, in so far as it impliedly authorised an extension of the business of the company by a special resolution, was at variance with the express provisions and spirit of the Act and wholly nugatory; and that it was impossible by any such resolution to enlarge the corporate capacity of the company so as to embrace such contracts as those in question.

It was not denied that if the corporate capacity of the company could be extended by such a resolution, then that contracts, which would have been regular and binding if such a resolution had been passed, might be subsequently sanctioned and ratified by all the shareholders if entered into by the directors without having previously obtained the requisite authority.

But on the ground that the corporate capacity of the company was incapable of such extension, it was sought to distinguish this case from those of *Spackman* v. *Evans* (8), *Evans* v. *Smallcombe* (9), and *Houldsworth* v. *Evans* (10), in all of which it was taken for granted that the contracts then in question might, although *ultra vires* of the directors, have been ratified with the assent of all the shareholders, the company in those cases having been established under a different Act, viz., the 7 & 8 Vict. c. 110, and the contracts impeached not having been either expressly or impliedly prohibited by the conditions on which the company was originally constituted.

Mr. Watkin Williams also, upon this point, adopted as part of his argument the following passage from *Lindley on the Law of Partnership*, vol. i. p. 262—"With respect to those acts which directors have no power to do at all, it must be borne in mind that corporations have no greater capacity than is conferred upon them by their constitution. They exist for certain purposes more or less well defined in the instrument incorporating them, but they exist for no other purposes, and a corporation created for one purpose cannot lawfully do anything which is foreign to the purpose for which alone it was created. If, therefore, it can be predicated of any contract entered into by or on behalf of a body corporate that such contract is *ultra vires*, i.e. one into

which the corporation, even with the assent of all its members, cannot legally enter, such contract must necessarily be invalid. . . . . There is an important difference between incorporated and unincorporated companies, for whilst it is competent for all the shareholders of an unincorporated company to depart from the agreement entered into by each with the others, it is not competent for all the shareholders of a company incorporated by charter or statute to do anything contrary thereto; nor can a corporate body be estopped by deed or otherwise from shewing that it could have had no power to do that which it purports to have done."

It was argued also that the case of *The Phosphate of Lime Company* v. *Green* (7), in which it was held (the company having been constituted under the Companies Act, 1862) that arrangements made by the directors of a company which were expressly forbidden by the articles of association, and therefore *ultra vires*, might be rendered binding by the subsequent assent and acquiescence of all the shareholders, was distinguishable from the present one on the ground, that what was there done was merely in contravention of the articles of association, but not inconsistent with the conditions of the memorandum, there being power under section 50 of the Companies Act, 1862, to alter the articles to an extent not permitted as to the memorandum by means of a special resolution; and that what was done therefore was within the competency of the company, though done irregularly.

On the other hand, it was contended on behalf of the plaintiff, that the memorandum of association and the articles must be read together, and that the statement in the former of the objects of the company must be qualified by article 4, giving power by means of a special resolution to extend the company's business to other objects and purposes than those described in the memorandum, and that thus construed the contracts in question were within the competency of the company, and that at all events they were, upon the authority of *Spackman* v. *Evans* (8), and the other cases following it, capable of ratification with the assent of all the shareholders.

The point does not appear to have been taken by the defendants in the Court below, nor does the attention of that Court appear to have been directed to the express provisions of section 12 of the Companies Act, 1862, prohibiting, with the exceptions already mentioned, any alteration in the conditions of the memorandum of association, or to the difference between the provisions of the Companies Act, 1862, and those of the 7 & 8 Vict. c. 110, which contains no express prohibition of an alteration after registration of the business or objects of the company; and it was assumed by Channell, B., and indeed by all the learned barons, and regarded as material to the question of ratification, that under the 4th of the articles of association means were (as expressed by Channell, B.), "provided for formally extending the business of the company so as to include the contract with the plaintiff."

It appears to me, however, that the memorandum of association and the articles are, by the Companies Act, 1862, treated as distinct, and that the memorandum cannot be so qualified by the articles as to reserve powers to extend or change the business or objects of the company by means of a special resolution.

The subsequent Act of the 30 & 31 Vict. c. 131, amending the Companies Act, 1862, extends, by section 8, the power to modify the conditions contained in the memorandum of association so far as to render unlimited the liability of its directors or managers, or of the managing director; but the circumstance that, in extending the power of modifying the memorandum of association, such power is only given to a limited extent, furnishes, to my mind, a strong argument that the Legislature intended that the operations of the company and its capacity to contract in its corporate character should be unchangeably fixed and restrained by the terms of the memorandum, and that the articles, with the exceptions specified in sections 12 and 13, are to be subject to or in entire consistency with the memorandum. If so, then, as the contracts in

question are not such as were contemplated by the incorporation of the company, and are in excess of its statutory powers, they must be void, unless they are such as can be rendered valid by the assent of all the shareholders: see *The Society of Practical Knowledge* v. *Abbott* (11), *Bagshawe* v. *The Eastern Union Railway Company* (12), *Colman* v. *The Eastern Counties Railway Company* (13), *The East Anglian Railway Company* v. *The Eastern Counties Railway Company* (15), *Mayor of Norwich* v. *The Norfolk Railway Company* (14), and *Taylor* v. *The Chichester and Midhurst Railway Company* (22).

Is there authority, then, that in such a case as the present the assent of all the shareholders can render the contracts valid as contracts of the corporation? The case of *Spackman* v. *Evans* (8) and the other cases following it in the House of Lords are relied on as authorities to that effect, but there are differences between the provisions of the Companies Act, 1862, and those of the 7 & 8 Vict. c. 110, which may well justify the distinction contended for by the defendants between the case of companies constituted under that Act and of companies under the Act of 1862, and account for the view taken by the House of Lords as to the power of all the shareholders to ratify a contract *ultra vires* of the directors, and apparently beyond the scope of the incorporation; but, at all events, I think the fact that there are no such prohibitory words in the 7 & 8 Vict. c. 110, as are to be found in section 12 of the Companies Act, 1862, and that the effect of such prohibitory words therefore was never considered by the House of Lords, is of itself sufficient to shew that the view taken in those cases is not necessarily binding in the present one.

The 7th section of the 7 & 8 Vict. c. 110, requires that companies constituted under it should be formed by a deed setting forth among other things the business or purpose of the company, and by section 25, on obtaining a certificate of complete registration, the shareholders are to be incorporated for the purposes of the trade or business for which the company was formed, according to the provisions of the Act and of the deed; but section 7 also gives the power of registering a further or supplemental deed if not repugnant to the Act, for the purpose of supplying any omission or defect as regards the matters required to be set forth in the deed of settlement, and under such a supplementary deed such alterations in the mode of dealing with the forfeiture of shares might have been adopted, as were the subject of the contracts made in the case of the Agriculturists' Cattle Insurance Company, out of which *Spackman* v. *Evans* (8) and the other cases which followed it arose. Upon this view, therefore, the 7 & 8 Vict. c. 110, provided means for formally giving effect to the contracts which were asserted to have been ratified in those cases.

It is true that this distinction was not adverted to in those cases, but there was no occasion to institute any comparison between the two Acts, or to put any construction on the Act of 1862. But in *Dent's Case; in re The Anglo-Moravian Hungarian Junction Railway Company* (36), decided by Lord Selborne, L.C., since the argument in this case, it was held that, under the Companies Act, 1862, articles of association professing to confer authority to modify the memorandum beyond the limited extent allowed by the Act are void, and the necessity of a rigid adherence to the directions of the Act is insisted on. The Lord Chancellor says in giving judgment, "We must not forget the important change made by the Act which introduced limited liability. Before that Act, partners in a trading partnership could not prescribe a limit to their liability. In favour of the shareholders the Legislature permitted a limit to be placed on the liability, but it prescribed the means by which alone this could be done, and those means must be exactly adhered to; and the Act expressly says that it must be done by the memorandum of association.

"Then the 23rd section of the Act provides that any subscriber of the memorandum shall be deemed to have agreed to become a member of the company, and shall be entered as a member on the

(36) 42 Law J. Rep. (N.S.) Chanc. 857; s. c. Law Rep. 8. Chanc. App. 771.

register; and the 38th section provides, that the members of the company shall be liable for no more than the unpaid portion of their shares. All these provisions have reference to the memorandum by which the shares are to be limited. In the present case, the memorandum mentions the limit of the shares; and the effect of a person subscribing the memorandum was to make him liable for 20*l.* on each share, and in some way or other he must pay it. That was laid down expressly in the case decided by Giffard, L.J., *In re The Baglan Hall Colliery Company* (37), who said that if there were in that respect a contradiction between the articles and the memorandum, the articles must give way. . . . Then the 12th section of the Act provides, that the conditions contained in the memorandum of association may be modified to a limited extent if the articles authorise it. But that could only be done (I am speaking of the law as it stood at the time when the question in this case arose) by the increase of capital or the consolidation or division of stock; and then the clause goes on, 'but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.' It is quite certain that under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void."

The privilege of contracting as a corporation and with a limited liability is conferred, only subject to the express directions and limitations of the Act, of which it seems to me to be the policy as well as the true construction, to ignore (so to speak) the existence of the corporation and the power of the shareholders, even when unanimous, to contract or act in its name for any purpose substantially beyond or in excess of its objects as defined by the memorandum of association; but if the business of a company as thus defined could be extended or altered by the consent of all the shareholders, notwithstanding the express prohibition of section 12, there would be an easy means of acquiring exceptional privileges whilst completely evading the Act.

A company registered for one purpose would practically obtain powers to carry out in its corporate name and character, and with a limited liability on the part of the shareholders, objects entirely different, and might undertake business or contracts altogether at variance with its object as set forth in the registered memorandum, without any notice whatever to the public. The shareholders in such a company might of course change from day to day, and persons buying shares, or even entering into contracts on the faith of the registered memorandum, might find all the funds of the company already pledged for totally different objects. Of course the individual shareholders assenting would have no just ground of complaint, but the fact that their acts might thus operate to the prejudice of strangers subsequently acquiring shares, or contracting with them on the faith of the registered documents of the company, goes far to prove to me that though all join in a contract beyond the competency of the company, the contract cannot be regarded as a contract by the corporation, but must be dealt with as one binding the shareholders, if at all, merely as individuals and not in their corporate capacity.

I admit that at Common Law (as was resolved in the case of *Sutton's Hospital* (38)), when a corporation is duly created all other incidents are *tacite* annexed, such as ability to purchase and alien, to sue and be sued, and to use what seal they will; and that even a clause in their charter restraining them from aliening or demising but in a certain form, though an ordinance testifying the desire of the Crown is to be deemed but a precept and not binding in law, so that a corporation thus constituted acquires rights of contracting as extensive as those of a natural person; but the question under consideration has reference to the creation of corporations by statute with a limited scope and

(37) 39 Law J. Rep. (N.S.) Chanc. 591; s. c. Law Rep. 5 Chanc. 346.

(38) 10 Co. Rep. 30 b.

objects, and to the true construction of the statute law in regard to such bodies, a question which depends necessarily to a great extent, where the legislative provisions are not unmistakeably clear and express the other way, on the general policy of such legislation.

No doubt, as observed by Lord Cranworth (in *The Shrewsbury and Birmingham Railway Company* v. *The North Western Railway Company* (39)), when the Legislature constitutes a corporation it gives to that body *prima facie* an absolute right of contracting. But he goes on to say, "that this *prima facie* right does not exist in any case where the contract is one which, from the nature and objects of the incorporation, the corporate body is expressly or impliedly prohibited from making."

Adopting this view, what can rebut more strongly the presumption of a *prima facie* general authority to contract than an express provision that the scope and objects of the company as originally declared by its memorandum of association shall be unchangeable, and in effect, therefore, that its corporate capacity shall exist only within the limits and for the purposes thus defined.

This argument is rendered more cogent by the considerations that the registered memorandum is notice to the public of the purposes for which alone the corporation exists, and of the scope of its powers; and that, in the case of a registered company, those who contract with it must be taken to have read its registered documents, and to be aware of any restrctions imposed by them on its capacity to contract—*The Royal British Bank* v. *Turquand* (5).

As to contracts substantially beyond its scope and objects, I prefer to regard the case as one of incapacity to contract, rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts. If, then, I am correct in this view, how can the individual assents of all the shareholders be sufficient to affirm or give validity to a contract which is beyond the scope and objects of the memorandum, so as to render it a contract of the ideal legal body, which exists only as a corporation and with powers and capacity which are thus admittedly exceeded?

I am unable to agree with my late brother Channell, that it is settled by the more recent authorities that shareholders in a company registered under the Act of 1862 may bind themselves in their corporate capacity by their individual assents to contracts not authorised by the memorandum of association. I cannot regard the cases of *Spackman* v. *Evans* (8), *Evans* v. *Smallcombe* (9), and *Houldsworth* v. *Evans* (10), as authorities to that effect; and I know of none others which can be so regarded. They may well do so with respect to any matter as to which they would have power under the Act (if it were done formally) to make an alteration in the memorandum or in the articles of association, but not otherwise; and I think that the distinction suggested on this ground by the counsel for the defendants between this case and that of *The Phosphate of Lime Company* v. *Green* (7) is a sound one. In that case an alteration, which it was competent to them to have made, in the articles of association would have enabled the company to have done in a formal manner what was done informally by the assent of all the shareholders. But as the contracts in question here are to my mind clearly and entirely beyond the scope of the memorandum or of any alteration that could be made in it, and therefore beyond the scope of the incorporation, I have arrived at the conclusion that they are incapable of ratification so as to bind the body corporate.

But even if capable of ratification, have they been in fact ratified by the assent, express or implied, of all the shareholders? Though there were differences of opinion as to the facts and their effect in the three decisions in the House of Lords—*Spackman* v. *Evans* (8), *Evans* v. *Smallcombe* (9), and *Houldsworth* v. *Evans* (10), it was assumed in all that in order to the ratification of a contract *ultra vires* there must be the assent, express or implied, of every shareholder. It must be taken also, as stated by Willes, J., in *The Phosphate of Lime Company* v. *Green* (7), that the

(39) 6 H. L. Cas. 135; s. c. 26 Law J. Rep. (N.S.) Chanc. 482.

ratification to be binding must be either with full knowledge of the character of the act to be adopted, or with an intention to adopt it at all events.

In dealing with this question I think we should be guided also by the considerations mentioned by Lord Cranworth in the case of *Houldsworth* v. *Evans* (10), and referred to by my brother Bramwell in his judgment, namely, "that in these joint-stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, except in cases where they are informed, that although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do." It seems to me equally reasonable that absent shareholders should not be bound to assume that those who attend a meeting will ratify acts of the directors in excess of their powers, unless they have express notice that the shareholders will be invited to do so.

But, applying these rules to the facts of this case, how does the matter stand? As far as appears, the first information to the shareholders, as already mentioned, that any portion of the company's funds had been advanced or applied towards contracts in connection with the Belgian railway was in the balance-sheet of the 5th of September, 1865, which was circulated with the letter of the secretary of the 27th of November, 1865, convening the meeting of the 5th of December, and announcing that the meeting would be required to declare a dividend out of the balance shewn by the balance-sheet. But the form in which these advances are entered in this and subsequent balance-sheets until the meeting at which an arrangement was made with the directors is quite consistent with advances having been made on contracts *intra vires*; and I am of opinion that it conveyed no sufficient information to the shareholders that anything had been done by the directors in excess of their power. From the strong observations made at the meeting of the 5th of December, it must be presumed that the facts as to the Belgian contracts were at all events to some extent made known to the shareholders present; yet, comparing the list and numbers of shareholders present with those who attended subsequent meetings, I have no hesitation in arriving at the conclusion that all were not present, and that whatever the effect of the approval and adoption of the accounts by that meeting (though I do not think it had any greater effect than that attributed to it by my brother Bramwell in his judgment), it did not amount to a ratification of the Belgian contracts by all the shareholders.

As regards the subsequent meeting, after a careful consideration of the evidence in the appendix, and giving full effect to the circulars by which the meetings were convened and to the form in which the accounts were presented, I find nothing up to the meeting of the 1st of May, 1867, which conveyed to the shareholders any full or accurate information as to what had been done by the directors. The report of the committee of investigation presented at that meeting, did so, no doubt, to all who attended, and I think the subsequent circular of the 6th of May, 1867, convening the meeting on the 14th, was calculated to put the shareholders on enquiry, which, if made, would have put them in possession of all the facts up to that time. They would have become acquainted with the fact that the Belgian contracts had been entered into by the directors in the name of the company, and that on the ground that they were *ultra vires* the directors were considered liable to repay to the company the amount which had been advanced out of the company's funds, and that the committee of enquiry had recommended an endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings, but nothing more.

But if with such knowledge, or means of knowledge, any shareholder omitted to attend the meeting of the 14th of May, 1867, or to protest against any agreement with the directors short of their doing exactly what they might have been compelled to do by means of hostile proceedings in a Court of equity, can it be said that he intended to sanction whatever might be done at the meeting at all events, or to constitute the other shareholders his

agents to make the arrangement which was adopted at that meeting, and afterwards carried out by the deed? If he did, I think the adoption of the concession would amount also to an adoption of the contracts with the plaintiff, for I agree that the two were inseparably connected, the directors having accepted the transfer subject to the contract with the plaintiff. But I cannot see on what principle he can be held to have done so, or that he was bound to take any step before this action was brought to signify his dissent. The case unfortunately does not state whether all the shareholders were present at the meeting of the 14th of May, 1867, and although a comparison of names and numbers in the case of other meetings leads to a conclusion that all were not present at some, at least, of those meeting, it is impossible by any such means to arrive at any conclusion either way as to the meeting in question. But the burden is on the plaintiff to make out the ratification, which would not on any principle be complete without the assent of all the shareholders, and in the absence of proof that all the shareholders were present and assenting, the ratification is not established. As regards the subsequent meeting of the 24th of December, 1867, I infer that there were shareholders who did not attend; and as the substance of the arrangement subsequently embodied in the deed was adopted by those present at the annual general meeting of the 14th of May, and was (so to speak) *un fait accompli*, I cannot understand on what principle any shareholders who were not then present, and were not bound by that arrangement, should lose their right to dispute it by failing to attend and express their dissent on the 24th of December. If the attendance and assent of all had been proved I should feel, no doubt, that the arrangement embodied in the deed was an adoption of the concession, and, as a consequence, of the contract with the plaintiff, for I concur in the view expressed by my late brother Channell in his judgment, that the deed which confers on the directors a right to transfer the contracts presupposes an election to take them, and not to treat them as void; and I think those parts of the deed by which the purchasers undertake to indemnify the company, and which declare that the deed is not to be taken as precluding the company from maintaining and alleging, if so advised, that the contracts were *ultra vires*, make no difference in this respect. They would have their effect as between the company and the purchasers, but they cannot, in my opinion, qualify the operation of the deed as a ratification so far as the plaintiff is concerned.

If, therefore, it had been competent to the shareholders to have ratified, and all had assented to the arrangement made on the 14th of May, 1867, the plaintiff would, in my opinion, have been entitled to recover. But as I think there is no proof of such assent by all the shareholders, and still more on the ground that the contracts under the circumstances were wholly incapable of ratification, I am of opinion that the question submitted in the case must be answered in the negative, and that the judgment of the Court of Exchequer should be reversed.

In this judgment my brothers Keating and Quain concur.

Judgment affirmed.

Attorneys—Stevens, Wilkinson & Harris, for plaintiff; Henry Skynner, for defendants.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Exchequer.*)

1874. June 19, 26. } LIVER ALKALI COMPANY (LIM.) *v.* JOHNSON.

Bailment — Carrier — Lighterman — Insurer of Goods—Liability of as Common Carrier.

A person who exercises the ordinary employment of a lighterman by carrying goods in his flats for reward, although he may not be bound as a common carrier to receive the goods of all comers indifferently, nevertheless incurs the liability of a common carrier for the safety of goods carried by him. So held by the majority of the Court.

Per BRETT, J., *such person is not a common carrier, but, in the absence of an special agreement, is, by a custom adopt and recognized by the Courts, liable as*

shipowner upon an implied undertaking to carry at his own absolute risk, the act of God and the Queen's enemies alone excepted.

Appeal from a judgment of the Court of Common Pleas discharging a rule (1).

This was an action brought to recover 179*l.*, being the value of 62½ tons of salt cake, the property of the plaintiffs, which was lost while being carried in a lighter or flat of the defendant in the river Mersey.

The cause was tried at the Liverpool Summer Assizes, 1871, before Martin, B.

The pleadings and facts were stated in a Special Case as follows.

1. The declaration contained three counts—First, that the salt cake was shipped by the plaintiffs on board the defendant's flat for carriage from Widnes in the river Mersey to Liverpool, and the breach complained of was that, although not prevented by certain excepted perils and casualties, the defendant had failed to carry and deliver the salt cake. Second, that the salt cake was so negligently carried that the same was lost to the plaintiffs. Third, that by reason of the defendant's careless and improper conduct whilst the salt cake was in his custody, and by reason of his not taking the necessary steps to preserve the same, such salt cake was lost.

The defendant pleaded—First, traverse of the delivery on the alleged terms. Second (to the first count), denial of the breaches. Third (to the second and third counts), not guilty. Fourth (to the first and third counts), that the defendant was prevented carrying and delivering the salt cake by certain excepted perils, namely, by the dangers and accidents of the sea, river and navigation. Issue thereon.

2. The plaintiffs carry on their alkali works at Liverpool, and the defendant is the owner of several flats or lighters which are employed in the carriage, as from time to time engaged by different persons, of goods to and from various points along the river Mersey as occasion may require.

3. On the 16th of January, 1871, the plaintiffs' manager asked the master of one of the defendant's flats, called *Eliza*, then lying empty in the Stanley Dock, Liverpool, if the said flat could be sent to Widnes for the purpose of carrying the salt cake in question from Widnes to the plaintiffs' alkali works at Liverpool, and such flat being disengaged, the master caused it to be taken to Widnes for the purpose of carrying the plaintiffs' salt cake, and he there received from the plaintiffs' servants the salt cake in question. There were on such flat the goods of no other person save the plaintiffs. With such cargo, the flat duly manned, proceeded down the river towards Liverpool on the 19th of January, 1871. A fog having come on, the flat dropped anchor two or three times on its passage down the river, and finally, between three and four o'clock P.M. on the 20th of January, 1871, being then abreast of the north end of the Clarence Graving Dock, the flat stuck on the ground, and as the tide was falling she remained there. When she so took the ground the weather was foggy. At the ebb the flat was left nearly dry, and when the tide rose again it was found that she was considerably strained and filled with water. Ultimately the master and crew finding that they could not keep down the water by pumping proceeded to secure the flat by her anchor, and by ropes made fast to the pier, until prevented by the pier-master. Several attempts were made to remove her but without success, and in the result the flat and her cargo were carried off by the tide and were wholly lost.

4. On behalf of the defendant a witness was called who stated as follows: "I went to the plaintiffs' manager to draw some freight. He said that he had taken the freight on account of damage. I told him that we could not be answerable for damage to cargo, it must be entirely at his own risk when he put goods on board the flats. I told him that it was quite possible that one of the flats might go down any day, and he might lose the whole cargo. He said the best way would be to insure. I said, Yes, it would. I said it was not reasonable that we should be called upon to insure the cargo at the low rate of freight of 7*d.* per ton."

5. The plaintiffs' manager said that no

(1) 41 LAW J. Rep. (N.S.) Exch. 110; s. c. LAW Rep. 7 Exch. 267, 269.

such conversation had taken place, but stated that it took place after the voyage in question, during which this loss had occurred, and did not refer to the loss in respect of which this action is brought. He said, that after such loss he stated that he would insure, and therefore he did in fact insure.

6. The questions of fact contested at the trial were—Firstly, as to whether or not the defendant had been guilty of any want of care in or about the carriage or safeguard of the plaintiffs' goods, or in or about the navigation of the defendant's flat on the voyage in question. Secondly, whether the said conversation took place before or after the voyage in question, and these facts having been left by the learned Judge to the jury, the latter found that the defendant had been guilty of no want of care in the premises, and that the said conversation took place after the voyage in question.

7. On the part of the plaintiffs, evidence was given that they had employed the defendant to carry goods for them for several years, and at a uniform rate of freight. On the part of the defendant two witnesses were called. The first witness, Richard Gregson, stated that he was the master of the flat *Eliza*, that he carried goods for different people, and that that flat was engaged from time to time as required for special cargoes of different persons. He said an engagement was made for each voyage, and to carry the goods of one person only on each voyage. He said the defendant's flats did not carry the goods of several people on board at one time, and that they were engaged from time to time to carry from different points up the river, to different places and docks lower down the river at Liverpool and Birkenhead. The second witness called for the defendant, and who managed his business, stated that the defendant's flats were employed in carrying the goods of the persons who from time to time employed them, each cargo consisting only of the goods of the particular person employing the flat on each occasion. He said that they carried for any one who choose to employ them, but that an express agreement was always made as to each voyage or employment of the defendant's flat. There was no cross-examination on the part of the learned counsel for the plaintiffs as to this evidence of the defendant's witnesses.

8. Upon this part of the case no question of fact was submitted to the jury. The freight of the defendant for the carriage of the salt cake on the voyage in question as agreed, amount to 7*l.* 16*s.* 3*d.*

9. There was no evidence that particular flats were, as a rule, selected by customers, nor was there any evidence that they were not, as a rule, so selected.

10. The plaintiffs' counsel then contended that the defendant was a common carrier, and that the defendant was liable, assuming the loss of the salt cake to have been caused by perils of the sea, river and navigation. The learned Judge, for the purposes of the day, directed the verdict to be entered for the plaintiffs, and reserved leave to the defendant to move to enter the verdict for him if the Court should be of opinion, on the facts herein appearing, that the plaintiffs had failed to establish the fact that the defendant was a common carrier, and that the defendant, on the facts stated, was not liable for the loss of the salt cake.

11. The Court of Exchequer having in Michaelmas Term, 1871, granted a rule *nisi* to enter a verdict for the defendant, the Court afterwards, in Easter Term, 1872, discharged it.

The question for the opinion of the Court of Exchequer Chamber was, whether the decision of the Court of Exchequer in discharging the said rule was right.

Charles Russell (with him *Butt*) (on June 19), for the defendant.—The defend-
ant was a simple bailee of this cargo, and
bound only to use ordinary care in it
transport. Therefore as the jury hav
acquitted him of negligence he is n
liable in the present action. He is not
common carrier. There is no evider
that his flats plied between fixed termi
or were ready to carry any goods tender
Here was a verbal charter by which
flat was to go to a spot designated by
hirer, and there load. In *Morse* v. *Slue*
the earliest case bearing on the sub

(2) Ventr. 190.

the master of a vessel lying in the Thames was eventually held liable for the loss of goods taken from him with violence by a pretended pressgang; but during the first argument stress seems to have been laid upon the question of negligence, which could not have arisen had the defendant been regarded as an insurer, and "the Court inclined strongly for the defendant, there being not the least negligence in him." The ship was probably a general ship. Sir Matthew Hale, C.J., certainly on the second hearing says, "He that would take off the master in this case from the action, must assign a difference between it and the case of a hoyman, common carrier or innholder;" but is inaccurate, at least, in not prefixing the word common to "hoyman," as Lord Holt, C.J., does when defining in *Coggs* v. *Bernard* (3), those carriers who are bound to answer for goods at all events, p. 917–18.

[BRETT, J.—What is the duty of the owner of a vessel advertised as a general ship? Is he bound to take all goods as offered?]

The cases rather tend to answer that question in the affirmative, but even the owner of a general ship does not ordinarily become a common carrier, for there is a bill of lading in every case.

[BLACKBURN, J.—But if the whole vessel is chartered, is he so?]

In *Lamb* v. *Parkman* (4) it was held that under a charter-party giving to the hirer the whole capacity of the ship, the owner thereof is not a common carrier, but a bailee to transport for hire. In 1 *Parsons on Shipping*, 245, the author says—"We take a common carrier to be one who offers to carry goods for any person between certain termini or on a certain route, and he is bound to carry for all who tender to him goods and the price of carriage, and insures those goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage. These are essentials."

A barge-owner at Liverpool is not bound to take all goods offered, even if he has room for them, and that obligation is one of the tests of a common carrier. Kelly, C.B., delivering the judgment of the Court below (*Liver Alkali Company* v. *Johnson* (1)), says—"Without going through all the authorities which have been referred to, it is enough to say that we have the clearest authority that 'hoymen, ferrymen and masters of ships, who carry goods for hire,' are common carriers—*Morse* v. *Slue* (2)." But here again the word "common" must be prefixed to hoymen, for it is not every hoyman who is liable to that extent. The etymology of the word suggested is, that it was derived from the practice of the man in charge of such a vessel as this in question to call out ahoy as he came down the river with it, to give notice to persons to bring their goods for transport. And see derivations of the word hoy in *Richardson's Dictionary*.

[BRETT, J.—But what is said to be the liability of a ship taken without charter?]

The owner is merely liable for negligence.

[BRETT, J.—Then why is the exception clause in charters necessary?]

First, the owner was simply liable for negligence. Then the custom sprang up which led to the introduction of the exception clause in the charter, but if no exception clause, there would still be the exception.

[BLACKBURN, J.—Is the clause, then, useless? Have you ever seen a charter without it? I have seen a Spanish charter in which it was not, but never an English one. BRETT, J.—And Willes, J., has said that it is always absent from, but invariably understood in Spanish charters.]

The Court below was not justified in placing the defendant in the class of common carriers.

Secondly. [He contended for a while that the loss of the goods by the fog was owing to an act of God, citing *Angell on Carriers*, section 155, but abandoned this point.]

T. H. James.—Upon the case the defendant has brought himself within the definition of a common carrier. Therefore it is unnecessary to contend that every general ship makes the owner a common carrier. The defendant has for a series of

(3) 2 Ld. Raym. 909.
(4) 1 Sprague, 343.

years carried this kind of goods for the public, and it is not found that in a single instance he has refused goods; he does not, like a shipowner, exercise his option of refusing goods. The distinction between the defendant and the owner of a general ship is, that the former undertakes to carry all that is brought to him, and the latter only to *treat* for carriage. There is no evidence of any express agreement which would alter the obligation of a common carrier; or at least no such express agreement as is different from that made in every case with an undoubted common carrier. Moreover, there is no distinct evidence of any selection of a particular vessel by the plaintiff. In the judgment below the Lord Chief Baron says—"Here no vessel was named." A definition of common carrier is found in *Gisbourn* v. *Hurst* (5)—"Any one who undertakes to carry the goods of all persons indifferently for hire is a common carrier, if he holds himself out to carry goods for every one as a business," as Alderson, B., says in *Ingate* v. *Christie* (6). The owner of a general ship *prima facie* is a common carrier, but his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one—See per Pollock, C.B., in *Laveroni* v. *Drury* (7). "All persons carrying goods for hire, as masters of ships, lightermen, stage-coachmen, &c., come under the denomination of common carriers, and are chargeable on the general custom of the realm for their faults and miscarriages," and "If a man delivers goods to a common hoyman, who is a common carrier of goods, to carry them to a certain place, and pays him according to the custom for the carriage of them, and after, for default of good keeping they are lost, an action upon the case lies against the hoyman; for by the common custom of the realm he ought to have kept and carried them safely."—*Bac. Ab.* Tit. Carriers A. Kent, in his *Comm.*, vol. 3, p. 599, says—"Common carriers undertake generally and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed for hire as a business, and with or without a special agreement as to price." And in the category which follows the author places the masters and owners of "ships, vessels and all water-craft;" and he cites *Jackson* v. *Rogers* (8), *Elsee* v. *Gatward* (9). The first reported action of the kind against a common bargeman is *Rich* v. *Kneeland* (10), who admitted his alleged vocation, and was held liable. "To bring a person within the description of a common carrier he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*."—*Story on Bailments* (8th ed.) section 495; and see the note thereto, in which an apposite passage from the judgment of Nisbet, J., in *Fish* v. *Chapman* (11) is set out.

[BRETT, J.—May one be a common carrier and yet not liable to an action for refusing goods?]

Yes. He may have all the liability of a common carrier without *that* liability. Hoymen are expressly classed among common carriers in the work last cited, at section 496, where there is a note upon *Brind* v. *Dale* (12), as to which the writer observes that "it is very difficult to distinguish between the case of a carman, and that of a hoyman, or lighterman, or bargeman, plying between different parts of the same town, who take jobs by the hour or the day. And yet it does not seem to have been doubted that such hoymen, lightermen and bargemen are common carriers." See *Lyon* v. *Mells* (13), where it is asked whether the parties having fixed *termini* of their business or not makes any difference,—for an answer in the negative. The public policy of making common carriers insurers is explained by Best, C.J., in *Riley* v. *Horne* (14).

C. Russell replied.

Cur. adv. vult.

(5) 1 Salk. 249.
(6) 3 Car. & K. 61, p. 63.
(7) 8 Exch. Rep. 166; s. c. 22 Law J. Rep. (N.S.) Exch. 2.
(8) 2 Shower, 332.
(9) 5 Term Rep. 143.
(10) Cro. Jac. 330.
(11) 2 Kelly, 353.
(12) 8 Car. & P. 207; s. c. 2 Moo. & R. 80.
(13) 5 East, 428.
(14) 5 Bing. 219; s. c. 7 Law J. Rep. (N.S.) C.P. 32.

The judgment of Blackburn, J., Mellor, J., Grove, J., and Archibald, J., was (on June 26) delivered by—

BLACKBURN, J.—It appears by the case stated for this Court, on appeal, that the defendant was engaged in carrying from Widnes to Liverpool some salt-cake of the plaintiffs in a flat on the River Mersey. The goods were injured by reason of the flat getting on a shoal in consequence of a fog. This was a peril of navigation, but could in no sense be called an act of God or of the Queen's enemies. The jury found that there was no negligence on the part of the defendant. The question therefore raised is, whether the defendant was under the liability of a bailee for hire, viz., to take proper care of the goods, in which case they are not responsible for this loss. Or whether he had the more extended liability of a common carrier, viz., to carry the goods safe against all events but acts of God and the enemies of the Queen.

We have purposely confined our expressions to the question "Whether the defendant had the liability of common carriers?" for we do not think it necessary to enquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him. The rule imposing this extended liability on common carriers was originally established, as Lord Mansfield states in *Forward* v. *Pittard* (15), on the ground of public policy. "To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man." And as Lord Holt explains it in the celebrated judgment in *Coggs* v. *Bernard* (3), one that exercises a public employment—"And this is the case of the common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Morse* v. *Slue* (2). And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing." It is too late now to speculate on the propriety of this rule; we must treat it as firmly established that in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability.

It appears from the evidence stated that the defendant was the owner of several flats, and that he made it his business to send out his flats under the care of his own servants for different persons, as required from time to time, to carry cargoes to or from places in the Mersey, but that it always was to carry goods for one person at a time, and that "they carried for any one who chose to employ them, but that an express agreement was always made as to each voyage or employment of the defendant's flats," which means, as we understand the evidence, that the flats did not go about plying for hire. We think that this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who exercises this business or employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries. It was argued before us that the defendant could not have this liability unless he held himself out as plying between particular places, or had put up his flat, like a general ship, to go to some particular place, and take all goods brought him for that voyage. It was urged that in *Morse* v. *Slue* (2) the goods were probably put on board a ship put up as a general ship. It certainly may have been so, but the count is set out in Ventris and is general, that by the law and custom of England masters and governors of ships which go from London beyond sea are bound, &c., and the ultimate decision was that the count was proved. Hale, C.J., seems to have had a difficulty from the fact that the ship was bound to foreign parts, and that the shipowner would not by the civil law or the maritime law be chargeable for piracy or *damnum fatale* (a difficulty, it may be remarked, which does not apply to the present case, where the whole transaction is in England).

(15) 1 Term Rep. 27.

Nothing is in any report said as to the ship being a general ship, and on that count no judgment could have been given on that ground. And the ultimate decision on the special verdict has always been understood to apply equally to all ships employed in commerce and sailing from England, as is shewn from the forms of charter-party and bills of lading in ordinary use in England, which always contain an engagement to deliver the goods in the same condition they were received aboard, and when Lord Tenterden first wrote, contained only an exception of the dangers of the seas. Now the exceptions in each class of instruments are much more extensive.

And certainly it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people. And to come nearer to the particular case, we find that "lightermen" are specially named in *Bacon's Abridgment*, carrier A., and in the notes to *Coggs* v. *Bernard* (3); and in *Lyons* v. *Mells* (13) the course of business of the defendant is thus described: "The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops; and when he had not employment for his lighters in his own business, he let them for hire to such persons as wanted to carry goods to other sloops." If there be any difference between the employment of the now defendant, as described in this case, and the employment of the defendant in *Lyons* v. *Mells* (13), it would seem that the latter was less clearly a public employment. The great point discussed was, whether a notice limiting the liability of the defendant was, as Lord Ellenborough states it, illegal, as being "to exempt him from a responsibility cast on him by law as a carrier of goods by water for hire," a proposition which could not well have been discussed by anyone who did not think that the defendant had, but for the notice, incurred that responsibility. The point actually decided was that the terms of the notice did not relieve the defendant from liability for furnishing an unseaworthy lighter. As to this, Lord Ellenborough says, "Every agreement must be construed with reference to the subject matter, and looking at the parties to this agreement (for so I denominate the notice, and the situation in which they stood in point of law to each other), it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where the law would otherwise have made them answerable for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against. We think that Mr. James, in arguing for the plaintiffs in this case, was right when he relied on *Lyon* v. *Mells* (13) as an important authority in favour of his client. It is true that the point was not precisely decided in *Lyon* v. *Mells* (13), and if it had been, it would not have been binding upon us in a Court of Error; but the opinions of Lord Ellenborough, and (as far as we can judge from the report) of every one concerned in the case, was that it was too clear for argument that, but for the notice, the lighterman, acting as the defendant did in that case, would have been liable to the same extent as a common carrier.

Lord Abinger, in *Brind* v. *Dale* (12), expressed a strong opinion that a town carman could not be considered a common carrier; but he reserved the point, and as the jury found in favour of the defendant, the question whether the goods were received by him as a common carrier, it never was reviewed *in banco*. The ruling of Alderson, B., in *Ingate* v. *Christie* (6) is in express conformity with what appears to have been Lord Ellenborough's view in *Lyon* v. *Mells* (13), and no English authority has been cited in conflict with this doctrine. We think, therefore, that the judgment below was right, and should be affirmed.

His Lordship then read the following judgment of

BRETT, J.—I cannot come to the conclusion that the defendant's liability in this case depended on whether he was a common carrier or not, because I conclude that he was liable, notwithstanding that I am

clearly of opinion he was not a common carrier. It seems to me that it is of the very essence of the definition of a common carrier that he should be one who undertakes to carry the goods (not being dangerous or of unreasonable weight or bulk) which are first offered to him. He who does not so undertake is not a common carrier. The force of the word "common" is not that the carrier's business is a public one, or "in common with others," but that he undertakes to carry for all indifferently, in the sense of for the first comer, i.e. "for all in common." It is clear to my mind that a shipowner who publicly professes to own ships and to charter them to anyone who will agree with him on terms of charter, is not a common carrier, because he does not undertake to carry goods for, or to charter his ships to the first comer. He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant in the present case, in my opinion, carried on his business like any other owner of ships or vessels, and was not a common carrier, and was in no way liable as such. But I think that by a recognised custom of England—a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers—every shipowner who carries goods for hire in his ship, whether by inland navigation or coastways or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter on a particular voyage or on particular voyages he limit his liability by further exceptions. I think that this liability attaches to shipowners carrying goods by reason of recognised custom, which may be pleaded as the custom of England, just as the custom of England as to common carriers may be pleaded. But it is a custom wholly independent of the similar custom with regard to common carriers. The similarity of the two customs has occasioned phraseology to be used in some cases which has raised an inaccurate idea that shipowners are common carriers; but I am of opinion that they are not. They are not bound to carry for the first comer. I therefore hold that the defendant is liable as a shipowner upon the custom applicable to them as such, but is not liable as a common carrier upon the custom applicable to that business or employment.

Judgment affirmed.

Attorneys—F. Venn & Son, agents for J. Quinn & Sons, Liverpool, for plaintiffs; Field & Roscoe, agents for Bateson & Co., Liverpool, for defendants.

1874. June 5, 6, July 6. } THE ATTORNEY-GENERAL *v.* THE NORTH LONDON RAILWAY COMPANY.

Revenue—Fares of Railway Passengers, Duty on—Exemption—The Cheap Trains Act (7 & 8 *Vict. c.* 85).

A train which travels along a line of railway from one terminal station to another for the conveyance of passengers at fares not exceeding one penny per mile, and fulfils the other requirements of section 6 *of the Cheap Trains Act* (7 & 8 *Vict. c.* 85), *is a cheap train within the meaning of the Act, although there may be no third class carriages in, nor third class tickets issued for such train, and the right of the railway company, under section* 9, *to exemption from duty in respect of such fares of passengers by any such train is not lost through the passengers being required, for the convenience of traffic, to change from one such train to another at a junction or other station between the termini in the course of transit, provided there is no unreasonable detention at the station where the change is made, so as to reduce the speed at which the passengers travel below the minimum speed of twelve miles an hour required by the Act. But such train must stop, so that passengers travelling at the fares aforesaid*

may enter and leave it, at every ordinary intermediate passenger station between the terminal ones, and the Board of Trade have no power, under section 8, to dispense with this condition.

The fares received for return tickets issued in respect of such train are not exempt from duty unless the fares that would be charged for the single journey over the same distance would not exceed one penny per mile.

Weekly tickets issued to workmen at a fare which, if the holders used them every day in the week, would not exceed one penny per mile, are nevertheless not exempt, unless the trains in respect of which those tickets are issued travel from one end to the other of a trunk, branch, or junction line, and the ticket-holders are allowed to take with them half a hundred weight of luggage without extra charge, in compliance with the provisions of the Act.

Information by the Attorney-General on behalf of the Crown to recover certain duties in respect of the receipts of the defendants from the fares of passengers carried upon their railway.

The substance of the case and arguments sufficiently appears in the judgment of the Court.

The Attorney-General (Sir R. Baggallay), Sir H. James and *W. W. Karslake*, on June 5 and 6, argued for the Crown.

Sir J. Karslake, J. Brown and *F. M. White*, for the defendants.

Cur. adv. vult.

The judgment of the Court (1) was (on July 6) delivered by

AMPHLETT, B. — This information is filed for the purpose of recovering from the defendant company certain passenger duties from which they claim to be exempted under the provisions of the 7 & 8 Vict. c. 85, commonly called "The Cheap Trains Act." By section 6 of that Act, after reciting that it was expedient to secure to the poorer classes of travellers the means of travelling by railway at moderate fares and in carriages in which they might be protected from the weather, it was enacted that all passenger railway companies therein mentioned, and which would include the defendant company, should, by means of one train at the least to travel along their railway from one end to the other of each trunk branch or junction line belonging to or leased by them so long as they should continue to carry other passengers over such trunk branch or junction line once at the least each day on every week day, except Christmas Day or Good Friday (such exception not to extend to Scotland), provide for the conveyance of third class passengers to and from the terminal and other ordinary passenger stations of the railway under the obligations contained in their several Acts of Parliament, and with the immunities applicable by law to carriers of passengers by railway, and also under certain conditions therein mentioned, among which are the following—"Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations.

"Such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance travelled on the railway, including stoppages.

"Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line.

"The carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected from the weather in a manner satisfactory to the Lords of the said committee.

"The fare or charge for each third class passenger by such train shall not exceed one penny for each mile travelled."

By section 7, a penalty is imposed on railway companies refusing or wilfully neglecting to comply with the provisions of that Act. By section 8, it was enacted that, except as to the amount of fare or charge for each passenger by such cheap trains, which should in no case exceed the rates thereinbefore in such case provided, the Lords of the said committee (hereinafter called the Board

(1) Kelly, C.B.; Pigott, B.; and Amphlett, B.

of Trade) should have a discretionary power upon the application of any railway company of dispensing with any of the conditions thereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid in consideration of such other arrangements as therein-mentioned. And by section 9, it was enacted that no tax should be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid.

The defendant company have, by various Acts of Parliament, become the proprietors of a line of railway which may be called their main line, running northwards from Broad Street, in the City of London, up to a certain place called the Dalston Junction, and from thence dividing into two branches, one running to the east, to Poplar, and the other to the west, to Chalk Farm.

Before reaching Chalk Farm, a line of railway, belonging to other companies, diverges from this main line and runs to Richmond and Kew Bridge; and the defendant company have running powers over that line, and work the same, not as a separate line or branch, but in connexion with their main line as hereinafter mentioned.

By arrangement the defendant company run some of their trains beyond Poplar to Blackwall and elsewhere; but for the purpose of this judgment, their line at this end may be considered as terminating at Poplar. The defendant company worked their system of railway as follows:—"Trains run continuously to and fro by the Dalston Junction between Broad Street and Poplar; other trains run continuously to and fro, also by Dalston Junction, between Broad Street and Chalk Farm, and between Broad Street and Richmond and Kew Bridge or one of them. No trains have run for some time past continuously to and fro between Poplar and the stations to the west of Dalston Junction; but passengers desiring to go from Poplar or an intermediate station between Poplar and Dalston Junction to any other station to the west, take an up train from Poplar to Broad Street as far as Dalston Junction, and then join, after an interval of a few minutes only, a down train from Broad Street to Chalk Farm or other terminal stations to the west as the case may be.

Under these circumstances we think that trains running from one end to the other, from Broad Street to Poplar, or from Broad Street to Chalk Farm, Richmond or Kew Bridge, or between other terminal stations on the defendants' system, and complying with the other requirements of the 6th section of the Act, are cheap trains within the meaning of the Act, and that exemption from duty in respect of the fare of passengers by any such train is not lost by their being required, for the convenience of the traffic, to move from one such train to another at Dalston Junction or any other station, provided there is no unreasonable detention at each station so as to reduce the speed at which such passengers travel below the minimum speed required by the Act.

The defendant company only use two classes of carriages upon the line, which are respectively called and marked first and second class carriages. The fares charged to second class passengers from any one terminal station to another terminal station, and indeed between most of the stations, do not exceed the parliamentary rate of 1*d.* a mile, and in all such cases second class tickets only are issued.

There are, however, a few cases where the fares to and from particular stations for second class passengers exceed the parliamentary rates; and in one of these cases, but not all, third class tickets are issued at fares not exceeding the parliamentary rate; and where third class tickets are so issued, there being no third class carriages, the holders of second and third class tickets are admitted to the same carriages and are afforded the same accommodation in every respect.

The defendants claim exemption from duty in every case in which the fares charged to the holders of either second or third class tickets do not exceed the parliamentary rate of 1*d.* a mile.

This claim to exemption is disputed by

the Crown on various grounds; and first it was contended that, in the absence of any third class carriages, a train ought not to be considered a cheap train within the meaning of the Act; and reliance was placed upon the preamble of the 6th section of the Act and the express mention of third class passengers in the body of the section, which, it was forcibly argued, shewed that the class of persons whose fares were to be exempted from duty were those who would ordinarily travel in third class carriages, and not those who, if there were both second and third class carriages, would prefer the former, even at a greater charge, in order to secure themselves from the discomfort of travelling in company with third class passengers. We are, however, of opinion that the objection ought not to prevail. There is no definition of a "third class passenger" in the Act, and it would, we think, be unreasonable to hold that the question whether a person is a third class passenger should depend upon the number affixed to his carriage or ticket, and which might be changed at any moment. We apprehend that the third class passengers were mentioned in the 6th section of the Act merely to shew that it was for that class of passengers only that the fares were to be *compulsorily* limited, leaving the companies to exercise their own discretion as to the fares to be charged to other passengers. It might otherwise have been held, as indeed is contended in the information, though not insisted upon in the argument before us, that no passenger by a cheap train, of whatever class, should be charged more than the parliamentary rate. Suppose the company chose to run a parliamentary train with only one class of carriages, such as are usually called third class carriages, would it not be a cheap train within the meaning of the Act? and could it be deprived of that character because the company gave the passengers the benefit of better or more commodious carriages?

It was then contended on the part of the Crown that, even assuming that the train was not deprived of its character of a cheap train within the Act by the absence of third class carriages, still that the fares of those only who asked for third class tickets would be within the exemption, and that if it be difficult or impossible to distinguish them from the others, the company have brought it upon themselves and cannot complain.

Looking, however, at the language of the 9th section of the Act where passengers generally, and not third class passengers are mentioned, we are of opinion that such distinction cannot be maintained, and that the fares of all passengers by a cheap train, of whatever class, are within the exemption, if not exceeding the parliamentary rate. It is easy to see that this construction may enable companies to claim exemption for the fares of passengers not within the purview of the Act, but that must be remedied, if thought advisable, by the Legislature, and not by putting a strained meaning on the language of the Act as it stands.

It was next contended on the part of the Crown that no train which did not stop at every ordinary passenger station between the terminal stations, and which did not carry passengers to all the stations at which they did stop at the parliamentary rate, was a cheap train within the meaning of the Act, and that consequently the fare of no passenger travelling by it, of whatever class, would be within the exemption, and we are of that opinion.

It was but faintly contended on the part of the defendants that this would not be so on the construction of the Act alone, but it was said that the Board of Trade had dispensed with both these conditions. It is, however, our opinion that even assuming that the Board of Trade, after the requisite knowledge of the facts, did *de facto* intend to dispense therewith (which but for the admission on the part of the Crown might have been very much doubted upon the evidence in the case) it was beyond their power to do so. By the 8th section of the Act the rates of fares are expressly excepted out of the dispensing power, and with respect to the stopping of trains we think that the dispensing power is confined to the conditions (expressly so called) at the end

of the clause, and does not extend to the requirements in the previous part of the clause which appear to constitute the essential definition of a cheap train under the Act. If this be so, it seems to us that to make the claim consistent with itself, the passenger stations, mentioned in the third condition, at which trains are to stop, *if required*, must be taken to mean stations other than the ordinary passenger stations before mentioned, for instance stations such as those which are sometimes established for the convenience of private individuals, or particular works, or on particular days for the accommodation of market people. The only other questions raised before us which are ripe for decision without further enquiry into the facts, are as to return tickets, and as to workmen's tickets.

With regard to return tickets it appears that in some instances such tickets are issued to second class passengers at fares which, assuming them to make full use of their tickets, would not exceed the parliamentary rate, while the fare for a single journey over the same distance would exceed that rate, and we are of opinion that no exemption can be claimed in respect of such return ticket since it appears to us to be the intention of the Act that a passenger whose fare is to be exempt should have the option of travelling for any part of his journey at the parliamentary rate.

With regard to workmen's tickets which are weekly tickets accorded to artisans, mechanics, and daily labourers upon a special contract, it appears that the charge for every such ticket is one shilling only, which, if the holder availed himself of it every day in the week would not exceed the parliamentary rate, but such tickets are only issued for trains running from Dalston Junction to Broad Street, and not for any train which travels from one end to the other of any trunk branch or junction line of the defendants, and, moreover, the passengers availing themselves of these tickets are not allowed to take with them half a hundred weight of luggage without extra charge in compliance with the Cheap Trains Act, and we do not find any evidence or admission that the last condition has been dispensed with by the Board of Trade. We think, therefore, that under the present arrangements the fares of these workmen's tickets are not entitled to the exemption, although we should have been of a different opinion if such tickets were issued to passengers travelling by a cheap train as herein defined, and if the condition as to luggage were dispensed with, as it doubtless would be on application by the Board of Trade.

Under these circumstances the proper decree appears to us to be as follows:—

Declare that every train running from one end to the other of the line between Broad Street station and Poplar Station, or between Broad Street Station and Chalk Farm, Richmond or Kew Bridge, or between other terminal stations on the defendants' system of railways and conveying passengers to and from such terminal and every intermediate ordinary passenger station at fares not exceeding the parliamentary rate, and complying with the several other conditions mentioned in the 6th section of the Cheap Trains Act so far as they have not been properly dispensed with by the Board of Trade ought to be considered a cheap train within the meaning of the Cheap Trains Act, notwithstanding there may be no third class carriages in such train.

Declare that the fares of passengers by such cheap trains are entitled to exemption from duty if they do not exceed the parliamentary rate, whether the tickets issued to them are second or third class.

Declare that such exemption is not lost by such passengers being required for the convenience of traffic to move at any particular station from one such cheap train to another provided there is no unreasonable detention at such station so as to reduce the speed at which such passengers travel below the minimum speed required by the Act.

Declare that no train ought to be considered a cheap train within the meaning of the Act whether approved by the Board of Trade as a cheap train or not, which does not stop at every intermediate ordinary passenger station, and which does not convey some class of passengers to and from every station at fares not extending the parliamentary rate, and

that no exemption ought to be allowed in respect of the fares of the passengers by any such trains, notwithstanding such fares may not exceed the parliamentary rate.

Declare that the fares received for return tickets are not exempt from duty unless the fares that would be charged to the same class of passengers for the single journey over the same distance would not exceed the parliamentary rate.

Declare that the fares received for workmen's tickets under the existing arrangements are not exempt from duty.

Direct, in case the parties differ, an enquiry as prayed in the third paragraph of the prayer (2), regard being had to the above declarations.

Judgment accordingly.

Attorneys—The Solicitor of Inland Revenue, for the Crown; Paine & Layton, for defendants.

[IN THE HOUSE OF LORDS.]

1873. July 2, 3. 1874. May 15. June 22. } SAXBY *v.* CLUNES AND ANOTHER.

Patent—Infringement—Combination of Machinery for particular Object in a particular Way—Adaptation of same Combination for similar Object in a different Way.

A patent for a mechanical arrangement whereby a particular operation may be performed for a particular purpose, the parts of the apparatus so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of parts for a similar purpose, if the mode of operation is sufficiently distinct, and different in principle from that which was described or claimed in the patent, and the object achieved is also sufficiently distinct or novel and does not form an essential part of the patent.

S. obtained in 1856 *a patent for "an arrangement of mechanism by which the points and the signals used on railways should be simultaneously actuated by one movement and in such a manner that the points could not be wrong when the signals were right, nor the signals wrong when the points were right." The invention effected this by connecting the rods and pulleys which worked the signals with the lever which moved the points so that when the signalman pushed or pulled the lever to open or shut the points he must of necessity raise or depress the signal and place it so that it should rightly indicate the position of the points. After describing the invention in all its parts, the specification stated that the claim was for the mechanical arrangement thereinbefore described, whereby "the signals and the points of each line are worked by the motion of a signal lever, or any modification thereof," and it was declared that the inventor did not confine himself to the precise arrangement of the mechanical details, as the same might be varied without departing from the invention.*

In 1866, *C. obtained a patent "for machinery for actuating railway-points and signals," the object being "to effect a simultaneous adjustment of points and signals, agreeing together so as to prevent the possibility of accident by collision at railway junctions, and to ensure the efficient working of points and signals in combination. The system employed under C.'s patent was that the normal position of the signals should be at 'Danger,' and they could only be changed to 'Safety' by the moving of a separate lever; they were not moved by the lever which moved the points. But the lever which moved the signals was connected with the lever which moved the points in such a way that when the line was not open the signal lever was locked, and it could not be moved, consequently the signal could not be changed from danger to safety. But when the point's lever was moved so as to open the line, the signal lever became at the same*

(2) Viz., to ascertain what trains had been run as cheap trains, and whether any had been properly approved by the Board of Trade, and what fares had been charged, and whether for single or return tickets, and what moneys had been received for such fares, and what duty was owing in respect thereof.

moment unlocked, and then the signalman might move it and so put the signal to safety. But the line might be opened or closed for shunting, &c., without moving the signal from danger. Thus C.'s invention was in fact one by which any two or more levers might be made to act upon each other and in communication, and not that one lever should act directly at the same moment upon both points and signals. The result, as described in his specification, was that "when one or more sets of levers were moved, such signals (it should have been signal levers) as may be required to be moved in accordance therewith were set at liberty, and all other signal levers which, if moved, would be antagonistic to the position of the points became locked and rendered incapable of motion."

C.'s patent was more useful than that of S., but S.'s patent could have been made to effect C.'s result by a slight modification, and the introduction of another lever. The mechanical contrivances employed in the one patent were of course much the same as those used in the other :—

Held, *that the working C.'s patent was not an infringement of S.'s patent; that the principle of his invention, namely, of simultaneously moving the points and making it possible to move the signal lever, was not equivalent to S.'s principle of simultaneously moving the signals and the points; and C.'s invention was one of practical importance and distinct from that of S.*

This was an appeal from a judgment of the Court of Exchequer Chamber, reversing a judgment of the Court of Exchequer, which last-mentioned judgment had discharged a rule to enter a verdict for the defendants in an action brought by the plaintiff for the infringement of a patent granted to him in the year 1856 for the invention of "a mode of working simultaneously the points and signals of railways at junctions to prevent accidents."

The defendants were also patentees under a patent granted to them in 1866 for "Improvements in machinery or apparatus for actuating and regulating railway-points and signals." The plaintiff affirmed that the defendants' patent was an infringement of his; and as the defendants were extensively using their patent, the action was brought and the cause was tried before Kelly, C.B., in 1869. At the trial the question of infringement was not left to the jury, but a verdict was directed by the learned Judge for the plaintiff, leave being reserved to the defendants to move to enter a verdict in their favour, on the ground that there was no sufficient evidence of infringement; the Court to be at liberty to draw inferences and to form opinions upon the evidence. The evidence was set forth in a Special Case, and consisted of the patents and specifications and the statements of several eminent engineers, which were to the effect that in their opinion a working under the defendants' patent was an infringement of the plaintiff's patent.

The plaintiff, in his amended particulars of the breaches complained of, alleged that the defendants had infringed the letters patent granted to him "by the manufacture, use or sale of signal apparatus for working points and signals of railways in which actuating levers are made, by means of the rods and cranks and shafts connected therewith, to act upon the points and signals corresponding thereto respectively in such a manner as to prevent a wrong signal being given or remaining exhibited, according to the invention of the" plaintiff as described in his patent.

In order to understand the intention of the plaintiff's patent, it should be observed here that prior to the publication of his invention the points or switches by which a train is directed or steered from one set of lines to another, as from a main up or down line to a branch line, had been moved by the signalman by means of a lever which he moved by his hands, and the signal lamps and the arms of semaphore signals or telegraphs were actuated by the same signalman by means of stirrups adjusted for the foot. This circumstance is mentioned in both the complete and the provisional specification of the plaintiff's invention, which then proceed to point out the dangers which arose from the negligence, confusion of mind or inattention of the signalman. The full specification then goes on to state

that by the plaintiff's invention "the signals and the points are all actuated by a single motion of a lever, thus rendering the duties of the signalman of the most simple character, and making it impossible for an accident to occur from the signals and the points differing." The provisional specification stated that the invention consisted "of an arrangement of mechanism by which the switches or points, the signal-lamps and the arms of semaphore signals, as used on railways, may be simultaneously actuated by one movement and in such a manner that the points cannot be wrong when the signals are right, nor the signals wrong when the points are right."

The mechanism described in the complete specification consisted of levers, cranks, rods, keys, slots, pins and other mechanical contrivances, none of which were new, and many of which had all along been employed in connection with the operation of shifting points and changing railway signals. But these contrivances had never before been employed all together for these purposes, or combined in the particular manner described by the plaintiff, nor of course for the particular purpose he aimed at. The result of the plaintiff's combination may be stated thus—Supposing the points are to be moved from the down main line to the down branch, the signalman, by moving one single lever, performs at the same instant the three following operations, viz., he pulls a rod connected with the main line signalpost, and so lifts that signal to "danger;" he pushes another rod connected with the branch line signalpost, and thereby allows that signal to fall by its own gravity down to "safety," and he moves the points. Where the branch line is on the down side of the main line, it is obvious that some further complication of the mechanism would be necessary to open the line from the up main to the up branch, because the train, to get from the one to the other, must cross the down main line, therefore a fourth operation is necessary, namely, the elevation of the danger-signal on the down line. This was accomplished by the plaintiff's invention by an ingenious employment of rods with slots, or large openings in them, but the principle and result were the same as that above mentioned for the simple process where crossing another line was not necessary; the lever which moved the points pushed or pulled rods which either lifted up or allowed to fall two or more signals.

Thus he very effectually performed that which he claimed in his specification, his claim being described as follows—"What I claim and desire to secure" . . . "is the mechanical arrangement hereinbefore described and shewn by the accompanying drawings, whereby the semaphore signals and coloured glass of the night signals and points of each are worked by the motion of a single lever, or a modification thereof."

Notwithstanding the seeming excellence of this system, it was found to be open to accidents, particularly where shunting had to be going on at stations, for which purpose the main line ought to be closed as dangerous while the points might yet be open. The plaintiff had provided for this also; but by distinct operations which, though ingenious and useful, were open to the objection that by inattention or carelessness they might be neglected and so an accident might occur.

To remedy this, the defendants conceived or adopted the idea of keeping the signals constantly at "danger," and of having them so contrived that, although they might still be at danger while the line was open, it would be impossible for the signalman to place them at safety unless the line was open. To effect this object, the defendants combined the machinery which had been employed by the plaintiff, and also certain other well-known mechanical contrivances, but there was this difference between their mode of attaining security and the plaintiff's mode. Instead of one lever for the signalman to work, they had three levers, all of which must be moved before the operation could be completed, which was effected by the movement of the plaintiff's single lever. The first lever to be moved was that which shifted the points. The points might be closed or opened at pleasure without any alteration of the signal taking place; but as the normal position of the

signal was at danger, no danger could result until the signal had been altered. It will be remembered that, under the plaintiff's invention, the signal and the points moved simultaneously; when the points on the main line were open, the signal fell to safety, when they were closed the signal was lifted to danger. The defendants' second lever to be moved was that which removed the signal from danger to safety. But the arrangement of the defendants was such that this could not be effected, unless the points were open and the line so far safe. The mode in which the defendants effected this was this: they had such a combination of rods connected with the first lever, namely, the lever which moved the points, that when the signalman moved that lever he simultaneously moved the points and set the signal at liberty. The signal was not thereby raised or depressed, as it was by the plaintiff's invention; it was only so operated on that by moving the second lever the signalman might change it from danger to safety. The third lever was for the signal on the branch line. Therefore, whereas by the plaintiff's patent points and signals must always correspond, by the defendants' they need never correspond, except at the moment when the signal was not at "safety;" and whereas the plaintiff's invention was for a mechanical contrivance whereby, on moving a single lever, three distinct operations must be simultaneously performed, the invention of the defendants rendered the simultaneous performance of these operations impossible, and required the movement of three distinct levers. With their patent the point levers must be worked first, and then, as was stated in their specification, "when one or more sets of point levers are moved, such signals as may be required to be moved in accordance therewith are set at liberty" (it should have been "*such signal levers, &c.,*" are set at liberty), "and all other signal levers which, if moved, would be antagonistic to the position of the points become locked and incapable of motion."

These being the points of difference, it remains to observe that the points of resemblance were, first, that in both inventions one and the same motion of the lever, which worked the points, simultaneously operated on or influenced the signals; in the plaintiff's invention directly by actually raising or depressing them, and in the defendants' indirectly by unlocking the signal levers, and so setting the signals at liberty to be raised or depressed in accordance with the position of the points. Secondly, the result was the same in each so far as that each of the contrivances put it out of the power of the signalman to give a 'safety' signal not in accordance with the points. And, thirdly, each patent was for a combination of levers, rods and other mechanical contrivances, all of which, though well known, had not been used for the purpose of disenabling signalmen to give wrong signals before the plaintiff's patent was taken out.

With regard to the simultaneity of operation upon the points and signals, the plaintiff's specification stated, as above-mentioned, that his invention consisted of an arrangement, &c., by which switches and signals may be simultaneously actuated by one movement; and the defendants stated in their specification that the object of their invention was "to effect a simultaneous adjustment of points and signals agreeing together," &c., and to "ensure the efficient working of the points and signals in combination or otherwise."

Having thus mentioned the principal points of similarity and of difference between the two patents, it should be further observed that the engineers who were examined on the trial very much agreed in opinion that at all events the contrivance of rods and so forth employed by the defendants to shift the signals was mechanically the same or equivalent to that employed by the plaintiff for that purpose, and that the contrivance by which the locking or unlocking of the signal lever in the defendants' patent was effected simultaneously with the motion of the points lever was mechanically the same or equivalent to the contrivance by which the simultaneity of action upon the points and upon the signals was effected in the plaintiff's patent, by moving his single lever, which thus became a points lever and a signal lever in one. It should be also

observed that Col. Yolland, the Inspector of Railways, stated that no railway would now be passed unless it had apparatus which would do what was done by the defendants' patent; and that which was affected by the plaintiff's patent no longer met the requirements of the Board of Trade.

The verdict having been entered for the plaintiff by the direction of the learned Judge, the rule to enter the verdict the other way was argued in the Court of Exchequer in 1869, and that Court, per Kelly, C.B., Channell, B., and Pigott, B., ordered that the rule be discharged, on the ground that the simultaneity of operation on the points and signals was the essential principle of both patents, and that the user of the defendants' patent was an infringement of the plaintiff's patent. But Cleasby, B., dissented, on the ground that, although a material element of the defendants' patent was the influencing points and signals by the motion of a single lever, the plaintiff's patent did not directly claim this, but the actual working of points and signals by the motion of a single lever. Either he never thought of the indirect and wider application of the principle, or he feared to claim it, lest so general a patent could not be sustained. He could not now claim as a necessary implication to be gathered from his specification that which, for whatever reason, he abstained from claiming by it.

On appeal to the Court of Exchequer Chamber, that Court reversed the judgment of the Court of Exchequer, on the ground that the defendants' invention was founded upon a new and distinct and different system from that of the plaintiff, namely, that of having the signal at danger as a preliminary; also that the defendants' principles of simultaneously moving points and making it possible to move the signal by a distinct operation of a separate appropriate lever, which may or may not be resorted to, was not equivalent to the plaintiff's principle of actually moving the signals themselves simultaneously with the points, the ultimate result brought about by the one principle being different from and more useful than that achieved by the other, and the immediate result of the simultaneity of action being different in the two cases, because in the plaintiff's patent the lever which moves the points must also move the signals at the same time, unless the signals be fixed by the use of a detached lever and pin, which were not claimed, while the defendants' lever which moves the points, cannot, under any circumstances, move the signals, it can only besides moving the points lock or unlock the other lever, by which, at the will of the signalman, the signals may, but need not be moved.

From this judgment the plaintiff appealed to the House of Lords.

The Judges were summoned, and Kelly, C.B.; Martin, B.; Keating, J.; Brett, J.; Denman, J.; and Pollock, B., attended.

Holker and *Aston* (with them *Macrory*) were heard for the appellants.

They cited *Jupe* v. *Pratt* (1), *Seed* v. *Higgins* (2), *Lister* v. *Leather* (3), *Cannington* v. *Nuttall* (4), *The Electric Telegraph Company* v. *Brett* (5), and *De la Rue* v. *Dickenson* (6). They contended that the influencing of signals simultaneously with points was the principle of the appellant's patent, and it was of no consequence that the respondents influenced the signals indirectly while the appellant did so directly. The principle of his patent was infringed. Throughout his specification he used the word actuate, and that word applies to indirect as well as to direct action upon a thing. The same arrangement of apparatus is with trifling exception used by the respondent as that employed by the plaintiff. But the respondent has achieved an additional object. But to adopt a combination of machinery or arrangement of apparatus originally directed to one purpose, and to use it for another and additional purpose is an infringement of the patent which

(1) 1 Webs. Pat. Cas. 145.
(2) 8 H.L. Cas. 550; s. c. 30 Law J. Rep. (N.S.) Q.B. 314.
(3) 27 Law J. Rep. (N.S.) Q.B. 295; s. c. 8 E. & B. 1004.
(4) 40 Law J. Rep. (N.S.) Chanc. 739; s. c. Law Rep. 5 E. & I. App. 205.
(5) 10 Com. B. Rep. 838; s. c. 20 Law J. Rep. (N.S.) C.P. 123.
(6) 7 E. & B. 738.

first introduced the combination or arrangement—*Cannington* v. *Nuttall* (4).

The Attorney-General (*Sir J. Coleridge*) and *Webster* (with them *O'Hara Moore*) for the respondents. [With reference to the word actuate they cited Johnson's, Webster's and other dictionaries to shew that the word implies "motion" actually imparting motion.]

Holker replied.

At the conclusion of the arguments the following question was propounded to the Judges:—

Whether the use, by the respondents, of their patented signal apparatus was an infringement of the appellant's patent, dated the 24th of June, 1856.

BRETT, J.—My Lords, the opinion which I am about to read to your Lordships is that of my brother Keating, my brother Denman, and my brother Pollock, as well as my own; it was written by Sir Samuel Martin.

My Lords, In answer to your Lordships' question we state that the use by the defendants of their patented apparatus for actuating and regulating railway points and signals is not an infringement of the plaintiff's invention for which the letters patent, dated the 24th of June, 1856, were granted. The cause was tried at Nisi Prius before the Lord Chief Baron, when several witnesses were examined on behalf of the plaintiff, one of them being Colonel Yolland, an inspecting officer of the Board of Trade. At the close of the plaintiff's case it was contended that there was no evidence of infringement to go to the jury. The result was that no question was submitted to the jury, but a verdict was taken for the plaintiff subject to leave to move to enter a verdict for the defendants or a nonsuit, the Court to have power to draw inferences and form opinions. A rule to shew cause was granted for this purpose by the Court of Exchequer, which was afterwards argued. The Judges differed in opinion. Cleasby, B., thought there was no infringement. The Chief Baron and two other Barons thought there was. An appeal was made to the Court of Exchequer Chamber, which was argued before five Judges, who were of opinion there was no infringement, and the judgment of the Exchequer was reversed. This is an appeal from that judgment. On the argument at your Lordships' bar there was no difference between the learned counsel as to the law affecting the case. The plaintiff's patent is for an apparatus to prevent accidents at railway junctions or stations, consisting of, and being an application and adjustment of well known mechanical means. The defendants' apparatus is for the same object, and if it be substantially the same, differing only in mechanical details, or, in other words, using mere mechanical equivalent—the use of it is an infringement. And again, if the defendants have in their apparatus made use of any part of the plaintiff's apparatus, which was new and material, and is included in the patent, there is an infringement—for a patent not only protects the entire apparatus, but also every part of it which is new and material. But, on the other hand, if the defendants' apparatus, although it be to effect the same object, be a new and different apparatus not copied from the plaintiff, nor there being used in its construction any part of the plaintiff's apparatus which was new and material, there is no infringement. A patent protects the apparatus described in the specification, and every part of it which is new and material, but it is free to anyone to construct and use an apparatus for the same purpose which is different in its principle, and in the construction of which there is not used any part of the patented apparatus which is new and material. The protection given by the law to a patentee is that no one shall without his consent use or counterfeit his invention, or any new and material part of it.

The apparatus of the plaintiff and the defendants are both for actuating or moving railway points and signals. Moving points and signals must have been coeval with railways themselves. When railways were first made, there must of necessity have been points for the removal of engines and carriages from the main line to the sidings and branches, and signals to indicate when there was danger in approaching stations and junctions. According to a statement in the specification of the plaintiff's patent, an apparatus

in use in 1856 (the date of the patent) was one whereby the signalman operated upon the points by a lever moved by his hands, and upon the signals by a sort of stirrup moved by his feet, and the patentee points out the danger and defects of this apparatus, and how he proposes to remedy them by his patented apparatus.

To answer your Lordships' question, the first thing to be done is to ascertain from the plaintiff's specification, with certainty and precision, what is the invention for which the patent was granted. The invention is stated to be "a mode of working simultaneously the points and signals of railways at junctions to prevent accident." Again, "By the invention the signals and points are all actuated by a single motion of a lever, making it impossible for an accident to arise from the signals and the points differing." The invention is then described in detail, making references to drawings and figures and letters, and it is stated, "Upon the stage or platform are fitted the pair of levers which actuate the signals and points of the up and down lines, and also a pair of levers by which the signals only may be set without disturbing the position of the points," and further on, "*H* is the lever by which the signals and points of the up line are actuated. H^1 is the lever by which the signals and points of the down line are put in motion, *I* is a lever by which the signals of the up line may be set when the points do not require alteration, I^1 is a similar lever by which the signals of the down line may be set irrespective of the points." The specification then describes the mechanical means, levers, cranks, connecting rods, &c., used to construct the apparatus, none of which are new or are claimed to be new, and concludes in the manner usual in specifications, as follows—"Having described the nature of my invention and the manner of carrying the same into practical effect, I wish it to be understood that I do not confine myself to the precise arrangement of the mechanical details herein-before described and shewn, as the same may be varied without departing from the invention. But what I claim and desire to secure under the letters patent is, the mechanical arrangement herein-before described and shewn by the accompanying drawings, *whereby the signals and the points of each line are worked by the motion of a single lever or any mere modification thereof.*"

It was argued on behalf of the plaintiff that the levers *I* and I^1, whereby the signals may be set without moving the points, were infringed by the defendants' apparatus; but it is clear to my mind that these levers are not within the patent at all. The patent is confined to the levers *H* and H^1, and I think the levers *I* and I^1 were of purpose and design kept out of it, and no doubt for a good reason. A lever for the mere moving or actuating a signal must have been as old as railways, and the claiming it might have endangered the patent.

Again, to make the using a part of an invention an infringement it must be a new part and a material part. Now there is not a scintilla of evidence that the levers *I* and I^1 were new or were stated by any one to be new; on the contrary there can be no doubt that they were old and long in use before the plaintiff's patent. What afterwards occurred was this: when the plaintiff's apparatus was put in use it was found defective, and when the defect is pointed out it is obvious. At junctions and stations it is frequently necessary to have the "danger" signal up when the points are free. Engines and carriages have to be shunted backwards and forwards to and from the main line to branches and sidings over the point of junction when it would be highly dangerous for a travelling train to enter, but by the plaintiff's apparatus the points and signals must of necessity move together—move simultaneously; when one is moved the other is moved. This defect is clearly shewn in Colonel Yolland's evidence. He says what he required was, that every signal should have its lever, and every point should have its lever, quite distinct from each other and worked independently. He also says, an apparatus according to model A would not now be passed. Model A is the plaintiff's patent apparatus. He also says the arrangement he required was carried out in model C. Model C is the defendants' apparatus.

It only remains to ascertain what is the defendants' apparatus. For it the defendants obtained a patent in 1866. The question here is not whether the patent is good, but whether the using an apparatus made according to its specification is an infringement of the plaintiffs' patent; and so far from being an infringement it is altogether a different thing, and made upon a different principle. Instead of one lever there are three levers. Instead of the points and signals being acted upon or moved by one action, they are moved by separate and distinct actions. In fact it is to effect what Colonel Yolland said he required, viz., that every signal should have its lever, and every point its lever, distinct from each other and worked independently of each other. Its principle and the principle of the plaintiff's apparatus are the direct contrary of each other. The plaintiff's principle is points and signals operated upon simultaneously by one and the same action of one lever. The defendants' principle is points and signals operated upon each by its own separate lever, quite distinct and independent from all others. If the levers *I* and I^1 in the plaintiff's specification were included in the plaintiff's patent and were new, there might have been evidence of an infringement, but it has been already shewn that they are not included in the patent, and that there is no evidence whatever of their being new. The defendants use in their specification the words "simultaneous adjustment." We do not think they thereby mean an adjustment made at one and the same moment of time. The context shews the contrary. What we conceive they mean is, that safety is provided by the adjustment of all the parts of their apparatus when in simultaneous action.

We have endeavoured, as shortly as as we could, to state the reasons for our answer to your Lordships' question. Our main object was and is to aid your Lordships towards the consideration of the judgments of our late brother Willes and our brothers Blackburn and Cleasby, which are printed in the case. In our opinion, when they are understood—for the subject is of necessity intricate and complicated—they amount to demonstration that the defendants have not infringed the plaintiff's patent.

KELLY, C.B.—My Lords,—The plaintiff by a patent of 1856 claims to be the inventor of a combination of machinery by which the points of a railway are set so as to close one line and open another, and the signals to the drivers of trains are made to shew that the one line is closed and the other opened; and this quadruple operation of closing, for example, the main line and opening the branch line, exhibiting and fixing the semaphore signal that the main line is closed, and depressing the signal which intimates that the branch line is opened, is effected by one and the same person at one and the same moment of time by the drawing downwards of a single lever, operating at once upon the points and the signals.

For a great length of time before this patent was obtained the points were set, and the one line opened and the other closed by one person and by one machine or combination of machinery, and the signals exhibited and fixed by another person and another combination of machinery. The consequence was that the points might be set to close a particular line and the signals exhibited that the line was open; and, *vice versa*, the points might be set to open a line while the signals might indicate that it was closed. From this cause numerous collisions occurred, and many lives were endangered or lost.

In 1847 one Stevens obtained a patent for machinery by which the points might be set and the signals exhibited by one person, but still the points were operated upon by one machine or combination of machinery and the signals by another, the two being unconnected, so that, the points being set by the motion of the foot in a stirrup, if the signalman failed to make the corresponding motion, which was effected by the hand operating upon the signals, the wrong signal might be exhibited, and a collision thus occasioned; whereas, by the machinery invented by the plaintiff, the same movement of the lever which sets the points for the closing

of the main line and the opening of the branch line exhibits the corresponding signals to the drivers of trains, and renders these signals unalterable and unmoveable except by another motion, which would at the same time operate, as required, upon the points. The error or inconsistency, therefore, between the state of the points on the lines of railway and the signals by which it is made known to the drivers of trains is thus rendered impossible.

The defendants are charged with having infringed this patent of the plaintiff, and the single question is, whether by the machinery adopted by them the patent is *de facto* infringed; in other words, whether the defendants have adopted the whole or any new and material portion of the plaintiff's invention.

Now the essential principle of the plaintiff's invention is, that, by means of the machinery put in motion, he operates simultaneously upon the points and upon the signals, rendering it impossible that when the points have been so set as to close one line and to open another, the signals can do otherwise than notify which line is open and which line is closed. Let us suppose, then, that the main line being opened and the branch line closed, and the signals exhibited accordingly, it became necessary so to set the points as to close the main line and to open the branch line, and at the same time to exhibit the signals that the one line was closed and the other opened, and to render the signals to that effect unalterable and unmoveable.

It has already been pointed out that the plaintiff effects these objects by drawing downwards a single lever, which operates at once so to set the points as to open the one line and close the other, and to exhibit and fix the signals to stop as to the main line, and to go on as to the branch line, accordingly.

The defendants, indeed, effect these operations, not like the plaintiff, by the movement of a single lever, but by first setting up but not rendering immoveable the danger signal or the signals to stop as regards the main line; then, by drawing downwards a second lever, they at once set the points, and by locking and unlocking the signal levers respectively, fix or render immoveable the danger signal that the main line is closed, and set free the lever which operates upon the safety signal, which shews that the branch line is opened; and finally, by drawing down a third lever, they depress the signal of the branch line, notifying that the branch line is open. It is true that this operation differs from the plaintiff's in this, that they produce the quadruple effect desired by the drawing downwards of three levers in succession, and not of one alone, as in the plaintiff's patent; but the question is, whether, in the second of these operations, that is, the drawing downwards of the second lever, by which they operate simultaneously, and by means of one single movement upon the points and upon the signals, they do not directly infringe the plaintiff's patent.

Now, in the first place, the plaintiff's witnesses, Mr. Imray and Mr. Bramwell, both eminent civil engineers of great skill and long experience, as well as Colonel Yolland and Mr. Saxby, the plaintiff, prove that, before the date of the plaintiff's patent, no machinery was ever in existence operating simultaneously and by one and the same movement upon the points and upon the signals; and Mr. Imray and Mr. Bramwell, and the plaintiff, performing the quadruple operation of closing the down main line and opening the down branch line by setting the points, and exhibiting the corresponding signals that the one line was closed and the other opened, first by the plaintiff's machine or model A, and then with the defendants', of which two or three models were produced at the trial, pointed out the several parts constituting the machinery of the one and of the other, and deposed that both combinations of machinery, consisting of levers, fulcrum levers, rocking shafts, rods, cranks, and slots, together with the points and signals, the machinery itself, and the objects attained, viz., the operating simultaneously upon the points and upon the signals, so as to render any inconsistency between the points and the signals impossible, were substantially

identical. Further, that although the defendants began by the use of a lever to set up the danger signal for the main line, and finished with another lever exhibiting the safety signal for the branch line, the operation effected by means of the second lever, that is, the setting of the points, and the locking and rendering immoveable the levers which actuated the danger signal for the main line, and the setting free of the lever which operates upon the safety signal for the branch line, was an adoption of the essential principle of the plaintiff's patent, and by means of substantially the same machinery.

It was insisted on behalf of the defendants that whereas simultaneity was of the essence of the plaintiff's patent, there was no simultaneity in the operation of the defendants' machinery. But it is to be observed, in the first place, that the evidence of identity by every one of the plaintiff's witnesses was uncontradicted, and all that appeared on behalf of the defendants, either upon cross examination, or in argument at the trial, or before the Court, was merely to the effect that the defendants made use of three levers in succession, and that with respect to the simultaneous operation by means of the second lever there are some slight differences in the machinery. But it was not denied that simultaneity of operation and of effect was accomplished by the drawing downwards of the second lever, and that the great object in view, and completely attained by the plaintiff's patent, namely, the operating at once upon the points and upon the signals, so that the exhibiting a wrong signal with respect to the points, or the setting the wrong points with respect to the signals, was rendered impossible, was completely effected, and substantially by the same machinery adopted by the defendants, by means of the drawing down of their second lever. If any doubt could exist whether the one operation is identical with the other, it appears to me to be set at rest by the language of the defendants' patent and specification of 1866, which, although it was alleged in argument that it did not correctly describe the operation and effects produced by the defendants, was in other portions of the argument, as well before the Court as at the trial, taken to contain, and does really and in fact, as was proved by three witnesses and the plaintiff himself at the trial, contain a true description of the machinery adopted by the defendants. The provisional and the complete specification are in substance the same, and expressly state, first, that their invention relates to improvements in the machinery for actuating railway points and signals, "the object being to effect the simultaneous adjustment of points and signals agreeing together, and preventing the possibility of accident by collision at railway junctions." Here we have, in clear and unambiguous language, admitted by the defendants to be the object effected by themselves, that which is also admitted to be the very essence of the plaintiff's invention, and proved to have been altogether new at the date of his patent, namely, the simultaneity of operation upon the points and signals, by which the possibility of the one being contrary to or inconsistent with the other is prevented. It is only necessary to read the description of what the operation really is in the defendants' machinery in the drawing down of the second lever, as it is set forth in pages 6 and 7 of their specifications, to see that the operation itself, and, with some slight and immaterial exceptions, the whole of the machinery and the effect produced of simultaneously setting the points and locking and unlocking the signal levers respectively, are all identical with the corresponding portions of the conjoint operation as described in the plaintiff's specification.

The defendants there point out the means by which the signal levers are actuated, by a rod and a spring lever, and the lever working in a shaft and carrying an arm to which chains, or wires, or rods, to actuate the signals, are attached, —the same description of machinery by which the points are actuated, all of which, with the slight and insignificant variation already alluded to, are the same as described in the plaintiff's specification. Then, after describing the mode in which the hand levers and the rocking

or oscillating levers are connected with the shafts, the specification proceeds thus—"The result accomplished by the foregoing arrangements will be that, where one or more sets of point levers are moved, such signals as may be required to be moved in accordance therewith are set at liberty, and all other signal levers, which if moved would be antagonistic to the position of the points, become locked and incapable of motion; also one or more signal levers would control one or more point levers in like manner to regulate such point levers in relation to the signal levers. From the foregoing it will be seen that no cross signals can be given, nor can the signals and the points be in antagonistic positions; so that it will be out of the power of the signalman to give a signal not in accordance with the position of the points, and *vice versa*." It is a simultaneity of operation upon the points and signals thus described and carried into effect by the defendants which constitutes the essential principle of the plaintiff's patent, and of the defendants' infringement. But for this adoption of equivalent machinery to produce simultaneity by the defendants, they might, after setting the points to close the main line and open the branch line, if the effect of the movement of the second lever stopped there, by next drawing downwards the wrong lever in order to actuate the signals, exhibit the wrong signals and indicate that the main line was still open and the branch line closed. But by simultaneously operating on the points and the signals according to the plaintiff's patent, they render it impossible that any contradictory signal could be exhibited as long as the points remain the same. The witnesses for the plaintiff, who, as already observed, were uncontradicted, deposed to the substantial inventing of the defendants and the plaintiff's machinery, as far as related to setting of the points and the locking and unlocking of the signal levers. And though it is for the Court to determine as matter of law, the construction of a specification, and whether upon the facts before them a patent is infringed, I apprehend it is for persons skilled in the nature and use and effect of machinery, and for them alone, to pronounce as a matter of fact upon the identity of the machinery in one machine with the machinery in another.

These witnesses proceeded further to explain the Barmouth model of defendants, and shewed how the defendants' point lever, when moved so as to open a branch line and close the main line connected with it simultaneously freed the branch line signal lever, and also interposed a stop which prevented the moving of the main line signal lever, and so locked the main line signal at the horizontal position at danger; and *vice versa*, the same process when the branch line was closed and the main line opened; and further that the operations above described were performed in the defendants' as in the plaintiff's apparatus by the single motion of one point lever, which simultaneously freed the signal that ought to be freed, and locked all the signals that ought to be locked; so that the result obtained by the defendants' apparatus was identical with that obtained by the plaintiff's, as shewn in model A; so also that "the effects produced by the defendants' apparatus are identical with those of the plaintiff's, and that the defendants' machinery from any one point lever connecting it with the signal, is also identical with the plaintiff's." And the witness finally proceeded to compare the working parts connecting the point levers with their respective signals in the defendants' apparatus, with the working parts connecting the point levers with their signals in the plaintiff's apparatus. They said that the point lever handles were the same in both; that, in both, each point lever handle was connected by a rod with a rocking shaft, placed behind the row of levers, which shaft they termed the master rocking shaft, because they said it sets in motion certain rods, levers and stops, which enable one lever to dominate several other levers, communicating motion to several of the rocking shafts connected with the signals. They explained that in the defendants' apparatus at Barmouth, owing to its being applied to a complicated junction of lines, more levers were used than in plaintiff's

model A, and the levers had, in consequence, apparently a more complicated operation to perform.

In order to enable them to compare more directly the material working parts of the defendants' apparatus with those which they alleged to be the corresponding parts of the plaintiff's, they then referred to a diagrammatic model, shewing how the locking is effected by Saxby's apparatus. The model was put in evidence and proved to be correct, and was called model D. This model D they compared with a like diagrammatic model, also put in evidence and marked E, which represented a part of the arrangement for locking used by the defendants; and after pointing out the similarity of the corresponding parts in the models D and E, the witness who had the models before him said, "I find no essential difference between them. It seems to me the mechanical result is the same, and the same action takes place through slots giving freedom in one way and not the other, in both cases. The effect produced by them is substantially the same. The means are the same."

It is evident from the specification of the plaintiff that simultaneity of action had upon the points and the signals, by one and the same movement of a lever, is the essential principle of the plaintiff's invention. And by the movement of the second lever in the defendants' machine, this principle is adopted and carried into effect, inasmuch as it sets the points and locks the signal levers at danger, and sets free the signal levers where the signals are to denote safety, at one and the same moment, and so effects simultaneously and by one movement that which before the plaintiff's patent had never been effected but by several movements in succession, and therefore operating at different moments of time.

The difference between the plaintiff's and the defendants' machinery is merely this; that the plaintiff performs the whole operation by the movement of one lever and at the same moment of time; whereas the defendants begin by the separate operation of moving a signal lever, and so setting up the danger signal belonging to the line to be closed; and then by a second operation, namely, the moving the points lever, set the points and lock the signal levers which actuate the danger signals, and set free the signal levers which actuate the safety signals; and finally by a third operation move the signal lever which actuates the safety signals, and so the act is complete.

Such being the difference in the machinery, it has been argued at the bar and held by the Judges in the Exchequer Chamber and by Baron Cleasby in the Exchequer, that the essential principle of the defendants' machine is that they set up the danger signal by a preliminary and separate movement, and that this is an advantage and an improvement for the reasons assigned by Colonel Yolland. And in some cases no doubt it is an improvement, while in others, as where the object is merely to effect a change from a main line to a branch line, or *vice versa*, the plaintiff's machine is every way preferable. But if the defendants' second operation, the moving of the points lever and the simultaneous setting of the points, and the locking and unlocking of the signal levers, be in itself a new and useful and material part of the plaintiff's invention, as I apprehend beyond all doubt it is, and might have been the subject of a patent though all other parts of the machine had been old and in use before, the case of *Lister* v. *Leather* (3) and other authorities clearly determine that this is an infringement of the plaintiff's patent, and actionable by the patentee.

The result upon the whole case appears to me to be this:—The defendants have adopted the principle and the entire machinery of the plaintiff, with the two exceptions, that before they commence the substance of the operation, they raise and fix the danger signal by the movement of a separate lever; and that after they have completed the substance of the operation, namely, the setting of the points and the locking of those parts of the machinery which operate upon the danger and safety signals respectively, they depress the safety-signal by the movement of another separate lever; the setting of the points and the securing the adaptation of the signals to the state of the points and of the lines, which involves

The appellants' invention, then, being an arrangement of machinery by means of which, by the motion of a single lever, the points and signals are moved simultaneously, it remains to examine the mechanical arrangement projected by the respondents, the object and end of their invention being substantially the same as that of the appellants; namely, so to regulate the movement of points and signals as to prevent accidents from the want of correspondence between them. In its details the respondents' invention differs materially from the appellants. According to their system three separate levers must be used, one for the points, and the two others for the main and branch signals, and the arrangement is not such as to produce a simultaneous movement of the points and signals, but such as to make any such simultaneous movements impossible. In the appellants' system it is not essential that the danger-signal should be up as a preliminary, but in the defendants' system this is absolutely necessary, and the lever which moves it becomes locked and incapable of acting except by a distinct operation, so that until this takes place it is impossible to take off the danger-signal. That this is an improvement on the appellants' invention no doubt can be entertained; for Colonel Yolland, Inspecting Officer of the Board of Trade, stated in his evidence on the trial that, "What he required with respect to the working of points and signals upon railways, was that every signal should have its lever quite distinct from each other, and worked independently." And he added, that an apparatus according to the appellants' invention would not now be passed.

But although the respondents' invention is a decided improvement upon the appellants,' yet, if in carrying it out they make use of any part of the appellants' invention to which his patent extends, and which is new and material, they are liable for an infringement. Great stress is laid by the Lord Chief Baron on the words "simultaneous adjustment" in the respondents' specification, as confirmatory of his view that the respondents' apparatus was an infringement of the appellants' patent; he says, "the provisional and complete specifications are in substance the same and state that the invention relates to improvements in the machinery for actuating railway points and signals, the object being to effect the simultaneous adjustments of points and signals agreeing together and preventing the possibility of accident by collision at railway junctions." "Here," he adds, "we have in clear and unambiguous language admitted by the defendants to be the object effected by themselves that which is also admitted to be the very essence of the plaintiffs' invention, viz. the simultaneity of operations upon the points and signals, by which the possibility of the one being contrary to or inconsistent with the other is prevented." The words "simultaneous adjustment," are certainly not happily chosen, nor do they describe accurately the working of the respondents' apparatus. It is an essential part of the action of their machinery, as already observed, that the danger signal should be up as a preliminary to any other movement. The words therefore should be read with the context, and then they must be taken to mean that when the points and signals are brought into correspondence by the successive means provided for their simultaneous adjustment the possibility of a collision is guarded against.

I cannot better express the conclusion at which I have arrived than in the words of Mr. Justice Willes, in his judgment in the Court of Exchequer Chamber—"It appears upon the evidence that the respondents have discovered a mode of securing safety in a way distinct from that adopted by the appellants. It cannot be treated as a mere improvement upon the appellants' method of working the points and signals simultaneously by one lever, far less as a mere mechanical equivalent for the appellants' system. The respondents act by separate levers distinctly upon the points and the signals. In their system it is impossible to work the points so as thereby under any circumstances to move the signals without a distinct operation, and this attains a distinct and novel and useful object, not forming any essential part of the appellants' patent, namely, to keep the signals necessarily at

the whole principle of the invention, being effected simultaneously by the one movement of a single lever. And if this intermediate act be a new and material part of the plaintiff's invention, I am of opinion that it constitutes an infringement of the patent, and entitles the plaintiff to the judgment of this House.

LORD CHELMSFORD [His Lordship stated the nature of the case, and said].—The nature of the appellant's invention is described at the end of his specification in these terms: "What I claim and desire to secure under the Letters Patent is the mechanical arrangement hereinbefore described and shewn by the accompanying drawings; the semaphore signals, the coloured glass of the night signals, and the points of each line are worked by the motion of a single lever, or any mere modification thereof."

Prior to the appellant's patent a person of the name of Stevens had invented an apparatus by which the points of a railway might be set by means of a lever, and at the same time the signals might be moved by the same person working what was called a stirrup with his feet. By this apparatus the movements of the signals were made to correspond, but, as the points were operated upon by one combination of machinery, and the signals by another, there was always the possibility of the person in charge, by some inadvertence or mistake, failing to make the simultaneous corresponding motions. The danger of any failure of this kind is completely prevented by the appellant's invention. For by his machinery the same movements of the lever which sets the points, exhibits the proper corresponding signals, and thus the failure of correspondence between them cannot occur.

The description which he gives of his invention in his provisional specification is as follows: "The invention consists of an arrangement of mechanism by which the "switches" or "points," the signal lamps and the arms of the semaphore signals, as used on railways, may be simultaneously actuated by one movement, and in such a manner that the points cannot be wrong when the signals are right, nor the signals wrong when the points are right.

The plaintiff in the Court below contended that his patent could not be construed as a patent "for merely moving signals simultaneously with the points as the down motion of the signals was what was called permissive, and that all that the lever effected was to remove a stop, and the signal moved down of itself." But Baron Cleasby effectually disposed of this argument by saying, "It appears to me that the lever makes the signal to move in both cases; it makes it move up in spite of gravity, and makes it come down from the effects of gravity;" and he added, "I consider, therefore, that the movement of the lever makes the points move, and makes the signals move simultaneously so as to correspond with the points."

The levers which produce the whole effect required are described in the specification in these terms—"'*H*' is the lever by which the signals and points of the up line are actuated. H^1 is the lever by which the signals and points of the down line are put in motion." These levers do not appear to influence any other machinery used in working the line. But in addition to their moving the points and signals they keep them in the position to which they have been moved until the person in charge moves the lever again.

It is necessary to advert to two other levers mentioned in the specification, marked respectively *I* and I^1 (which are described—*I* as a lever by which the signals of the up line may be set when the points do not require alteration, and I^1 as a similar lever by which the signals of the down line may be set irrespective of the points), because it was argued that these levers were infringed by the respondents' apparatus. But this part of the machinery forms no part of the patent, and is at variance with its object, making the points and signals disagree, instead of making them correspond by the motion of a single lever. Besides, an infringement can only take place by the use of a part of an invention which is new and material, and there is no ground for supposing that there can be any novelty in a lever for actuating signals upon railways.

The appellants' invention, then, being an arrangement of machinery by means of which, by the motion of a single lever, the points and signals are moved simultaneously, it remains to examine the mechanical arrangement projected by the respondents, the object and end of their invention being substantially the same as that of the appellants; namely, so to regulate the movement of points and signals as to prevent accidents from the want of correspondence between them. In its details the respondents' invention differs materially from the appellants. According to their system three separate levers must be used, one for the points, and the two others for the main and branch signals, and the arrangement is not such as to produce a simultaneous movement of the points and signals, but such as to make any such simultaneous movements impossible. In the appellants' system it is not essential that the danger-signal should be up as a preliminary, but in the defendants' system this is absolutely necessary, and the lever which moves it becomes locked and incapable of acting except by a distinct operation, so that until this takes place it is impossible to take off the danger-signal. That this is an improvement on the appellants' invention no doubt can be entertained; for Colonel Yolland, Inspecting Officer of the Board of Trade, stated in his evidence on the trial that, "What he required with respect to the working of points and signals upon railways, was that every signal should have its lever quite distinct from each other, and worked independently." And he added, that an apparatus according to the appellants' invention would not now be passed.

But although the respondents' invention is a decided improvement upon the appellants,' yet, if in carrying it out they make use of any part of the appellants' invention to which his patent extends, and which is new and material, they are liable for an infringement. Great stress is laid by the Lord Chief Baron on the words "simultaneous adjustment" in the respondents' specification, as confirmatory of his view that the respondents' apparatus was an infringement of the appellants' patent; he says, "the provisional and complete specifications are in substance the same and state that the invention relates to improvements in the machinery for actuating railway points and signals, the object being to effect the simultaneous adjustments of points and signals agreeing together and preventing the possibility of accident by collision at railway junctions." "Here," he adds, "we have in clear and unambiguous language admitted by the defendants to be the object effected by themselves that which is also admitted to be the very essence of the plaintiffs' invention, viz. the simultaneity of operations upon the points and signals, by which the possibility of the one being contrary to or inconsistent with the other is prevented." The words "simultaneous adjustment," are certainly not happily chosen, nor do they describe accurately the working of the respondents' apparatus. It is an essential part of the action of their machinery, as already observed, that the danger signal should be up as a preliminary to any other movement. The words therefore should be read with the context, and then they must be taken to mean that when the points and signals are brought into correspondence by the successive means provided for their simultaneous adjustment the possibility of a collision is guarded against.

I cannot better express the conclusion at which I have arrived than in the words of Mr. Justice Willes, in his judgment in the Court of Exchequer Chamber—"It appears upon the evidence that the respondents have discovered a mode of securing safety in a way distinct from that adopted by the appellants. It cannot be treated as a mere improvement upon the appellants' method of working the points and signals simultaneously by one lever, far less as a mere mechanical equivalent for the appellants' system. The respondents act by separate levers distinctly upon the points and the signals. In their system it is impossible to work the points so as thereby under any circumstances to move the signals without a distinct operation, and this attains a distinct and novel and useful object, not forming any essential part of the appellants' patent, namely, to keep the signals necessarily at

danger, whether the line be open or closed, until they are separately acted upon by the proper and distinct levers. . . . . There are different methods of attaining the common object of safety, but not different methods of attaining safety by the working of the points and signals simultaneously by the way invented by the appellants." I am of opinion that the judgment of the Court of Exchequer Chamber is right and ought to be affirmed.

LORD HATHERLEY.—I am entirely of the same opinion.

It really seems to me that the point of difference between the two inventions is manifest and distinct, and is capable of being explained in a very few words. The plaintiff says that his invention is one whereby "the signals and points of such line are worked by the motion of a single lever or any other modification thereof." Now the course that the plaintiff took in his invention was to say, if I always, when the line is open, take care that the signal representing safety, shall be put up, I always, when the line is closed, take care that the signal of danger shall be put up, then I shall stop the great course of accidents that have occurred from these being hitherto either the acts of two persons or of two independent operations of the same mind. Originally of course two men were employed, and I suppose two men continued to be employed before Stevens's invention, the one to put up the signal and the other to open or close the line by means of the points. That was an operation by two independent minds. Stevens devised the notion of having one mind to operate by placing a single man at a spot where he could operate both on the signal and on the points, the one with his hand, and the other with his foot, but those were after all two independent operations of the one mind, and any hesitation on the part of one individual might be as mischievous as a discrepancy of action between two independent minds.

Therefore, the plaintiff contrived a plan by which whenever the signal was moved the point was moved, and *vice versa*. Colonel Yolland gives his reason for that being in itself sometimes not altogether so desirable an operation to be carried forward. He said he should rather see the signals and the points operated upon by distinct operations for this reason. The line, whether it were a main line or a branch line, might be open and yet might be dangerous. It might be open for the purpose of traffic being shunted or trucks being moved from one side of the line to the other, and whilst that operation was going forward we know a very serious danger might arise. We know by frequent experience of late that a fatal accident might occur by the train that was in motion, passing along the through line, coming in contact with the waggons that were being shunted. The defendant's apparatus is of a totally opposite character. He does not put the signals and points in direct communication, he takes care that they shall not be put in direct communication at one and the same time. There is a simultaneity of operation no doubt in his proceedings which ties the signals and the points together, but by a totally new and different process. His simultaneity is not produced by occasioning the same mechanical operation, the same movement of machinery that moves the signal to move the points, but he puts the signal of danger up, and when that signal is up, then he at once informs all those coming along that there is a risk in moving along that line. But then he follows that up by moving the points with a different motion, and that moving of the points fastens and fixes the signal at danger so that when the point is moved to the proper place, the signal of danger is fastened and fixed up. The same operation also stops all the other signal levers, and the consequence is that no other signal than that can be put up, and that the signal will tally with the state of the line from the circumstances of somebody having first put up the signal at danger, and afterwards by a totally distinct operation placed the levers in such a position that they shall compel the abiding of that signal in its due position, and prevent any other signal being hoisted while the points remain in the same position.

The end and object that the two parties had in view is the same, but the operation is as different as possible. The

plaintiff was really driven, I may say, to rely very much at the time upon the argument—If you have not invaded one part of my machinery, my levers *H H* which act conjointly upon the signals and upon the points, then you have invaded my apparatus *I I*, by which I by a separate operation deal with the signals without operating upon the points. But then, as the learned Judges have said, and as everybody will see at once, if that be the contention, the circumstance of having the signals and points operated upon by distinct levers is as old as the first introduction of levers and signals at all; and it could not possibly be claimed as a new invention, or any part of a new invention, under the plaintiff's patent. It comes therefore to this, that if there be anything at all which is adopted from that description contained in the plaintiff's patent, which in itself is altogether old, it has no novelty whatever to recommend it, and whatever else is done by the defendant, you find does not in the least interfere with anything which is described by the plaintiff, as his mode of operating under the patent. I think therefore that the conclusion which my noble and learned friend has come to, is correct—

That the judgment of the Court of Exchequer Chamber be affirmed and the appeal dismissed with costs.

Attorneys—George Faithfull, for appellants; Palmer, Eland and Nettleship, for respondents.

[IN THE HOUSE OF LORDS.]

1873. June 30. 1874. May 15, June 22. } BAIN AND OTHERS *v.* FOTHERGILL AND OTHERS.

Damages—Contract for Sale of Real Estate—Defect of Title.

If one contracts to sell real estate and is unable to complete from want of title, whether he be aware of the defect at the time of entering into the contract, and does not disclose it, or not, and even if he never had title, nor possession, nor any right to possession, yet in the absence of fraud the intending purchaser cannot, in an action for breach of the contract, recover damages beyond his deposit with interest and costs. Flureau *v.* Thornhill *approved.*

By LORD CHELMSFORD.—*The rule is, without exception, if a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred, by an action for the breach of the contract. He can only obtain other damages by an action for deceit.* Hopkins *v.* Grazebrook *overruled.*

Semble, *Where the breach of the contract arises not from the vendor's inability, that is, not upon a question of title, but upon a question of conveyancing, as from his own refusal on the ground of expense, or from whatever other motive, to perform the contract himself, or to compel others whom he can compel to concur in conveying or in giving up possession, the proper remedy is by bill in equity to enforce him to complete, and to compel the completion of the contract. Whether, therefore,* Engell *v.* Fitch *should be followed,* quære?

F. being under contract for the purchase of mining interests of large value, contracted to sell to B. one of them, a leasehold interest, which was subject to a restraint against assignment, except with the consent of the reversioners. The consent was refused, and F. was unable to complete. F. knew at the time of his contracting with B. that the consent was necessary, but he did not mention it to him:—Held, *that B. could not recover in an action for damages any damages for the loss of his contract beyond his deposit with interest and costs.*

This was a proceeding in error from a judgment of the Court of Exchequer Chamber, which had affirmed a judgment of the Court of Exchequer in favour of the defendants below, now the defendants in error.

The action was brought by the now plaintiffs in error to recover damages for the breach of an agreement dated the 17th of October 1867, whereby the de-

fendants in error agreed to sell and transfer to the plaintiffs in error their interest in a mining royalty in the county of Cumberland, called Miss Watters' Royalty, and which they afterwards failed so to sell or transfer.

The cause was tried before Willes, J., and a special jury in 1870, when a verdict was by consent entered for the plaintiffs for the damages claimed, subject to the opinion of the Court on a Special Case.

The Special Case is printed in 40 Law J. Rep. (N.S.) Exch. 34. The facts may be briefly stated as follows:—

The defendants, prior to the making of the agreement sued on, had contracted with the executors of one Anthony Hill for the purchase, at the sum of 250,000*l.*, of extensive iron works and iron ore mines held under various leases and agreements for leases. A small part of this property consisted of iron ore mines under certain lands called Miss Watters' Royalty, which were held by an agreement for a lease dated the 19th of October, 1861, which lease contained a clause against the assignment of the premises therein comprised without the consent of the lessors.

In order to enable the executors to carry out the assignment to the defendants of their testator's interest in Miss Watters' Royalty they applied to the lessors for their consent to such assignment. The lessors were then willing to give such consent provided the defendants would execute a duplicate of it. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors and retained in the hands of their solicitors. The other part was sent by the solicitors acting for the executors to the defendants' solicitors for execution by the defendants.

On several occasions subsequently to the month of June, 1865, the solicitors for the lessors requested the solicitors of the executors to obtain the execution by the defendants of the duplicate consent or license, and intimated that the lessors would withdraw their consent unless the duplicate was returned executed. Intimation of this fact was conveyed to the defendants' solicitors in October, 1865, but the duplicate consent remained in the hands of the defendants' solicitors unexecuted at the time when the agreement now in question of the 17th of October, 1867, was entered into, the defendants' solicitors being engaged from the date of the contract down to August, 1868, in investigating the vendors' title to other parts of the property.

On the 17th of October, 1867, an agreement was entered into between the plaintiffs and defendants for the sale and transfer to the plaintiffs of Miss Watters' lease or royalty in the following terms:

"Plymouth Iron Works,
"Near Merthyr Tydvil,
"17th October, 1867.

"Messrs. Bain, Blair & Paterson.

"Gentlemen,—We offer to sell you our interest in the Miss Watters' Royalty in Cumberland upon the following terms, namely:

"2,500*l.* to be paid us in cash on our handing you a transfer of the said royalty.

"A certain rent of 300*l.* a year to be paid us half-yearly for the remainder of the term of the lease or royalty beyond the certain rent already reserved under the said lease or royalty.

"A royalty to be paid us of 1*s.* per ton beyond the royalty payable under the said lease or royalty upon all the ore raised out of the property, the said additional royalty of 1*s.* per ton to merge in the additional rent of 300*l.* a year.

"A deposit of 250*l.* to be made us forthwith, and the whole arrangement to be carried out and accomplished as soon as may be. The usual covenants for our protection as standing between you and our lessors to be made by you.

"(Signed) Richd. Fothergill,
"For the Plymouth Iron Company
"and self.

"We accept of offer on terms stated,
"Bain, Blair & Paterson,
"per John Paterson."

The agreed deposit of 250*l.* was imdiately paid.

Shortly after this agreement was entered into the plaintiffs discovered that according to the terms upon which the royalty was held, the defendants could not assign it without the license of the lessors. One of the plaintiffs accord-

ingly saw the agent for the lessors, who complained that the duplicate consent, before mentioned, to the assignment to the defendants had not been executed by them, and refused to have anything to say to the plaintiffs until this was done.

The plaintiffs communicated this fact to the defendants at the commencement of November, and a correspondence ensued between the parties and between the defendants and the lessors' agent. In August, 1868, the sale and purchase between Hill's executors and the defendants was completed. They then, before executing the duplicate consent themselves, applied to the lessors' agent for leave to assign to the plaintiffs, but the lessors refused, having formally on the 6th of January, 1868, withdrawn the consent they had previously given to the assignment by Hill's executors to the defendants, and they only consented to the assignment by Hill's executors to the defendants, on the express condition that the defendants would simultaneously enter into an agreement with a Mr. Stirling to sell the defendants' interest to him.

The defendants accordingly, on the 28th of September, entered into an agreement with Mr. Stirling for such sale to him.

Some correspondence then ensued between the plaintiffs and the defendants, the former insisting on holding the latter to the contract they had entered into with them.

The sum paid into Court was sufficient to cover the deposit and interest and the expenses incurred by the plaintiffs, but the plaintiffs claimed in addition damages for the loss of their bargain; and the question for the opinion of the Court was, whether the plaintiffs were under the circumstances entitled to recover such damages.

The case came on to be argued in the Court of Exchequer on the 15th day of November, 1870, when judgment was given for the defendants, and the Court of Exchequer Chamber, on the suggestion of the plaintiffs' counsel, affirmed the judgment of the Court of Exchequer without argument as the authorities on the subject could only be freely reviewed by a higher tribunal.

The Judges were summoned, and Martin, B.; Keating, J.; Pigott, B.; Brett, J.; Denman, J.; and Pollock, B., attended.

The Solicitor-General (*Sir George Jessel*), and *Herschell*, for the appellants.—The rule in *Flureau* v. *Thornhill* (1), though standing for nearly 100 years without being expressly overruled, has not met with hearty consent from the Courts; and that case has not been so strongly acquiesced in as to be entitled to consideration as a great authority, and it is not recognised in Scotland or in America. At all events, the rule is only applicable to cases where the person contracting to sell is in possession, and where he believes himself to have a good title, and where his want of title is not due to his own default. The rule is an exception to the general law, and has only received the qualified assent it has met with, because from the complicated state of our law no man can be certain that he has a perfect title to his estate. But being only an exception to the law, it must not be applied as if it were a principle applicable to any cases but such as it was expressly framed to meet. Where a person contracts for the absolute sale of lands, not being in possession nor entitled otherwise than by expectation, as in *Hopkins* v. *Grazebrook* (2), he is not protected by the rule, nor *a fortiori* is he protected where his want of possession or legal title is the result of his own default, as was the case here. In the same way he was held not to be protected where the failure in title arose from his own refusal, as in *Engell* v. *Fitch* (3). If he contracts with full knowledge that he has no title, as in *Robinson* v. *Harman* (4), he cannot set up the rule. In *Pouncett* v. *Fuller* (5) the would-be vendor believed that he had a good title, and he had a good

(1) 2 W. Black. 1,078.
(2) 6 B. & C. 31.
(3) 9 B. & S. 250; s. c. 37 Law J. Rep. (N.S.) Q.B. 145; in Ex. Ch. 10 B. & S. 738; s. c. 38 Law J. Rep. (N.S.) Q.B. 304; s. c. Law Rep. 4 Q.B. 659.
(4) 1 Exch. Rep. 855; s. c. 18 Law J. Rep. (N.S.) Exch. 202.
(5) 17 Com. B. Rep. N.S. 660; s. c. 25 Law J. Rep. (N.S.) C.P. 145.

right to entertain such belief, being in possession of that he contracted to sell under an agreement, which, however, not being under seal, was inoperative. That case and *Walker* v. *Moore* (6) clearly shew how the rule in *Flureau* v. *Thornhill* (1) must be qualified, and do not weaken the other rule in *Hopkins* v. *Grazebrook* (2), which has been adopted in many subsequent cases, apparently in the two cases cited in *Sugden's Vendors and Purchasers of Bratt* v. *Ellis* (7) and *Jones* v. *Dyke* (8), and among more recent cases (not to mention again *Engell* v. *Fitch* (3)), *Godwin* v. *Francis* (9) and *Lock* v. *Furze* (10). The case now on appeal falls exactly within the class of exceptions described by Erle, C.J., in *Sikes* v. *Wild* (11), where his Lordship laid it down, that if the intending vendor knowingly withholds from the intending purchaser that he has no title, he ought not to have the protection of the rule in *Flureau* v. *Thornhill* (1). Here the defendant Fothergill knowingly withheld from the appellants his want of title; he was not in possession; he wilfully abstained from doing what was necesary to entitle him to possession; he contracted, speculating on an expectancy, and he is not entitled to protect himself by the rule in *Flureau* v. *Thornhill* (1).

Manisty and *Holker* (*J. R. Mellor* with them), for the respondents.—The appellants in this case are, in fact, asking your Lordships to overrule the case of *Flureau* v. *Thornhill* (1), a case which has been the law of this country for 100 years, and has been approved of and followed in numerous cases. It has received the sanction and approval of Lord St. Leonards, and in opposition to what was stated by the learned counsel for the appellants, has been adopted in America. In *Sedgwick on Damages*, p. 234, the cases of *Flureau* v. *Thornhill* (1), *Hopkins* v. *Grazebrook* (2), *Robinson* v. *Harman* (4) and *Pouncett* v. *Fuller* (5), are cited, and the author says that where parties act in good faith and fail to perform because they could not make a title, the plaintiff can only recover his deposit with interest and expenses; and he adds, this is well settled in practice, though he seems to doubt its justification on principle. The only exception to the rule is where a person not being in possession, and knowing that he has no title, contracts to make a good title, as was the case in *Hopkins* v. *Grazebrook* (2). But besides that, that case has been unfavourably commented on by Lord St. Leonards in his *Vendors and Purchasers*, and in *Dart's Vendors and Purchasers*, 3rd ed. p. 614, and it has not been acted on in numerous cases, as in *Walker* v. *Moore* (6), *Worthington* v. *Warrington* (12), *Johnson* v. *Johnson* (13), *Sikes* v. *Wild* (11), *Pouncett* v. *Fuller* (5), and other cases. The case of the respondents is distinguishable from that case; for they only contracted to sell their interest in the royalty; they did not contract to give possession by a certain day; and they had good reason to believe that they had got a perfect right to convey. Further, nothing has been alleged to shew that the profits which the appellants have alleged they have lost through the miscarriage of their bargain were in the contemplation of *both* the parties to it. The rule, therefore, laid down in *Hadley* v. *Baxendale* (14) applies, and even if *Flureau* v. *Thornhill* (1) were out of the way they ought not to recover in this action these remote consequences of the non-fulfilment of their contract, which their vendors knew not of when they entered into the contract.

Herschell replied.

At the conclusion of the arguments the following questions were submitted to the Judges:—

1. Whether upon a contract for the sale of real estate, where the vendor, without

(6) 10 B. & C. 416.
(7) Sug. V. & P. App. No. 5.
(8) Ibid. No. 6.
(9) 39 Law J. Rep. (N.S.) C.P. 121; s. c. Law Rep. 5 C.P. 295.
(10) 34 Law J. Rep. (N.S.) C.P. 201; s. c. in Ex. Ch. 35 Law J. Rep. (N.S.) C.P. 141; s. c. Law Rep. 1 C.P. 453.
(11) 1 B. & S. 587; s. c. 30 Law J. Rep. (N.S.) Q.B. 325, affirmed in Ex. Ch. 4 B. & S. 421; s. c. 32 Law J. Rep. (N.S.) Q.B. 375.
(12) 8 Com. B. Rep. 134; s. c. 18 Law J. Rep. (N.S.) C.P. 350.
(13) 3 Hare, 157; s. c. 13 Law J. Rep. (N.S.) Chanc. 79.
(14) 9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179.

his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain?

2. Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau* v. *Thornhill?*

3. Whether, if the rule of law is correctly laid down in *Flureau* v. *Thornhill*, the circumstances of the present case distinguish it and take it out of that rule?

The Judges answered as follows:—

POLLOCK, B.—In answer to the first question submitted by your Lordship to the Judges, I am of opinion that upon a contract for the sale of real estate where the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain.

This was so decided as far back as the year 1775, in the case of *Flureau* v. *Thornhill* (1), and has been acted upon and almost universally acquiesced in ever since, and the rule is in my judgment consistent with good sense, and with what may be supposed to be the intention of the contracting parties; nor does it contravene any principle of law which has been established with reference to the amount of damages that may be recovered on breach of contract.

The report of the case of *Flureau* v. *Thornhill* (1) is somewhat meagre. The ground of decision as stated by Chief Justice De Grey is, that upon the contract for a purchase if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain. Mr. Justice Blackstone adds that these contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title.

The proposition asserted by Chief Justice De Grey as reported might no doubt be stated in more accurate language, but its meaning is sufficiently clear, and the decision has been followed in all subsequent cases in which the facts have been substantially the same. Many of these, including *Walker* v. *Moore* (6) and *Sikes* v. *Wilde* (11), were cited in argument at your Lordships' bar, and the law is considered as settled by Lord St. Leonards in his work on vendors and purchasers, c. 8. s. 3. Other cases were referred to in which a different measure of damage was acted upon, but in these the circumstances also were different. In *Hopkins* v. *Grazebrook* (2), the vendor when he contracted to sell had substantially no estate, and the conditions of sale contained a distinct undertaking to make a good title. Lord Tenterden, no doubt, said in giving judgment that he should desire time to consider before he assented to the general proposition, that where a vendor cannot make a good title the purchaser shall recover no more than nominal damages, and Bayley, J., appears to ground his decision upon the fact that the vendor held out the estate as his own, when in fact he had only an equitable title; but I can find nothing said by either of these very learned Judges which ought to lead me to doubt the correctness of the view taken in *Flureau* v. *Thornhill* (1) or to disturb a rule which for nearly a hundred years has been acted upon in a matter of constant occurrence.

In *Robinson* v. *Harman* (4), the defendant agreed to grant a valid lease when he well knew that he had no power to do so. In *Engell* v. *Fitch* (3), which was disposed of by an elaborate and exhaustive judgment of the Court of Queen's Bench, confirmed by the Exchequer Chamber, the defendants, who were mortgagees of a lease and not in possession, sold it to the plaintiff, undertaking by the particulars of sale that possession should be given on completion of the purchase, and on the faith of this the plaintiff resold at a profit. The title was good, but on the plaintiff requiring possession it was found that the mortgagor was in possession and refused to give it up, and further that the defendant could have ousted him by ejectment but refused to incur the necessary expenses. Under these circumstances the Court of Queen's Bench held that the plaintiff was entitled to recover not merely the deposit and expense of investigating the title, but also damages for

the loss of his bargain, and in giving the grounds for their judgment on the particular case said that the rule in *Flureau* v. *Thornhill* (1) can have "no application where the failure either to make out a title or to give possession arises not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense."

It was urged by the learned counsel for the appellant that the rule laid down in *Flureau* v. *Thornhill* (1) was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from that applicable to a contract for the sale of goods is true, but the subject matter to which it is applied differs also.

It is observable in following the history of the rule in question that when it was first laid down in *Flureau* v. *Thornhill* (1) the whole question of the proper measure of damages had not received from our Courts the attention which it has done in later years. Moreover at that time, although it had never been expressly so decided, it was commonly supposed that upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor* as laid down in *Co. Litt.*, 102 a, and by Noy in his *Maxims*, c. 42, applied, and therefore the suggested anomaly probably was not present to the minds of the Judges who decided *Flureau* v. *Thornhill* (1); but assuming that the difference exists, as it now undoubtedly does, there are two marked distinctions affecting the present question between a contract for the sale of personal and of real property.

In the first place a man who sells goods must be taken to know whether they are his or not. Secondly, he must be aware that in the majority of cases the goods he is selling are intended for resale or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of its deficiency may fairly be presumed to be in the minds of the contracting parties.

With real property the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not; hence, as was said by the Court in *Engell* v. *Fitch* (3), the undoubted owner of an estate often finds unexpectedly a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bona fide*, the difficulty must be equally known to the vendee as to the vendor. Secondly, to enter into a contract for the purchase of land in order to immediately resell it before the title is examined is unusual and exceptional.

It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty, that the vendor has power to convey, but as involving the condition that the vendor has good title, and that if on examination of the abstract this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual covenants had been executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau* v. *Thornhill* (1) was rightly decided at the time it was decided on sufficient legal principles, but if it was a decision to which at the time I could not have acceded, I should nevertheless think that a contract of purchase and sale of real property made at this day must be construed to be made on the footing of that decision being correct. All persons who prepare such contracts know of that decision, and that it has been acquiesced in and acted on for a hundred years. The contracts which such persons prepare are therefore made with the understanding that upon failure to make out a satisfactory title, the rule as to damages enunciated in that case will be applied. Then such rule is by intention and understanding of the parties a part of the contract.

Your Lordships' second question is—"Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau* v. *Thornhill*?"

Such actual possession is not, I think, necessary. If I am right in what I have already stated as to what are the true grounds upon which that rule is founded this seems to follow. In seeking to arrive at a conclusion whether the statements of a vendor as to his title are *bona fide* or otherwise, so as to take the case out of the rule in *Flureau* v. *Thornhill* (1), it may be material to enquire, among other facts, whether the vendor was in actual possession or not, but assuming his *bona fides* the fact ought not in my opinion to affect the question. A man who has never been in actual possession may often have better grounds for believing, and therefore may be better entitled to act upon the belief, that his title is good, than another who has been in possession for some time. Thus A. may have bought Black Acre; the abstract of title may have been investigated, and the conveyance executed without possession being taken, whilst B. may have been for months in possession of a family estate, his title to which may not only be doubtful, but may actually be at the very time in litigation.

In either of these cases on a sale by A. or B. of the whole or a portion of the property it may turn out, either from a more thorough investigation, or from the decision of a Court, that A. or B. had not good title to what they had sold, but in both these cases the facts might be such as ought to protect the vendor, if he had been guilty of no *mala fides*, from a liability to pay, as damages, any loss sustained by the vendor arising from his failing to reap the profits of a good bargain.

Lastly, in answer to your Lordships' third question, the circumstances of the present case do not distinguish it or take it out of the rule laid down in *Flureau* v. *Thornhill* (1).

The property in question which the defendants had agreed to sell to the plaintiffs consisted of iron ore mines, called Miss Watters' Royalty, and formed a small portion of a large mining estate which the defendant had purchased in 1863 from the executors of one Hill. The defendants entered into possession of the whole estate, but the purchase had not been completed upon the 17th of October, 1867.

On this day the defendants agreed to sell to the plaintiffs the defendants' interest in Miss Watters' royalty. Upon enquiry it appeared that Miss Watters' royalty was held by Hill under an agreement for a lease for twenty-one years from March, 1860, and that agreement contained a clause providing against the assignment or subletting of the premises without the consent of the lessors, in writing.

Before the 17th of October one of the defendants who negotiated the sale had been informed that it would be necessary to obtain the consent of the lessors for an assignment to third parties of the defendants' interest, but it is found, as a fact, that at the meeting on the 17th of October, 1867, between one of the plaintiffs and one of the defendants when the sale was negotiated this necessity did not cross the mind of the latter, or if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise in respect to such consent, and that it was therefore a matter of no importance. After this the defendants did all that was in their power to obtain the lessors' consent to assign, but failed to do so.

The defendants therefore acted with perfect *bona fides* and the contract failed, not because the defendants did not do what they could have done to make a good title, but because the defendant who personally negotiated the contract overlooked a fact which might, and in the event did, prevent them from making a good title to the plaintiffs.

Under these circumstances it seems to me that there existed in this case all the material facts which bring it within the decision in *Flureau* v. *Thornhill* (1), and none of those which have been held to create an exception to that rule.

My learned brothers, the Lord Chief Baron, Mr. Justice Keating and Mr. Justice Brett, concur in the opinion which I have had the honour to express to your Lordships.

DENMAN, J.—In answer to the first question put by your Lordships, I am of opinion that upon a contract for the sale of real estate, when the vendor, without his default, is unable to make a good

title, the purchaser is not by law entitled to recover damages for the loss of his bargain. I answer your Lordships' question, in its terms, upon the assumption that I am thereby in substance only stating that in my opinion the doctrine laid down in the case of *Flureau* v. *Thornhill* (1) is a part of the law of the land, binding upon all Courts of justice, and only to be altered, if at all, by the Legislature. I must, however, at once add that the rule laid down in *Flureau* v. *Thornhill* (1) is, in my opinion, more limited in its operation than might be contended for upon several possible constructions of the words "without his default unable to make a good title," as I shall endeavour to explain hereafter.

In the argument for the plaintiffs in error it was powerfully contended that *Flureau* v. *Thornhill* (1) could not be law because it was not founded on any principle; because it was at variance with the ordinary rules of law applicable to the question of the damages recoverable upon a breach of contract; and because it was merely Judge-made law, the origin of which was apparent in the case itself.

It may be admitted that the case of *Flureau* v. *Thornhill* (1) is not a wholly satisfactory case. The report is meagre, and the judgments unargumentative; but the case cannot truly be said to be founded on no principle. It has been frequently explained upon a principle which cannot be called unreasonable, and even in cases in which nice distinctions prevailed and prevented its operation from being held applicable some of the most learned Judges while declining to act upon it have recognised it as binding, and explained the principle on which it rests. For example, in *Robinson* v. *Harman* (4), Parke, B., in speaking of *Flureau* v. *Thornhill* (1), says, "It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title" (adopting the judgment of Blackstone, J.), and then adds, "so that when a person contracts to sell real property there is an implied understanding that if he fail to make a good title the only damages recoverable are the expenses which the vendor may be put to in investigating the title." The same principle is shortly expressed by Blackburn, J., in the case of *Sikes* v. *Wild* (11), in the words, "It is implied from the usage of this particular business."

Nor do I think that *Flureau* v. *Thornhill* (1) is bad at law because it is at variance with the ordinary rules applicable to damages on breach of contract. It has from time to time, as fresh cases have arisen, been found necessary to lay down rules for the guidance of juries in the assessment of damages. *Hadley* v. *Baxendale* (14) is a notable instance of such a rule laid down a few years ago, and now recognised as a part of the Common Law. The very fact that the rule laid down in *Flureau* v. *Thornhill* (1) has been for nearly a century recognised and acted upon as a known limitation in respect of the damages upon breach of a contract for the sale of real estate seems almost sufficient to answer the argument founded upon the anomalous character of the rule.

Still less do I think that the argument against the rule in question, that it is "Judge-made law," ought to prevail. Difficult as it is to lay down any precise rule or definition as to the extent of acquiescence which will amount to conclusive evidence that the law as laid down in any judicial decision is a part of the Common Law of England, and granting that no rule ought to be laid down which should prevent your Lordships from overruling any decision clearly contrary to good sense, however ancient it might be, I am of opinion that the case of *Flureau* v. *Thornhill* (1) as understood in subsequent cases, and as limited by your Lordships' question, is neither absurd nor unreasonable; and that it has received an amount of subsequent judicial recognition sufficient to stamp it as part of the undoubted Common Law, to be noticed by all Courts, and not to be overruled except by the Legislature. The exact extent of the rule and the limits of its operation I propose to consider in my answer to the second and third questions proposed by your Lordships.

In answer to the second question put by your Lordships I am of opinion that the actual possession of the property, the subject of the contract, is not essential to

bring the case within the rule laid down in *Flureau* v. *Thornhill* (1). In order to consider this question it appears to me to be necessary to explain my view of the exact effect and extent of the ruling in *Flureau* v. *Thornhill* (1), which, in my opinion, has sometimes been supposed to have gone further than the words or the reasons of the judgments as reported really go. The report, after stating the purchase by the plaintiff at an auction of a rent issuing out of a leasehold house for 270*l.*, and payment of a deposit of 20*l.*, states that "*on looking into the title the defendant could not make it out.*" From this I conclude that it was an ordinary case of a person in possession of property, with a holding title, and without any knowledge of any defect in his selling title, discovering for the first time, on investigation of the matter, that he has not such a title as a purchaser could be compelled to take. In such a case, and in such a case only, as it appears to me, does *Flureau* v. *Thornhill* (1) decide that the ordinary rule relating to damages for breaches of contract does not apply to sales of real estate. The language of De Grey, C.J., and Blackstone, J., seems to me to be quite applicable to such a case, and not strictly applicable to any other. The former says, "Upon a contract for a purchase, if the title *proves* bad, and the vendor is (without fraud) incapable of making a good one;" by which I understood him to refer to a discovery made subsequently to the making of the contract. Mr. Justice Blackstone says, "These contracts are merely upon condition, frequently expressed, but always implied that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." These words do not very correctly express that which they have been always understood to mean, viz., that the contract is one made upon the terms that if the title is not good the damages shall be limited as described; but there is no difficulty in understanding what Mr. Justice Blackstone meant, and I apprehend it is clear that when he speaks of an "implied *condition* that the vendor has a good title," he cannot have intended to include the case of an intending vendor *knowing* that he has not a good title, and neglecting to disclose the fact to the intended purchaser before the contract is made.

Before dismissing the case of *Flureau* v. *Thornhill* (1) it may be desirable to refer to two cases to be found in the Appendix to *Sugden's Vendors and Purchasers*, which have been sometimes cited as proving that the case of *Flureau* v. *Thornhill* had a wider operation than that above explained. The first of these is *Bratt* v. *Ellis* (7), set out in No. 4 of the Appendix to the eleventh edition of the work. That case, however, can scarcely be cited as an authority for any particular proposition, inasmuch as the decision is only to the effect that the defendant should be let in to plead after a verdict against him on a writ of enquiry, including 250*l.* for loss of bargain, upon payment into Court of the deposit money and interest, and on payment to the plaintiff of costs. What became of the action does not appear.

The other case (No. 5 in the Appendix) *Jones* v. *Dyke* (8), was an action against a firm of auctioneers who professed to be authorised to sell certain estates in Wales, tried before McDonald, C.B., at the Hereford assizes. The only part of the report affecting the present question is the following passage—"It appearing that the defendants had no authority to sell, the plaintiff had a verdict *by consent* for 261*l.*; the Judge thinking the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain," from which it would appear that at most this was only a ruling at Nisi Prius; and in all probability one given under such circumstances would have precluded either party from afterwards objecting to it.

Both these cases appear to have been decided between 1804 and 1808 from the dates which appear in the reports, and I can find no case throwing any light upon the subject down to the case of *Hopkins* v. *Grazebrook* (2) decided in the year 1826, which I will now consider. In that case the declaration stated that the defendant caused the premises to be put up to sale by auction, subject to conditions that the purchaser should immediately pay a deposit, and should pay the residue of the purchase money on the subsequent 25th

of March, *and on payment be let into possession*, and a proper conveyance should be executed by the vendor *who undertook to make a good title*, which he did not do, nor execute a proper conveyance. Whereby plaintiff was deprived of all benefit to be derived from the purchase, and put to great expense. The defendant pleaded the general issue and paid into Court the amount of the expenses which the plaintiff had been put to, and a small sum for nominal damages for the breach of contract. The facts proved at the trial were extremely similar to those found in the case now before your Lordships. The premises in question were part of a property belonging to Hill & Co. they had contracted to sell to one Harwood, and the defendant had agreed to purchase from Harwood. Owing to some misunderstanding which arose between Hill & Co. and Harwood, the conveyance to Harwood was never executed. The report goes on to state that the defendant, *expecting that the matter would be arranged*, and that the contract between Harwood and himself would be carried into effect, put up the premises to auction, *as stated in the declaration*, but that in consequence of the disputes between Hill & Co. and Harwood he was unable to complete his contract. It was admitted that he had acted *bona fide*. The learned Judge, Garrow, B., told the jury that they were not bound to confine their verdict to nominal damages, and the jury having found a verdict for 70*l.* beyond the sum paid into Court, the full Court, consisting of Abbott, C.J., Bayley, J., Holroyd, J., and Littledale, J., refused a rule moved pursuant to leave reserved to enter a nonsuit. Before considering the judgments in that case it may be observed that there existed the following facts, which were wholly wanting in *Flureau* v. *Thornhill* (1)—First, there was an express undertaking to let into possession on payment of the purchase money on a day certain; secondly, the defendant expressly undertook to make a good title; and thirdly, the defendant evidently knew that he was contracting to sell a property upon an expectation only (though a *bona fide* one) that the contract between Harwood and himself would be carried into effect, a matter over which he must have known that he had no control. The contract, therefore, was not broken, as in *Flureau* v. *Thornhill* (1), by reason of a discovery that the defendant's title was defective, but by a failure to do the very thing he had contracted to do by a certain day. Nor was it possible in that case to imply a condition "from the usage of that particular business" such as that implied in *Flureau* v. *Thornhill* (1), inasmuch as the parties had expressly agreed, absolutely and not conditionally, that a good title should be made. When carefully examined, I think that all the observations of the learned Judges in that case, read with reference to the facts of the case, amount to no more than a decision that mere inability to make a good title does not of itself bring a vendor within the rule laid down in *Flureau* v. *Thornhill* (1) as to damages; but that it depends upon the nature of the contract, and also upon the reasons of the inability whether he can avail himself of that rule; and that in such a case as that of *Hopkins* v. *Grazebrook* (2) a vendor was not within the rule. It is true that several expressions of Abbott, C.J., and Bayley, J., in that case have been thought to have laid down more precise rules than would be the case according to the above view of it, but in my opinion the judgments are to be read as only containing some of the reasons for holding that whether *Flureau* v. *Thornhill* (1) was correctly decided or not, it certainly was no authority for the proposition that under all circumstances and whatever the cause of the default, a vendor unable to make a good title should have a right to break his contract, subject to a certain limited amount of damages; but on the contrary that, notwithstanding *Flureau* v. *Thornhill* (1), a vendor who puts up an estate to auction, contracting to make a good title and knowing he has no title, is responsible for his breach of contract in the same way and to the same extent of damages as other persons breaking their contracts. It is true that there are expressions in the judgments in *Hopkins* v. *Grazebrook* (2) which read by themselves would seem to imply that *Flureau* v. *Thornhill* (1)

could never apply where the vendor was not in possession of that which he had contracted to sell. Abbott, C.J., says, "The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title." And Bayley, J., says, "For here the vendor had nothing but an equitable title," as though that were the test; but I think that both these expressions must be read in connection with the fact that the defendant knew he was offering a property the title to which was defective, and his ability to sell it a matter beyond his own control. Cases may easily be conceived in which a person without actual possession, but *bona fide* believing that he had a present right to convey, might be properly held entitled to the benefit of the rule in *Flureau* v. *Thornhill* (1) without in any way over-ruling the decision in *Hopkins* v. *Grazebrook* (2), if I am right in my interpretation of its meaning and effect. *Pouncett* v. *Fuller* (5) was in fact such a case. There the defendant having a mere agreement from the owner of a manor for a right of shooting, but *bona fide* believing that he had a selling title, contracted to sell his right of shooting to the plaintiff. It turned out on the investigation of the title that he had no legal title. Under these circumstances it was held by the Court of Common Pleas that the rule in *Flureau* v. *Thornhill* (1) applied. After an elaborate argument, in which all the cases which had then been decided were discussed, Jervis, C.J., and other Judges delivered a judgment in favour of the defendant, which seems to me quite satisfactorily to dispose of this question. Jervis, C.J., thus shortly states the grounds of the decision—"Though he had not a right to sell that which he professed to sell, inasmuch as it was an incorporeal hereditament, which could only be granted under seal, yet as a layman he had a fair right to believe he had the power to sell which he professed to have, and, therefore, this case comes within the qualification of the rule as expressed in *Hopkins* v. *Grazebrook* (2) and *Walker* v. *Moore* (6)." He had previously stated the effect of *Walker* v. *Moore* (6) as expressly determining "that where the party is not to blame, but professes to sell that which he *bona fide* believes he can sell, though in fact he have no title, he is liable only for the expenses of investigating the title;" and the case of *Hopkins* v. *Grazebrook* (2) as deciding that where the party enters into a contract, knowing that he cannot make a title, he is remitted to "his general liability," by which is of course meant liability to damages as in an ordinary case of breach of contract. Cresswell, J., says, "The defendant having a grant, though not a legal one, of the shooting, both parties acted under a *bona fide* impression that he had that to sell which he professed to sell; I cannot, therefore, see how the case can be brought within the exception in *Hopkins* v. *Grazebrook*" (2). Williams, J., uses an expression in his judgment which appears to me clearly to shew that he does not take the judgment of Bayley, J., in *Hopkins* v. *Grazebrook* (2), to be intended to lay down a general rule that wherever the vendor has nothing but an equitable title the rule in *Flureau* v. *Thornhill* (1) cannot apply. He says, "It is true that here the defendant had a mere equitable title; but the facts shew that he did not know when he entered into the contract that he had not a perfectly good legal title. Ignorance of law is not that kind of misconduct which brings the case within the rule in *Hopkins* v. *Grazebrook* (2).

I have come to the conclusion upon the above consideration of the cases, especially that of *Pouncett* v. *Fuller* (5), which I think was satisfactorily decided, that the application of the rule laid down in *Flureau* v. *Thornhill* (1) does not depend upon the actual possession of the property by the vendor. I think, for instance, that it would apply in the case of a sale of property, where upon investigation of the title it should be discovered that, owing to some deed of partition, the effect of which had been misunderstood, the vendor was dealing with property A. when he had only a right to sell property B., and in many other cases which may be supposed where the contract goes off, owing to a discovery subsequent to the contract that the vendor has not a title to

sell what at the time of the contract he *bona fide* supposed himself to possess.

I am, however, of opinion in answer to the third question proposed by your Lordships, that the circumstances of the present case do distinguish it and take it out of the rule laid down in *Flureau* v. *Thornhill* (1).

I need not here repeat the observations already made as to what I conceive to be the actual limits of the rule laid down in that case or the extent of the qualification of its apparent generality established by subsequent cases; but I will at once proceed to state what I conceive to be the material facts stated in the present case.

It appears from the case that one Hill was possessed of certain iron ore mines, amongst others, of one called Miss Watters' Royalty, by virtue of an agreement, in 1861, for a lease for twenty-one years. This agreement contained a clause providing against assignment without the consent of the lessors in writing first thereto obtained. Hill having died, his executors, about August, 1863, contracted to sell all the mines of Hill deceased, including his interest in Watters' Royalty, for 250,000*l.* This purchase had not been completed when the contract, the subject of the action, was made on the 17th of October, 1867. The case then states an application by Hill's executors to Hill's lessors for their consent to the assignment to the defendants which the lessors were willing to give, if the defendants would execute a duplicate. A duplicate consent was prepared, and in June, 1865, one part was executed by the lessors and retained by them. The other part was sent to the solicitors for the executors to obtain the defendants' signature, and in the same month the solicitors for the executors sent the duplicate consent to the defendants' solicitors for their execution. The lessors' solicitors having more than once requested the solicitors for the executors to obtain the execution by the defendants of the duplicate consent, the solicitors for the executors wrote to the defendants' solicitors on the 11th of October, 1865, stating, as the fact was, that they had learnt from the lessors' solicitors that unless the duplicate was sent back signed in a few days the assent of the lessors would be withdrawn. The duplicate consent remained unexecuted in the hands of the defendants' solicitors at the time when the agreement, the subject of the action, was entered into on the 17th of October, 1867. In the meantime questions arose upon several abstracts of title relating to various parts of the property included in the agreement of August, 1863, between the defendants' solicitors and the executors' solicitors which were not settled until October, 1868, when the purchase of all the property included in the agreement of August, 1863, was completed. Before the agreement of October, 1867, was signed, the defendant Fothergill, who afterwards made that agreement, had been informed that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the defendants' interest in Watters' Royalty; but at the meeting at which the contract sued upon was discussed and afterwards signed he made no mention of the necessity for such consent, as the case finds, either because it did not occur to him, or if it did, because he felt sure that no difficulty would arise in respect to such consent, and therefore, that it was a matter of no importance. On the 17th of October, 1867, the agreement sued upon was signed, the material part of which is in the words—"We offer to sell you our interest in Miss Watters' Royalty, 2,500*l.* to be paid us in cash on our handing you a transfer of the said Royalty. A deposit of 250*l.* to be made us forthwith, and the whole arrangement to be carried out and accomplished as soon as may be. Signed, Richard Fothergill, for, &c., and self. We accept of offer in terms stated, Bain & Co., per John Paterson." Before acceding to the proposed terms Mr. Paterson asked for time to consult his partners, which was declined. The bargain was thereupon concluded, and the deposit of 250*l.* paid. Mr. Paterson did not learn till the 22nd or 23rd of October that the consent of the lessor was necessary. He then wrote to Mr. Fothergill requesting him to sign the consent, which the defendants had still to sign (alluding to the duplicate consent which remained unsigned in the defendants' possession), but

though the defendants did their best to obtain the consent of the lessors, they failed to obtain such consent, in consequence of which, after attempts to make a fresh arrangement and to obtain the consent of the plaintiffs to cancel the agreement, the defendants being unable to obtain the consent of the lessors to an assignment except to one Stirling, sold to Stirling, and the present action was commenced.

From the above statement it appears that when the contract of the 17th of October, 1867, was signed, the defendant Fothergill knew that the consent of Hill's lessors was required before Hill's executors could assign their interest to the defendants, and also that the like consent was necessary before the defendants could effectually assign their interest to the plaintiffs. The plaintiffs were not informed either of the necessity or of the non-existence of such consent. It further appears that before the contract was signed, the defendants had had notice through their solicitor that the consent of the lessors of Hill to the assignment of his agreement with them was dependent upon the defendants doing an act which they were being pressed to do as far back as October, 1865, and which had not yet been done, and that such notice was not communicated to the plaintiffs, nor the difficulty, which might obviously arise in consequence, pointed out. It appears to me that under the circumstances, it was so clearly the duty of Mr. Fothergill to have put the plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the Royalty, that it is impossible for the defendants to rely upon the rule in *Flureau* v. *Thornhill* (1). I think that the contract did not in this case go off through the *discovery* by the defendants that they could not make a good title, but by reason of the over sanguine expectation on the part of Mr. Fothergill, that an obstacle, which he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase. In such a case I am of opinion that the case of *Flureau* v. *Thornhill* (1) does not apply.

Finding myself unfortunately compelled to differ from the rest of my learned brethren in the answer I give to the third question asked by your Lordships' House, it is necessary for me to notice certain other decisions *in pari materia* with those already commented upon, and to consider how far they bear upon the present case, and how far they can be supported upon principle so as to be properly regarded as binding upon your Lordships, as part of the law upon the subject.

The first of these is *Walker* v. *Moore* (6), already referred to, decided in the year 1829, only three years after *Hopkins* v. *Grazebrook* (2). In that case the agreement for purchase was in July, 1827. The abstract of title was delivered in August, 1827, and returned in September with observations and a request for an appointment to examine documents. In November, before the appointment was made, notice was given by the purchaser of a proposed resale by him of a part of the property, and a part was resold. On the 6th of February the original documents were examined and the defect in the defendants' title was then discovered. In that case it was held in perfect conformity with *Flureau* v. *Thornhill* (1), and not inconsistently with *Hopkins* v. *Grazebrook* (2), that no damages for loss of bargain could be recovered. No doubt the main ground of the decision in that case, so far at least as the judgment of Mr. Justice Bayley is concerned, appears to have been that the plaintiff was premature in selling before he had obtained an actual conveyance of the estate, but that ground itself, looking at the facts of the particular case, depended upon the doctrine laid down in *Flureau* v. *Thornhill* (1). Littledale, J., in his judgment in p. 422, so treats of the matter, and says—"Where a contract for the purchase of lands is made *each party* cannot but know that the title *may prove* defective and must be supposed to proceed upon that knowledge." Mr. Baron Parke in his judgment speaks of "a *defect being found* in the title," and states the rule in *Flureau* v. *Thornhill* (1) thus—"In the absence of any express stipulation about it, the parties must be considered as content that the damages, *in the event of the title proving* defective, shall be measured in the ordinary way, and that excludes

the claim of damages on account of the supposed goodness of the bargain." Both these passages are wholly inapplicable to the case of one party *knowing* that a consent to his selling the property is essential and wanting, the other party being wholly in ignorance of those facts. I am, therefore, of opinion that *Walker* v. *Moore* (6) is no authority for the defendants' contention in the present case.

The case of *Robinson* v. *Harman* (4) (decided in 1848), appears to me to be a very strong authority for the plaintiffs. That case in effect decided that where a vendor *knows* he has no title, and chooses to contract for the sale of the property, he is not within the rule as to limitation of damages laid down in *Flureau* v. *Thornhill* (1). There may be some doubt whether that case is wholly reconcilable with the case of *Sikes* v. *Wild* (11), to be noticed afterwards as to what constitutes sufficient *knowledge* on the part of a vendor to deprive him of the benefit of the rule; but in any case I am of opinion that the case of *Robinson* v. *Harman* (4) was rightly decided, because the vendor in that case, in answer to express enquiries as to his power to lease, and as to the legal estate being vested in trustees, took upon himself positively to assert that the property was his out and out, and that he alone had the power of leasing. The contract being made after such a statement I think it was rightly held as against the vendor, that he could not set up a rule applicable only to the case where both parties are in ignorance as to whether the title will prove defective or not. He either knew in a legal sense that it was defective, or having taken upon himself to assert its perfection in a matter upon which inquiry had been expressly made he could not set up a rule which implies ignorance of the defect in both contracting parties. I think, therefore, that his liability was properly held to be that of any person who breaks his contract, and not limited as in *Flureau* v. *Thornhill* (1).

In *Worthington* v. *Warrington* (12), decided in 1849, the doctrine in *Flureau* v. *Thornhill* (1) was again discussed and applied, but without in any way questioning the authority of *Hopkins* v. *Grazebrook* (2), or of *Robinson* v. *Harman* (4), then recently decided by the Court of Exchequer, and cited upon the argument. Mr. Justice Coltman, who delivered a judgment in which the rest of the Court concurred, placed his decision on grounds entirely in conformity with the view I have submitted of the true extent and application of the rule. He says, "everyone who purchases land knows that a difficulty *may* exist as to the making a title *which was not anticipated* at the time of entering into the contract."

The case of *Pouncett* v. *Fuller* (5), decided in 1856, has already been referred to. I only notice it again for the purpose of adding that I think it fully bears out the observations I have made as to the effect of the previous decisions. The only qualification of, or addition to, the law laid down in those decisions which I find, in the case of *Pouncett* v. *Fuller* (5), is that which is embodied in a sentence of Mr. Justice Williams' judgment, already cited from p. 682 of the report—"Ignorance of law is not that sort of misconduct which brings the case within the rule in *Hopkins* v. *Grazebrook* (2)." In the present case I do not think that Mr. Fothergill's neglect to mention either the necessity or the absence of the required consents was in the nature of an ignorance of law, but a neglect to mention an obstacle within his own knowledge and beyond his own control, and which he *knew* to be fatal, as long as it existed, to his title to sell; and that the mere circumstance that he either thought nothing about it, or that he expected that the obstacle would be removed, did not entitle him to the benefit of the rule in *Flureau* v. *Thornhill* (1); but on the contrary is conclusive to shew that the case is within the principle of *Hopkins* v. *Grazebrook* (2) and *Robinson* v. *Harman* (4).

I come now to the case of *Sikes* v. *Wild* (11), affirmed on appeal to the Exchequer Chamber. This was a case very peculiar in its circumstances, and led to a difference of opinion in the Court of Queen's Bench. The property in question was encumbered with an annuity, and the vendor knew that no title free of incumbrance could be made unless the annuitant and her trustee would dis-

charge the part sold from the trust to secure the annuity. *The annuitant had verbally agreed to transfer her security to another property*, but after the plaintiff had agreed to buy the property, the annuitant refused her consent to the transfer, and so the bargain went off. The jury found, first, that the defendants *bona fide* believed that they would be able to make the purchaser a good title free from incumbrance; and, secondly, that they had reasonable grounds for so believing. After a full discussion of the cases previously decided, Mr. Justice Blackburn delivered judgment for himself and Mr. Justice Wightman in favour of the defendants, holding that the rule in *Flureau* v. *Thornhill* (1) applied. Lord Chief Justice Cockburn differed, and held that the case fell within the rule in *Hopkins* v. *Grazebrook* (2) and *Robinson* v. *Harman* (4). The judgment of the two learned Judges who held for the defendants, though it expresses great doubt as to the soundness of the decision in *Hopkins* v. *Grazebrook* (2), and also as to the ground of that decision, ultimately proceeds upon the narrow ground that "it is impossible to say as a matter of law that there is misconduct in putting property up to sale, without disclosing every material fact, and that the only ground for imputing misconduct was putting up the property for sale, though they knew that their power of making a title free from incumbrance was precarious, which the jury" (under the circumstances of the unretracted promise at the time of the contract) "had found to have been done *bona fide*, and not unreasonably." The judgment of the Court of Exchequer Chamber, delivered by Lord Chief Justice Erle, after stating the rule in *Flureau* v. *Thornhill* (1), goes on to say—"The damages here therefore must be assessed according to the rule in *Flureau* v. *Thornhill* (1), unless the case comes within the exception in *Hopkins* v. *Grazebrook* (2); namely, that if the intended vendor *knowingly* withholds from the vendee that he has not a title, he is guilty of culpable want of truth, and is bound to make the latter compensation for the loss of his bargain, and ought not to have the protection of the doctrine established by *Flureau* v. *Thornhill* (1)." It may be observed that this is certainly a somewhat free translation of the decision in *Hopkins* v. *Grazebrook* (2). The learned Chief Justice then states the proposal made to the annuitant as to a change of the property upon which her annuity was to be charged, and goes on —"She assented, and it might reasonably have been supposed that she would continue in that mind to the last. Under these circumstances the failure to make a title does not bring the case within *Hopkins* v. *Grazebrook* (2)."

Upon a full consideration of these judgments it appears to me that they do not govern the present case. The existence of a parol promise to consent to the transfer of the incumbrance was there, the circumstance relied upon to save the application of the rule in *Flureau* v. *Thornhill* (1), whereas in the present case so far from the existence, at the time of the contract in 1867, of any promise to consent on the part of the lessors to a sale by the defendants to the plaintiffs, all the facts stated in the case, especially the notice in October, 1865, seem to me to shew that there was no reason for assuming such consent. Moreover it is impossible to deny that the authority of *Sikes* v. *Wild* (11), as applicable to any other case, not identical in its facts, is much weakened by the forcible judgment of the Lord Chief Justice in the Court below, in favour of the plaintiff. After commenting on the rule in *Flureau* v. *Thornhill* (1), and the reasons upon which it is founded, he adds—"But I can see no reason, in the absence of authority, for extending the exception to parties, who, *knowing* that they have not any present estate to convey, *take upon themselves to sell in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance.* There is an obvious difference between an owner, who knows that he alone is entitled to an estate and has a right to sell it, although he may fail to make out a sufficient title, and the person who not having the estate takes upon him to sell on the expectation of acquiring the estate in time and making out a title." Even if the majority of the Court in that case and the jury by their finding, were right

in holding that there was there a reasonable expectation, as distinguished from a speculative belief, I can see nothing of the kind in the present case, which therefore in my opinion is not affected by the case of *Sikes* v. *Wild* (11), even assuming that case to have been correctly decided. The present case was not argued in the Exchequer Chamber in consequence of an understanding between counsel that the case of *Engell* v. *Fitch* (3) bore so closely upon it that it was desirable to proceed at once to your Lordships' House after a formal judgment for the defendants, in order that the whole subject might be freely discussed. Upon a careful perusal of the case of *Engell* v. *Fitch* (3), I am unable to perceive that it bears so closely upon the present case as appears to have been supposed at that time. Both in the Queen's Bench and in the Court of Error, the case was decided upon the ground that the breach of contract having arisen from the *neglect* of the defendants to do an act within their power, in order to complete the title, and not from *inability* to make a title, *Flureau* v. *Thornhill* (1) did not apply. In the present case I do not think that the facts shew that the defendants were in a position, if they chose, to have got over the difficulty which existed, but on the contrary that it was a matter wholly beyond their control. The case, however, is of great value, as shewing beyond all question that the rule in *Flureau* v. *Thornhill* (1) is a rule wholly confined to cases of *inability* to make a title, and not to breaches of contract *in respect of the sale of real property* from whatsoever cause arising. Kelly, C.B., in the Exchequer Chamber (15), speaks, as I venture to think, with correctness of the rule as "a qualification of the rule of common law, founded entirely on the difficulty that a vendor often finds in making a title to real estate, not from any default on his part, but from his ignorance of the strict legal state of his title."

I come now to consider the judgments of the learned Barons of the Exchequer in the present case. Those judgments were delivered without time taken to consider, and they are not all founded upon the same grounds. Baron Martin passes over what I feel to be the main difficulty in the defendants' way by the observation, "the defendants were willing to complete their contract and only failed because they failed to get the consent which they might reasonably have supposed there would be no difficulty in getting." It appears to me on the contrary that, under the circumstances of the case, there was nothing to justify them in making such a contract with the knowledge they possessed without communicating the present defect of their title to the intending purchaser, and certainly nothing to justify them in assuming that that defect would be cured. The judgment of Baron Channell seems to proceed upon the supposition that the rule in *Flureau* v. *Thornhill* (1) applies wherever *fraud* is not suggested, for which position he says that *Pouncett* v. *Fuller* (5) and *Sikes* v. *Wild* (11) seem to be strong authorities. To this I do not assent, for the reasons explained above. Baron Cleasby proceeds on a wholly different ground from his learned brethren, and bases his decision on the ground that the defendants having merely contracted to sell "their interest" had in fact only sold their interest, such as it was, in a contract relative to the property, and not any legal interest whatever. But, as pointed out by Baron Martin in his judgment, this view of the case, if correct, would shew that the defendants were not liable for any breach of contract at all, a point never suggested on their behalf, and I think it plain that the meaning of the contract cannot be so restricted. The very words, "We offer to sell you our interest," must, I think, be construed as an offer to sell something which they had an unrestricted right to sell, and the subsequent words as to payment of 2,500*l.*, "to be paid in cash on *our handing you a transfer of the said Royalty*," are in my opinion quite inconsistent with the supposition that both parties could be held to have contracted deliberately upon any other basis than that the defendants had an absolute right to convey, subject only

(15) 38 Law J. Rep. (N.S.) Q.B. 304; s. c. Law Rep. 4 Q.B. 666.

to unanticipated difficulties in making out the title.

For these reasons I am of opinion that the rule in *Flureau* v. *Thornhill* (1) is not applicable to the present case, and that the plaintiffs are entitled to such damages for the loss of their bargain as the arbitrator appointed may assess.

PIGOTT, B.—In answer to the questions submitted by your Lordships to the Judges I am of opinion, first, that upon a contract for the sale of real estate where the vendor, *without his default*, is unable to make a good title, the purchaser is by law entitled to recover *no damages for the loss of his bargain.*

Secondly, that the actual possession of the property, the subject of the contract, is not *essential* to bring the case within the rule laid down in *Flureau* v. *Thornhill* (1). And, lastly, that the circumstances of the present case do not distinguish it from *Flureau* v. *Thornhill* (1).

I base my answers to the first and second questions of your Lordships upon the decision in *Flureau* v. *Thornhill* (1), which is, in my opinion, both good law and good sense. I think that it would have been impolitic and unjust to have allowed damages to be recovered in such a case for the loss of the bargain.

The Court considered it an exceptional case, taking it out of the ordinary rule as to damages, but confining the exception to cases where (to use the words of the Chief Justice) "*without fraud*" *a vendor was incapable of making a good title to real estate.* If the vendor by his own default had caused the breach, that would be, I conceive, in the nature of a fraud upon the vendee, and would disentitle the former to the benefit of the exception.

The reasons for such an exception seem both evident and cogent. No man, not a lawyer, could, from the difficulty of the subject, know in the majority of cases the state of his title to land, and this was well known to both vendors and purchasers; hence Blackstone, J., said, "these contracts are upon condition that the vendor has a good title," implying that it was at that time a well-understood term of such contracts within the contemplation of all parties. Without such a term being implied every man must have expressed it in his contract, or have incurred beforehand an expensive investigation of his title; or another very probable result would have been that such contracts would be unduly discouraged by the fear of consequences which vendors could not foresee. Such being the circumstances under which these contracts were entered into, it was, in my opinion, highly reasonable that the Court should infer that the parties contracted with reference to them, and that the damages for a breach should be assessed upon the principle thus contemplated by both. I submit also that the rule was intended to be a broad and plain one, making no distinction, and calling for none, whether the vendor was at the time of his contract in possession or not.

The case thus decided 100 years ago has been with very slight exceptions acted upon ever since. Its soundness has been generally admitted and approved, and it must be taken, I think, that all subsequent contracts for the sale of real estates have proceeded upon the law thus established. Perhaps many such contracts may be now in existence, and it would not only be hard to apply to them an *ex post facto* law; but I venture to think that only the most irresistible reasons should induce your Lordships to disturb that decision.

In the year 1826 *Hopkins* v. *Grazebrook* (2) seems to have cast some disparagement upon *Flureau* v. *Thornhill* (1), but that case went in the result no further than to engraft an exception upon it.

The facts were that the defendant had put up for sale part of an estate which belonged to one Hill. Hill had contracted for the sale of it to Harwood, and defendant had contracted to purchase the same from Harwood. The case only states that "a misunderstanding arose between Hill and Harwood," and the conveyance to the latter was never executed. In consequence of this dispute, defendant (who acted *bona fide* throughout) was unable to complete his contract, and was sued for the breach of it. It is not very clearly to be collected from the case what the dispute was about; but assuming as I do

from the argument and judgments that it was upon defective title, I venture humbly to submit that the distinction has no real foundation.

The Chief Justice Abbott says, "The defendant unfortunately put the estate up to auction before he got a conveyance," and Bayley, J., says, "The case of *Flureau* v. *Thornhill* (1) is very different, for here the vendor had nothing but an equitable title."

But no reason is given why a person may not as properly contract for the sale of an estate to which he is entitled in equity as well as in law. He is (*ex hypothesi*) entitled to the thing he contracts to sell (which is the estate), and he is bound to perform his contract. The contract does not express nor necessarily assume that he is actually in possession of the estate, or anything more than that he is so far entitled to possession that he will be able to give it at the proper time to his vendee, nor does it assume that he has had it conveyed in law to him. It is a contract to convey and give possession within the time fixed, or within a reasonable time, subject to the implied condition that the title is not objected to by the purchaser. If this be the whole effect of the contract, there seems to be no ground for saying, as the Chief Justice did, "that he was bound to have had a conveyance before he put it up to auction;" or in the language of Bayley, J., that "the purchaser might presume that he had had a satisfactory title, and if he had not, that he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted." But a reason altogether different from these is ascribed for this decision of Chief Justice Abbott in the judgment of *Sikes* v. *Wild* (11), namely, that the Chief Justice thought it illegal and against public policy to contract to sell things of which the vendor was not in possession. I need not say this is a ground hardly tenable at the present day. I must, however, refer your Lordships to the judgment of the Court of Queen's Bench in the case of *Engell* v. *Fitch* (3) in 1868, with reference to *Hopkins* v. *Grazebrook* (2). The Lord Chief Justice certainly says, "It stands upon a perfectly intelligible and sound foundation;" and he adds, "there is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a marketable title, and that of one who not being the owner, but having only a contract for the purchase, takes upon himself to sell it to another as his own, and as if the title were his to convey," &c. Now with great respect to so high an authority it seems to me that the alternatives here presented come to very much the same result; namely, who is the owner of the estate, and as such entitled by law to deal with it in contract?

The vendor has ceased to have the power of disposing of it, while the vendee may have good reason to believe that the title is unobjectionable, and that he can with perfect *bona fides* offer it for sale. Why may he not do so? It is difficult to see; for if he were in possession his title may prove defective, and it is only an equal chance that it may prove so where he is entitled to possession by contract.

In *Walker* v. *Moore* (6), Littledale, J., said, "Where a contract for the purchase of lands is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that knowledge;" and Parke, J., says, "in the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

I would refer especially to another case in which *Flureau* v. *Thornhill* (1) was followed, namely, *Pouncett* v. *Fuller* (5). It differed in its circumstances in this important particular, that there the defendant had only an agreement in writing, but not under seal, for a right of shooting over a manor for four years. He contracted to sell this right to the plaintiff (together with a furnished cottage which does not seem to have been held under the agreement with the shooting). But in consequence of the objection of his lessor the defendant was unable to complete his contract for the shooting. The

Court said that it fell within the decisions of *Flureau* v. *Thornhill* (1) and *Walker* v. *Moore* (6), because the defendant was not to blame, and the judgment of Chief Justice Jervis goes on to say, "though legally and technically he had not acquired a right to sell what he professed to sell to the plaintiff since he had no agreement under seal, still he, as a layman, might fairly believe that as he had signed a written agreement he had a right to sell, and was therefore not to blame for entering into a contract to sell." Mr. Justice Cresswell indeed assumes that the defendant was in possession of the shooting; but the judgment of Mr. Justice Williams, whilst it goes further in the expressions of approbation of *Flureau* v. *Thornhill* (1) as laying down a rule called for by the position of the parties to such contracts, goes on to say, "Here it is true defendant had nothing but an *equitable title, but he did not know that he had not a perfectly good title.*"

This was followed by the case of *Sikes* v. *Wild* (12), where it was affirmed.

The defendants were devisees under the will of E. upon trust to sell the land, and to pay out of the interest of the proceeds 100*l.* per annum to his wife. The estate was held subject to a settlement by which *the legal estate was in trustees* for securing that sum to her. The defendants offered the land for sale, believing that the wife would in accordance with advice concur in the conveyance of the land free from incumbrance. After sale, and a deposit paid, she refused to concur, and the plaintiff claimed damages for the loss of his bargain. In the Court of Queen's Bench Justices Wightman and Blackburn held that it came within the rule of *Flureau* v. *Thornhill* (1), and their judgment was affirmed by the Exchequer Chamber. The Lord Chief Justice Cockburn in the Court below held that it came within the exception engrafted upon it by *Grazebrook* v. *Hopkins* (2), but the whole of the Judges in both Courts, nine in number, approved of the rule in *Flureau* v. *Thornhill* (1).

I beg leave to refer your Lordships to the judgment delivered by Mr. Justice Blackburn in that case, both for the very exhaustive review which it takes of the whole of the cases bearing upon this subject, and especially for the observations there made upon *Hopkins* v. *Grazebrook* (2), in which I entirely agree. The latter passage is this, "We think that it will be worthy of the consideration of any Court competent to review that case, whether the strong opinion of Lord St. Leonards, reported in the 13th edition of *Vendors and Purchasers*, page 301, does not shew that the general understanding of conveyancers has been misapprehended," and he adds, "it is impossible to say as a matter of law that there is misconduct in putting up property for sale without describing every material fact, as if it was a case of marine insurance." This case was decided in 1861, Trinity Term. And in the edition of *Vendors and Purchasers* in the following year, the learned author in his commentary upon the decision writes thus, "This seems to be the true rule; it is a point which whilst at the bar I should have treated as beyond doubt." Upon these authorities, and for these reasons, I submit that both the first and second questions of your Lordships should be answered in the affirmative in point of law.

The third question of your Lordships depends upon the facts, which are that Anthony Hill was possessed of a mine called Watters' Royalty, by virtue of an agreement dated the 19th of October, 1861, for a term of twenty-one years. The agreement contained a clause against assignment or sub-letting without the consent of the lessors in writing first had. Anthony Hill died the 2nd of August, 1862. His executors in August, 1863, contracted with defendants for the sale to them of (*inter alia*) Miss Watters' Royalty.

This purchase had not been completed on the 17th of October, 1867. The executors applied to the lessors for and they were willing to give consent to the above assignment, provided the defendants would execute a duplicate of it. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors and retained in the hands of their solicitor. The other part was sent on the 15th of June, 1865, to Messrs. Upton & Co.,

the solicitors for the executors, in order that they might obtain the signature of the defendants, and then exchange it for the one executed by the lessors. The duplicate was about that time sent by Messrs. Upton to defendants' solicitors for execution by the defendants. On two or three occasions the lessors' solicitors requested the solicitors of the executors to obtain the execution by the defendants of this duplicate, and about the 11th of October, 1865, intimated that the lessors would withdraw their consent unless the duplicate was returned executed in a few days, and by a letter of the 11th of October, informed the solicitors of the defendants of their intention.

The duplicate remained unexecuted in the hands of defendants' solicitors on the 17th of October, 1867, when the agreement now in question was entered into. On that morning one of the plaintiffs saw the defendant Fothergill, with the view to purchase Miss Watters' Royalty; they discussed terms and entered into the agreement on that date (the 17th of October, 1867) for the breach of which this action was brought.

Before that date (the 17th of October) Mr. Fothergill had been told that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the defendants' interest in the Royalty, and no mention was made by him to Mr. Paterson of the necessity for such consent. The case states as a reason for this, "either it did not cross his mind, or if it did occur to him, he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was therefore a matter of no importance."

In the result after every endeavour had been made to induce the lessors to give their consent to the assignment, their consent was finally refused, and the defendants were, therefore, unable to complete their contract with the plaintiffs. From these statements I infer that the defendants acted *bona fide* in making the contract with the plaintiffs, that they had an equitable title to the mine at the time, and that they were prevented from carrying out the completion of the contract without any fraud or default (in the nature of misconduct) on their part, but in consequence solely of a defect in their title, which they had not the power to cure. The utmost that can be urged against them is a knowledge that they required the consent of the lessors, which they did not communicate, but there is no pretence for saying that they knew or thought that they were not sure to obtain it. As they honestly believed that they should get it at the time when they sold, it seems to me to be conclusive of the case.

Upon the whole, therefore, I beg to state it as my opinion that the exception as to damages, which was established by *Flureau* v. *Thornhill* (1), applies to the present case.

Lord Chelmsford.—This appeal brings in review before your Lordships the case of *Flureau* v. *Thornhill* (1) and other cases which have engrafted exceptions upon it, and the first question to be considered is, whether that case was rightly decided. The decision took place very nearly a century ago, in the year 1775, and has been followed ever since, not, however, without an occasional expression of doubt as to its soundness. Should your Lordships happen to share in this doubt, you would be extremely reluctant to disturb the rule which it laid down for the assessment of damages upon contracts for the sale of real estates, and which has been so long acted upon, unless you were clearly convinced that it is erroneous and ought no longer to be maintained.

Now the rule established by *Flureau* v. *Thornhill* (1) is that, upon a contract for the purchase of a real estate if the vendor without fraud is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. The case is very shortly reported. Lord Chief Justice De Gray merely laid down the rule without giving any reason for it. But Mr. Justice Blackstone said this, "these contracts are merely upon condition frequently expressed, but always implied that the vendor has a good title."

The rule, and the reason for it, have been adopted and followed in subsequent cases. In *Walker* v. *Moore* (6), where the plaintiff contracted with the defend-

ant for the purchase of a real estate, the vendor, acting *bona fide*, delivered an abstract shewing a good title, and the plaintiff, before he compared it with the original deeds, contracted to sell several portions of the property at a considerable profit. Upon an examination of the abstract with the deeds it was found that the title was defective. The plaintiff refused to complete his purchase, and brought his action claiming, amongst other damages, the profit that would have accrued to him from the re-sale of the property. It was held that he was not entitled to these damages. Parke, J., said, "A jury ought not in the case of a vendor in possession to give any other damages in consequence of a defect being found in the title than those which were allowed in *Flureau* v. *Thornhill* (1) which was recognised in *Johnson* v. *Johnson* (13), *Bratt* v. *Ellis* (7) and *Jones* v. *Dyke* (8). In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

The same learned Judge recognised the authority of *Flureau* v. *Thornhill* (1) in the case of *Robinson* v. *Harman* (4). He there said, "The case of *Flureau* v. *Thornhill* (1) qualified the rule of the Common Law that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." Again in *Pouncett* v. *Fuller* (5), the Court following the rule in *Flureau* v. *Thornhill* (1), held that where a vendor failed to make a good title pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation on the part of the vendor), was not entitled to damages for the loss of his bargain. Mr. Justice Cresswell, in delivering his opinion, said, "We are not called upon here to investigate the grounds upon which the decision in *Flureau* v. *Thornhill* (1) proceeded, or to pronounce any opinion as to the wisdom or the expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent cases to allow us now to call it in question." And in the recent case of *Sikes* v. *Wild* (11) the Court of Queen's Bench, and on appeal the Court of Exchequer Chamber, adopted the rule and acted upon it.

In a more recent case of *Engell* v. *Fitch* (3), to which I shall presently have occasion more particularly to refer, the Lord Chief Justice in an elaborate judgment expressed his opinion that the case of *Flureau* v. *Thornhill* (1) was unsatisfactory, and gave his sanction to Lord Tenterden's doubt as to the soundness of the decision in that case.

There is perhaps some difficulty in ascertaining the exact grounds of the judgment in *Flureau* v. *Thornhill* (1); but in addition to those which have been previously assigned it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision. "The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a resale appears to me to be a consequence too remote from the breach of the contract. I am aware that in *Engell* v. *Fitch* (3), where after the contract and before the breach of it the purchaser contracted for a resale at an advance of 105*l.*, the Court of Queen's Bench and the Court of Exchequer Chamber, though pressed with the decision in *Hadley* v. *Baxendale* (14), held that, "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case." But it must be borne in mind that this question as to damages depends, as Alderson, B., said in *Hadley* v. *Baxendale* (14), upon what "may reasonably be supposed to have been in the contemplation of *both* parties at the time they made the contract as the probable result of the breach of it." Now although the purchaser in *Engell* v. *Fitch* (3), when he entered into the contract,

may have contemplated a resale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The Judges were no doubt influenced by the fact of the profitable resale having actually taken place, and were in consequence drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract.

The decision in *Flureau* v. *Thornhill* (1) derives great additional authority from the opinion of Lord St. Leonards, who, in his work on the *Law of Vendors and Purchasers* (14th edit. p. 360), considers that it was rightly decided.

The almost unanimous approval of the decision in *Flureau* v. *Thornhill* (1) was broken in upon by an expression of disapprobation from Abbott, C.J., in the case of *Hopkins* v. *Grazebrook* (2) to which I have already alluded. He there said, "Upon the present occasion I will only say that if it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point I should desire to have time for consideration." As the case of *Hopkins* v. *Grazebrook* (2) was one which according to the opinion of the Court was not within the operation of the rule in *Flureau* v. *Thornhill* (1), there was no occasion for this passing reflection upon that case which had been then silently acquiesced in for fifty years.

In *Hopkins* v. *Grazebrook* (2) a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do as his vendor never made a conveyance to him, and it was held that a purchaser of certain lots at the auction might in an action for not making a good title recover not only the expenses which he had incurred but also damages which he sustained by not having the contract carried into effect. Abbott, C.J., said, "The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And Bayley, J., said, "The case of *Flureau* v. *Thornhill* (1) is very different from this, for here the vendor had nothing but an equitable title."

The decision itself in *Hopkins* v. *Grazebrook* (2) cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbott that, "the defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in *Hopkins* v. *Grazebrook* (2) did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in *Flureau* v. *Thornhill* (1), and as having withdrawn from its operation a class of cases where a person knowing that he has no title to real estate enters into a contract for the sale of it. It is not correct to say with Lord St. Leonards in his *Vendors and Purchasers* (page 359, 14th ed.), that *Hopkins* v. *Grazebrook* (2) has not been followed. It has been recognised in several cases since, and in one to which I shall presently refer it has been expressly followed. In *Robinson* v. *Harman* (4), already mentioned as having sanctioned the decision in *Flureau* v. *Thornhill* (1), Baron Parke said "the present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins* v. *Grazebrook* (2)." And Baron Alderson and Baron Platt expressed the same opinion. In *Pouncett* v. *Fuller* (5), *Hopkins* v. *Grazebrook* (2) was treated as a valid authority by all the Judges, the question which they considered being whether the case fell within *Flureau* v. *Thornhill* (1) or the exception in *Hopkins* v. *Grazebrook*

(2), and they decided that it was within the former case.

But in the case of *Engell* v. *Fitch* (3) the Court of Queen's Bench and afterwards the Exchequer Chamber proceeded expressly on the cases of *Hopkins* v. *Grazebrook* (2) and *Robinson* v. *Harman* (4), the Chief Baron, quoting the very words of the Lord Chief Justice, relying on those cases. In that case the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of the expense. The purchaser brought an action upon the contract of sale, and it was held that as the breach of contract arose, not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and the expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shewn he would have made upon a resale. It was upon this decision in *Engell* v. *Fitch* (3) that the plaintiffs in error declined to argue the present case in the Exchequer Chamber, and the appeal came to your Lordships' House without the advantage of the opinions of the learned Judges of that Court.

Notwithstanding the repeated recognition of the authority of *Hopkins* v. *Grazebrook* (2), I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak of course of the exception which it introduced to the rule established by *Flureau* v. *Thornhill* (1) with respect to damages upon the breach of contract for the sale of a real estate, for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the Court in *Hopkins* v. *Grazebrook* (2) engrafted upon the rule in *Flureau* v. *Thornhill* (1) has always been taken to be this—that in an action for breach of a contract for the sale of real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain.

In *Sedgwick on Damages* (4th ed. page 234), mentioned by Mr. Baron Martin in his judgment in this case, after a reference to the general rule as to damages, it is said, "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case the plaintiff can only recover whatever money has been paid by him with interest and expenses. In the latter he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts *bona fide*, and where his conduct is tainted with fraud or bad faith, is not to be "justified or explained on principle."

I fully agree in the doubt expressed by Mr. Justice Blackburn in *Sikes* v. *Wild* (11) as to the soundness of the exception in *Hopkins* v. *Grazebrook* (2), and in the observations which follow the expression of that doubt. The learned Judge said, "I do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed—it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by Mr. Justice Parke in *Walker* v. *Moore* (6), and I think the true one), and that the usage is such that this

implied condition excludes such cases as *Hopkins* v. *Grazebrook* (2), I think that it will be worthy of the consideration of any Court competent to review that case, whether the strong opinion of Lord St. Leonards repeated in the 13th edition of *Vendors and Purchases* does not shew that the general understanding of conveyancers has been misapprehended." In the 14th edition of his work (pp. 360, 361) Lord St. Leonards quotes the whole of the above passage from Mr. Justice Blackburn's judgment, and adds, "this seems to be the true rule, it is a point which whilst at the bar I should have treated as beyond doubt."

The case of *Hopkins* v. *Grazebrook* (2) comes in review before your Lordships in the following way—The Court of Exchequer having given judgment in favour of the defendants in error, in the Court of Exchequer Chamber the plaintiffs in error declined to argue the case, admitting that after the case of *Engell* v. *Fitch* (3) they could not expect a favourable judgment from the Court. Now the decision in *Engell* v. *Fitch* (3) was governed by the case of *Hopkins* v. *Grazebrook* (2), and therefore the judgment of the Exchequer Chamber necessarily brings that case under consideration. I am at a loss to understand the course pursued by the counsel for the plaintiffs in error, for the case of *Engell* v. *Fitch* (3) established the very principle for which they were contending, that there were exceptional cases to which the rule in *Flureau* v. *Thornhill* (1), as to damages, did not apply, and they submitted to a judgment which, affirming the decree of the Court of Exchequer, virtually determined that the present case was not one which fell within the exception.

Upon a review of all the decisions on the subject, I think that the case of *Hopkins* v. *Grazebrook* (2) ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule as established by *Flureau* v. *Thornhill* (1), or is to be considered as involving circumstances which have been regarded as removing cases from the influences of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.

It is only necessary to add that, in my opinion, if there were any exceptional cases from the rule in *Flureau* v. *Thornhill* (1), the present case would not fall within any of them, but is within the rule itself. The respondents when they entered into the contract for the sale of Miss Watters' royalty had an equitable title to the mine, which they might have perfected by obtaining the lessor's consent to the assignment to them. This consent had not been obtained at the time the contract was entered into, and the fact was not communicated to the intended purchaser. The reason for this non-communication is stated in the case to be that "either it did not cross the mind of the respondent, Fothergill, or if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was therefore a matter of no importance." There is no reason to think that the respondents were not acting throughout under a *bona fide* belief that the lessors' consent might be obtained at any time upon application. They were prevented performing their contract, not from any fraud or wilful act on their part, but by an unexpected defect in their title which it was beyond their power to cure.

The case falls precisely within the terms of the rule as stated in *Flureau* v. *Thornhill* (1); and, therefore, in my opinion, the judgment appealed from is right and ought to be affirmed.

LORD HATHERLEY.—I entirely concur in the view which has been expressed by my noble and learned friend who has just addressed your Lordships.

If the question in this case depended entirely upon the case of *Flureau* v. *Thorn-*

hill (1), it could scarcely, in my judgment, after the lapse of time which has taken place since that decision, be argued at your Lordships' bar. I certainly remember, myself, now more than fifty years ago, when I was reading in chambers, to have heard that it was considered as a settled rule, that no damages could be recovered for a loss of the benefit of a bargain in case a good title could not be made out by a vendor to his purchaser. That was then considered as settled by the decision in *Flureau* v. *Thornhill* (1), which had taken place forty-nine years before that time—that would make it altogether ninety-nine years from the present time. Therefore, for ninety-nine years the rule has prevailed as settled by *Flureau* v. *Thornhill* (1), and it has affected and governed, I may say, thousands and thousands of transactions annually, for, undoubtedly, the contracts for the sale of real estate may be reckoned by thousands annually, and nobody, I apprehend, has as yet ever contradicted it. Whatever may have been the expressions of dissatisfaction that have been uttered with regard to that decision, nobody has come to the conclusion that the rule as established in *Flureau* v. *Thornhill* (1) should be overthrown. Upon a much less extensive series of practice by conveyancers, your Lordships' House has been in the habit of acting; but in this case there is not merely the practice of conveyancers, but the common dealings of mankind, which, continuing year after year, as I have said, in many thousands of cases, have required the practice to be put into effect. As far, therefore, as this case falls within the rule in *Flureau* v. *Thornhill* (1), it must be considered as one beyond all doubt.

As regards the case of *Engell* v. *Fitch* (3)—I do not speak for the moment with regard to the case of *Hopkins* v. *Grazebrook* (2)—that certainly was a very peculiar case, whether the course taken by the Court was correct or not in the decision upon the point of damages arising in consequence of the loss of the benefit of the contract. The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance. In *Engell* v. *Fitch* (3), a man having sold his estate, but having failed to do everything in his power to compel possession of the estate to be given up, and being in a condition in which, if a bill had been filed in equity, he would have been compelled by the Court to take proceedings, in order to deliver up possession according to his contract with his vendee, he refused to take any such proceedings whatever, simply upon the ground of the expense it might entail upon him. There could be no doubt whatever in that case that he was acting in gross violation of his contract, which he had the power of performing. Whether or not the proper mode of correcting that abuse was by giving damages to the plaintiff in respect of the loss of his contract, I will not stop to enquire. But it is quite clear that that case was exceedingly different from the case of *Flureau* v. *Thornhill* (1), where it turned out on investigation that the vendor had no legal title.

The reasons given for the judgment in *Flureau* v. *Thornhill* (1) were certainly not altogether satisfactory, because the Lord Chief Justice is said upon that occasion to have stated *simpliciter*, without alleging any ground for the decision whatever, that upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain, to which Mr. Justice Blackstone added, that "these contracts are merely upon a condition frequently expressed but always implied that the vendor has a good title." That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then, in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is al-

ways entitled in equity to do, namely, to insist upon having the title, good or bad, if he be so minded; if the title be defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract.

Therefore the reason is, not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognised on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor, and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating that matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper so to do; but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled under all circumstances to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one.

A contract for a sale of real estate is very different indeed from a contract for a sale of a chattel, where the vendor must know what his right to the chattel is, or at all events is taken to know what his right to the chattel is. And further, in the case of chattels, we well know, as regards the larger part of those contracts at least, that the chattels are purchased with a view to resale, and therefore the whole transaction between the two parties is upon the footing and upon the faith that all the expense or loss that may be incurred, whether it be by the vendee being put to the expense of making any enquiry upon the subject, or whether it be by a loss of profit which he might have obtained if the chattel had been delivered to him, is within the contemplation of both parties, and that is therefore assumed to be the actual contract which the vendor wished to enter into.

The only question, therefore, really remaining in the case, assuming that your Lordships will not think it right to act contrary to the practice which has prevailed ever since the decision of *Flureau* v. *Thornhill* (1), is whether or not the present case can be distinguished in any way from that decision. It appears to me that there is nothing whatever in this case to distinguish it. The contract was made *bona fide* (there is no allegation to the contrary) by the vendor, in this genuine belief that he had a good title. The circumstance that there had been some litigation before, as between him and his original lessors, from whom he derived the lease which he sold, as to whether or not they would give their consent to an assignment, is not, as it appears to me, a circumstance which necessarily implies that there was any want of good faith on his part in offering to sell the property, he being in the full belief that his lessors might reasonably assent, and being consequently in the full belief that that assent would be given. Nor in the case which is suggested as an alternative of his having forgotten altogether the circumstances of the existence of that necessary ingredient in his title, would the case be at all different from that of any vendor who believed at any period of the existence of his title that there was some difficulty existing in it, but forgot that circumstance at the time of his making his bargain; in which case the vendor with a good conscience would be brought within the rule in *Flureau* v. *Thornhill* (1).

I entirely agree with the comments which my noble and learned friend has made upon the case of *Hopkins* v. *Grazebrook* (2). I think it would be impossible to say, regard being had to the principles upon which the Courts have proceeded since the rule in *Flureau* v. *Thornhill* (1)

was laid down, that *Hopkins* v. *Grazebrook* (2) can substantially be distinguished from that case; because in *Hopkins* v. *Grazebrook* (2) the vendor had made a bargain with another person for the purchase of a property which he had every reason to suppose would be conveyed to him within a certain reasonable time. Having made that bargain he made another contract for the sale of the same property. He was just in the same position as any other vendor having an equitable title transferred to him, who might under those circumstances choose to sell it himself, as the defendant chose in that case to make a sale of that property. The circumstance of his not being in possession, when you look at the complicated law which governs real estate in this country, is not a circumstance which, in itself, ought at all to lead the Court to say that he must have known that he could not complete the title. In a vast number of instances, from a variety of circumstances, the actual vendor may not be immediately in possession, although he may have a right to obtain that possession in a reasonable time, and to compel —as the vendor had a right to do, in *Engell* v. *Fitch* (3)—those who are in possession to hand over that possession to him. I do not think, therefore, that there is any sound distinction between the case of *Hopkins* v. *Grazebrook* (2) and that class of authorities which are governed by *Flureau* v. *Thornhill* (1).

Under these circumstances, I have no hesitation in coming to the conclusion that the decision of the Court now appealed from was right and ought to be affirmed.

Judgment of the Court of Exchequer Chamber affirmed with costs.

Attorneys—Helder & Roberts, agents for Brockbank & Helder, Whitehaven, for the plaintiffs in error; Thomas & Hollams, for the defendants in error.

[IN THE HOUSE OF LORDS.]

1874. May 8, 19. } THE EAST LONDON RAILWAY COMPANY *v.* WHITCHURCH.

Poor Rate—Liability of Railway Company to make good Deficiency in Rates until the Railway, or the Works thereof, are completed and assessed, or liable to be assessed—8 & 9 *Vict. c.* 18. *s.* 133.

A company was authorised by their special Act to take lands in several parishes, and to construct thereon seven railways, which when completed were to be called the East London Railway. Section 128 *enacted that, "if and while the defendants are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor rate, church rate or other parochial or ward rate, they shall, from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment of such rates by reason of those lands being taken or used for the purposes of the railway or works." The interpretation clause enacted that the expression "the railways," should mean "the railways, stations, works and conveniences, or any or either of them, or any part by this Act authorised." The defendants took, for the purposes of the Act, lands in R. parish assessed to parochial rates, and completed thereon all that portion of railway No.* 1 *which lay within R. parish, and also the stations thereof; they were constructing, but had not completed, the rest of railway No.* 1. *This completed portion they had let to the B. company, who had opened it for traffic, and now occupied and worked it. The defendants had also taken lands in other parishes, whereon they had completed railway No.* 4, *and were constructing, but had not completed, the remaining five railways:*—Held, *that under the* 128*th section of the above-mentioned local Act, as also the* 133*rd section of the Lands Clauses Act,* 1845, *railway companies are only liable to be assessed for parochial rates at the original value of the lands taken by them for the construction of their lines, so long as they have not substituted for the buildings and assessable property which they shall have taken another property capable of assessment, or actually assessed. When*

they have done this, as by completing and actually working a line, or part of a line, within any parish, the company can claim, and is liable to be assessed in respect of the actual letting value of the line, or part of a line, so completed and actually worked, whether it be or be not as valuable as the assessable property for which it is substituted, and whether the whole of the line of railway authorised by their Act of Parliament has or has not been completed.

[For the report of the above case, see 43 Law J. Rep. (N.S.) M.C. 159.]

END OF TRINITY TERM, 1874.

INDEX

TO THE SUBJECTS OF THE

CASES AT COMMON LAW

IN THE

LAW JOURNAL REPORTS,

NEW SERIES, VOL. XLIII.

[*In the following Index*, Q.B. *refers to the* QUEEN'S BENCH, C.P. *to the* COMMON PLEAS, EX. *to the* EXCHEQUER, *and* M.C. *denotes that the case is reported in the* MAGISTRATES' CASES.]

—— *delivery of goods: custom of port of delivery*] —Plaintiffs shipped several bales on board defendant's steam vessel at Calcutta, under a bill of lading, by which the goods were to be delivered to plaintiffs or their assigns at the port of London, the bill of lading containing the terms that the goods were "to be delivered in the like good order and condition from the ship's deck where the ship's responsibility shall cease." The custom of the port of London was proved to be for steamers coming from a foreign port to discharge their cargo on a quay of one of the docks, and for the Dock Company to afterwards put the goods into the lighters of the consignees free of charge, if the consignees send for them within a certain limited time, but if they send after that time the consignees have to pay the dock charges. Defendant's vessel duly arrived with plaintiffs' goods at the port of London, and according to the custom landed the goods on one of the quays of the Victoria Dock, and the dock company loaded plaintiffs' lighter. It was proved that although all the plaintiffs' bales were landed on the quay one of them was lost and was never put into plaintiffs' lighter:—*Held*, that by the terms of the bill of lading defendant's liability ceased when the goods left the ship's deck, and that he was therefore not liable for the non-delivery of the missing bale. *Petrocochino* v. *Bott*, C.P., 214

—— See Freight.

BILL OF SALE—*successive bills of which last alone registered*]—E. & W. were engaged in a speculation and E. had agreed that the plaintiff should receive a share of the profit which should accrue to him. E. advanced a sum of money, and as W. was unable to repay it when it became due, it was agreed between E., W. and the plaintiff, that a bill of sale should be given to the plaintiff of certain furniture in a house occupied by W. It was at the same time agreed between the three parties that the bill of sale was to be kept renewed for twelve months, and that neither it nor the renewals were to be registered during that period unless W. should get into difficulties in the meantime. In pursuance of such agreement a bill of sale, dated the 8th of March, 1872, was executed by W. On the 27th of March, 1872, a fresh bill was executed in pursuance of the agreement, but the first bill of sale remained in the possession of the plaintiff. Another fresh bill was registered on the 15th of April, 1872, and the plaintiff having learnt that W. was in difficulties, took possession under it on the 20th of April:—*Held* (CLEASBY, B., *dubitante*), affirming the judgment of the Court of Queen's Bench, that the plaintiff was entitled as against an execution creditor who seized on the 24th. *Ramsden* v. *Lupton* (Ex. Ch.), Q.B., 17

—— See Bankruptcy.

BOND—*by defendant to pay sum recovered if determination of action in plaintiff's favour: notice of appeal but no bail*]—Plaintiff obtained a verdict in an action against E., who then, in consideration of a stay of proceedings until the following term, executed a bond, the condition of which was, that if the determination of the action should be in favour of plaintiff, and E. should pay the amount for which the verdict was given, the bond should be void. A rule to set aside the verdict upon a point reserved at the trial was afterwards discharged, and E. gave notice of appeal under section 37 of the Common Law Procedure Act, 1854, but, no bail having been put in under section 38, and more than two years having passed without any step being taken to prosecute the appeal, plaintiff brought an action on the bond:—*Held*, that the time for putting in bail having elapsed, and no bail having been put in, the action against E. must be considered as determined in favour of plaintiff, and that the bond might therefore be enforced. *Burnaby* v. *Earle*, Q.B., 209

BRIBERY AND CORRUPT PRACTICES. See Municipal Election. Parliament.

CARRIERS BY RAILWAY—*common carriers: loss of goods of value exceeding 10l. by felony of servant: evidence*]—In an action against a railway company for the loss of a parcel of money above the value of 10*l.*, the issue being whether the loss was occasioned by the felonious act of one of the company's servants, who had absconded at the time of the parcel being missed, it is allowable to call a police officer to prove instructions which he received from the station master tending to shew that he, the station master, had suspicions that the servant had stolen the parcel. *The Kirkstall Brewery Company (lim.)* v. *The Furness Rail. Co.*, Q.B., 142

—— *loss of goods by felony of servants: evidence: carriers act*, 1 *Will.* 4. *c.* 68. *s.* 1]—To support a replication under the Carriers Act (1 Will. 4. c. 68. s. 1) of loss by the felonious acts of defendants' servants, it is not necessary to give such an amount of evidence as would be required to justify a Judge in leaving it to the jury upon an indictment for felony, because in the civil action the servants have an opportunity of being witnesses for the defence, and of clearing themselves from imputation; nor is it necessary for the plaintiff to charge any one individual servant with the theft. *Vaughton* v. *The London and North Western Rail. Co.*, Ex., 75

—— "*parcel or package*" *within carriers act*] —Pictures were laid upon one another without any covering or tie in the owner's waggon, which had sides but no top; and the waggon was delivered to a railway company, and placed by their servants on one of their trucks for carriage by the railway:—*Held*, that the pictures were "contained in a parcel or package" within the meaning of section 1 of 1 Will. 4. c.

first, that the Judge of the City of London Court was wholly unjustified in the course which he took, as he had no right to enquire into the validity of the order of the Judge of a Superior Court, such order being on the face of it properly authenticated; secondly, that the proceeding by rule as provided by 19 & 20 Vict. c. 108. s. 43, applied to the Judge of the City of London Court. Ibid.

—— See Prohibition.

COMMON—*pour cause de vicinage: cattle damage feasant: distress*]—If cattle which are *levant* and *couchant* upon a common stray on to another, there being no inclosure, a commoner upon the latter common has no right to distrain them; he has no right to take the law into his hands, the cattle being upon the common under some colour of right. *Cape* v. *Scott*, Q.B., 65

COMPANY—*liability of transferree of shares on implied contract to indemnify transferror against loss on the shares*]—On the 4th of September, 1865, plaintiff sold to defendant twenty shares in a joint-stock company. On the 8th he executed a transfer to defendant, who paid the purchase-money and caused the transfer to be registered by the company on the 4th of December. On the 20th of March, 1866, defendant transferred the shares to M. On the 18th of April, 1866, the company stopped payment, and on the 8th of May, 1866, was ordered to be wound up. On the 24th of July, 1866, M. was placed on the A. list of contributories, being the list of existing members. On the 30th of October, 1866, M. executed a deed of inspectorship. An order was made upon M. to pay a call of 40*l.* a share, but he did not pay, and the liquidators failed to get any payment out of his estate. On the 6th of December, 1867, the plaintiff and defendant were placed, in respect of the same shares, on the B. list of contributories, being the list of past members. On the 27th of December, 1866, defendant executed a deed of inspectorship under section 192 of the Bankruptcy Act, 1861, which was registered on the 29th of December, 1867. On the 20th of March, 1869, the Court ordered defendant to pay a call of 40*l.* a share, which he did not do, and on the 10th of May plaintiff, in pursuance of an agreement of compromise made between himself and the official liquidator, paid the sum of 15*l.* per share in respect of the twenty shares sold by him to defendant. The official liquidator proved under both deeds of inspectorship:—*Held*, affirming the judgment of the Court below (42 Law J. Rep. (N.S.) Q.B. 174), that plaintiff was entitled to sue defendant for the amount which he had paid to the official liquidator, and that the deed which defendant had executed formed no defence to the action. *Kellock* v. *Enthoven* (Ex. Ch.), Q.B., 90

—— *articles of association: contract before incorporation: privity of contract: preliminary expenses*]—A provision in the articles of association of a company incorporated under the Companies Acts, 1862 and 1867, that preliminary expenses shall be defrayed by the company, does not enable the promoters to sue the company after its formation in respect of expenditure necessary for its establishment; for no privity of contract exists between it and the promoters. *Melhado* v. *The Porto Alegre and New Hamburg and Brazilian Rail. Co.*, C.P., 253

—— *contract ultra vires: ratification by assent of shareholders*]—The directors of a limited liability company, incorporated under the Companies Act, 1862, entered, on behalf of the company, into contracts with R., which were *ultra vires* and beyond the scope of the Memorandum of Association:—*Held*, per BLACKBURN, J., BRETT, J., and GROVE, J. (affirming the judgment of the Court of Exchequer), that, as the contracts, although unauthorised, were not expressly or impliedly prohibited by the memorandum and statute, they were capable of ratification by the unanimous shareholders. Per ARCHIBALD, J., KEATING, J., and QUAIN, J. (*dissentientibus*), that the contracts being *ultra vires* of the company were incapable of ratification. *Riche* v. *The Ashbury Rail. Carriage and Iron Co., Lim.* (Ex. Ch.), Ex., 177

COMPENSATION—*for deprivation of office: attorney*]—Certain trustees having the management of the relief of the poor of a Metropolitan parish, appointed S. to be solicitor for the arrangement of legal matters, with an annual salary. After the passing of the Metropolitan Poor Act, 1867, the Poor Law Board refused to allow the Board of Guardians elected under that Act to continue S. in the appointment which he had received from the trustees:—*Held*, that he was entitled to an award of compensation from the Poor Law Board, under s. 76. *R.* v. *The Local Government Board*, Q.B., 49

—— *Lands Clauses Consolidation Act*, 1845: *lands injuriously affected: Thames Embankment Acts*]—Where works are constructed under the authority of an Act of Parliament, and by their construction, apart from the user of them, there is a physical interference with any right, public or private, which the owner or occupier of any land or house is entitled to make use of in connection with his property, and which right gives an additional marketable value to such property, apart from any uses the particular occupier might put it to, there is a title to compensation, if by reason of such interference the property as a property is permanently lessened in value. *Metropolitan Board of Works* v. *M'Carthy* (H.L.), C.P., 385

Chamberlain v. *The West End of London and Crystal Palace Railway Company* and *Beckett* v. *The Midland Railway Company*, approved. Ibid.

The injury must have been actionable but for the statute. Ibid.

parcel until the rest contracted for was delivered, but there was no inability on their part to pay for the same:—*Held*, that such refusal to pay, though it rendered plaintiffs liable to an action, did not under the circumstances amount to a refusal to perform the contract so as to free defendant from his obligation to deliver the rest of the iron. *Freeth* v. *Burr*, C.P., 91

—— *description of subject-matter: premises in vendor's occupation: penalty or liquidated damages*]—By an agreement for the disposal to defendant of plaintiff's interest and goodwill in a public-house the premises were described as "the house and premises he now occupies known by the sign of the White Hart, with stabling and garden situate and being at," &c. The agreement contained a stipulation that plaintiff was not, during defendant's tenancy of the premises, to be concerned in the trade of a licensed victualling house within the distance of two miles from the said premises under a penalty of 100*l.* It also contained stipulations by defendant to purchase certain effects and stock by valuation, and it stated that if defendant was not accepted by the landlord as tenant at a certain rent or under, a deposit money of 50*l.* should be returned, and the agreement should be void, and concluded thus: "if either party shall refuse or neglect to perform all and every part of this agreement they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of 100*l.* as damages, and recoverable in any of her Majesty's courts of law":—*Held*, that the words "he now occupies" could not be rejected, and therefore a coach-house which belonged to the premises, but which was shewn by extrinsic evidence to be at the time of the agreement not in the occupation of the plaintiff but of a person to whom the plaintiff had let it for a term then unexpired, was not included in the agreement. *Held* also, that the 100*l.* mentioned at the end of the agreement as damages was a penalty and not liquidated damages. *Magee* v. *Lavel*, C.P., 131

—— *letters: incomplete contract: parol evidence of custom of trade*]—When letters contain certain terms which may form the basis of a contract, it is necessary to ascertain from the letters whether the terms are finally arrived at, and if they are not, verbal evidence is admissible to shew that a different contract has been entered into. *Johnson* v. *Appleby*, C.P., 146

Plaintiff proposed by letter to enter into defendant's service as salesman; the term of service was to be for one year, and a list of customers was to be drawn up. Defendant replied by letter stating that the terms of plaintiff's letter required further definition, but requesting him to come on an appointed day. Plaintiff entered upon defendant's service, but was dismissed before the expiration of the year with a month's notice. Plaintiff having sued for a wrongful dismissal, at the trial, evidence was tendered of a custom to dismiss salesmen at a month's notice; the Judge rejected the evidence, on the ground that the letters contained a complete contract in writing:—*Held*, that the evidence was admissible, as the contract in the letters was incomplete. Ibid.

—— An agreement to bring no action for false imprisonment or malicious prosecution if indictment for felony be withdrawn is void. *Rawlings* v. *The Coal Consumers' Association* (*Limited*) (M.C., 111), C.P., 160

—— *arbitration clause: indivisible agreement: reference a condition precedent*]—Declaration, that the defendant became tenant to the plaintiffs of lands upon the terms that the defendant would keep such number only of hares and rabbits as would do no injury to the trees, &c., belonging to the plaintiffs, or to the growing crops of any of their tenants, and that in case the defendant should keep such number of hares and rabbits as should injure the trees, &c., the defendant should and would pay to the plaintiffs or their tenants a fair and reasonable compensation for such injury. Breach, that the defendant kept such a number of hares and rabbits as did injury to such trees, &c., and had not paid a fair and reasonable or any compensation. Plea, that one of the terms of the said tenancy was that, in case any such injury should be done by the defendant, he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, &c. Averment, that a difference arose, no arbitrators had been appointed, nor had an award ever been made deciding the amount of such compensation, according to the terms of the said tenancy. On demurrer,—*Held* (BRAMWELL, B., *dubitante*), that the plea was good; for that the stipulation stated therein did not consist of two separate agreements, viz., one to pay compensation, the other to refer the amount, but was an indivisible agreement to pay such compensation as should be assessed by arbitration, and not otherwise. *Dawson* v. *Fitzgerald*, Ex., 19

—— *service for "twelve months certain, after which time" notice or payment*]—By an agreement between brewers and their traveller, the latter was engaged at a salary of 200*l.* a year, payable fortnightly, and it was, *inter alia*, stipulated "that the agreement between the aforesaid parties shall be for twelve months certain, after which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice in writing." But if the said employers "shall be desirous of terminating this agreement without notice, after twelve months, or before any notice shall have expired, they may do so on payment of 50*l.*":—

breach of the contract. He can only obtain other damages by an action for deceit. *Hopkins* v. *Grazebrook* distinctly overruled. Ibid.

Semble, where the breach of the contract arises not from the vendor's inability, that is, not upon a question of title, but upon a question of conveyancing, as from his own refusal on the ground of expense, or from whatever other motive, to perform the contract himself, or to compel others whom he can compel to concur in conveying or in giving up possession, the proper remedy is by bill in equity to enforce him to complete, and to compel the completion of the contract. Whether, therefore, *Engell* v. *Fitch* should be followed, quære? Ibid.

DEBTOR AND CREDITOR—*Bankruptcy Act*, 1869: *release of one of two joint debtors: equitable set-off: evidence of trust*]—Sections 49 & 50 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which relate to the effect of an order of discharge, apply to discharges under proceedings in liquidation under sections 125 and 126, and the rules and forms relative to them; and consequently an order of discharge in all these cases releases only the debtor in whose favour it is given, and not his solvent co-debtor. *Megrath* v. *Gray, and Gray* v. *Megrath*, C.P., 63

M. and H., who were partners, were jointly liable to G. on a bill of exchange accepted by them for goods sold to them by G. They dissolved partnership, and after their acceptance had been dishonoured H. filed his petition for liquidation by arrangement under the Bankruptcy Act, 1869, and a composition was accepted by his creditors and duly paid; B., to whom G. had endorsed the bill, proving under the liquidation, and receiving the composition. G. himself afterwards filed his petition for liquidation by arrangement under the Bankruptcy Act, 1869, and a composition was agreed to and paid, the trustee being authorised by the creditors to transfer to G. the debts which were set forth in a schedule annexed, but which did not include the liability of M. in respect of the acceptances given by him and H.; the reason for such omission being that B. was at that time the holder of the bill, and the debt was considered by the trustee of G.'s estate of no value, and not from any intention of reserving to the trustee any right in respect of it. The bill was afterwards given by B. to G., and in an action against G. by M. for a debt due to him separately, G. set off what was due to him on the said acceptance of M. and H. in an equitable plea of set-off:—*Held*, that the discharge of H. under the liquidation by composition under the Bankruptcy Act, 1869, did not release M., but left him liable to G., who, whether the right to sue for it was legally in him or in his trustee in trust for him, might maintain such equitable plea of set-off. Ibid.

Held also, that in order to establish the trust for G., evidence was admissible as to the reasons why M.'s liability in respect of the bill had not been inserted in the schedule to the resolution of G.'s creditors to accept the composition, and also that such resolution had been founded on a proposal by G. to pay such composition in consideration that the trustee should be authorised to transfer to G. any debts vested in him which had not been realised. Ibid.

—— *order of committal by superior court under Debtors Act*]—An order of commital by a superior Court under the Debtors Act, 1869, s. 5, is valid for the arrest of a debtor, though it has been made more than a year before, and has not been renewed. *Hermitage* v. *Kilpin*, Ex., 127

—— *revivor of creditor's rights on non-payment of composition: committal*]—The non-payment by a debtor of a composition according to the terms of a resolution, passed pursuant to section 126 of the Bankruptcy Act, 1869, revives not only the debt but also the rights and remedies of the creditor in respect thereof as they would have existed if no such composition had been agreed to. Therefore, where after a Judge's order had been made under the Debtors Act, 1869, for the payment of a judgment debt by instalments, the judgment debtor took proceedings for liquidation under the Bankruptcy Act, 1869, and a resolution binding on the judgment creditor was passed according to s. 126 to accept a composition, and the debtor subsequently failed to pay the composition according to the terms of the resolution, it was held that the judgment creditor was entitled to proceed upon the Judge's order for the payment of the debt by instalments as if there had been no composition, and accordingly to apply under s. 5 of the Debtors Act, 1869, for the debtor's committal in case of his not paying such instalments when he had the means of paying. *Newell* v. *Van Praagh*, C.P., 94

DECEIT. See Banker and Banking Company. False Representation.

DEED—*conveyance of—adjoining houses: front of one overlapping the other*]—Plaintiff purchased two adjoining houses, one of which he had agreed to sell to P. in whose occupation it then was. This house had in front a projecting portion, which, to the extent of between two and three feet, overlapped the adjoining house, so that it extended to some distance beyond the party wall of the two houses. The door of the house was in the centre of the projection, which formed a portico with a pillar, cornice, string course and pediment, all of which in part overlapped the adjoining house of plaintiff. P. conveyed his house to the defendant, who painted the front including the whole of the projecting portion. In the conveyance to P., which the owner of the two houses had prepared at plaintiff's request, the projecting part was not specifically mentioned as being conveyed. Plaintiff brought an action of trespass against the defendant:—*Held* (reversing the judgment of the Court below) that the plaintiff was not entitled to re-

who had purchased from W. B., the remainderman, was entitled to recover from defendant. *Board* v. *Board*, Q.B., 4

EVIDENCE—*construction of document: mercantile meaning a question for jury*]—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth* v. *Redford*, C.P., 57

Plaintiff sold to defendants certain goods; the invoice was dated the 1st of May, and at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price thereof on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the Judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage; the jury having found that the action was not brought too soon,—*Held*, per KEATING, J., and BRETT, J. (GROVE, J., doubting), that the direction to the jury was proper, and that the plaintiff was entitled to the verdict. Ibid.

—— *verbal promise contemporaneous with but collateral to written agreement: contract concerning land: statute of frauds*]—Defendant demised to plaintiff a messuage in an unfinished state by a written agreement. Before and at the time of plaintiff's signing the agreement defendant verbally promised plaintiff to put the messuage into a condition fit for habitation. Amongst the things which defendant undertook to do upon the messuage was the construction of a water-closet. In an action for the breach of defendant's promise to put the messuage into a condition fit for habitation,—*Held*, that defendant's verbal promise to finish the messuage was collateral to the written lease; that evidence of the promise was admissible at the trial; and that defendant's undertaking to build a water-closet in the messuage was not a contract for an interest in land within the fourth section of the Statute of Frauds, and therefore need not be in writing. *Mann* v. *Nunn*, C.P., 241

—— of usage of trade. See Contract—*Johnson* v. *Appleby*.

—— Presumption. See Criminal Lunatic.

—— See Custom. Libel. Sale of Goods.

EXCISE DUTIES AND LICENSES ON CARRIAGES—Meaning of "trade." Conveyance of goods or burden in the course of trade. *Speak* v. *Powell* (M.C., 19), Ex., 24

EXECUTION—*haste in issuing fi. fa. on taxation of costs*]—Judgment for 20*l.* having been recovered and signed against defendant, a man of known and undoubted wealth, the costs were taxed at 72*l.*, and on the allocatur being given for that sum about one o'clock in the day, the attorney's clerk, who represented defendant at the taxation, asked the attorney's clerk attending for the plaintiff, to grant time until a return of post in which to pay the money. This the latter refused to do, and he at once issued execution, which was levied at four o'clock the same afternoon. A master made an order setting aside the *fi. fa.*, and all proceedings thereunder, with costs, on the ground that the execution had been issued with unreasonable haste:—*Held*, that such order was wrong, as the plaintiff had a right to issue execution *instanter*, not being bound to wait during the time asked for, and no other indulgence of a more reasonable kind having been craved. *Smith* v. *Smith*, Ex., 86

—— *seizure without sale: money paid to sheriff on account: proceeds of sale*]—Goods of a trader debtor were seized under a *fi. fa.*, for an amount exceeding 50*l.* He paid the sheriff two sums on account of the judgment debt, and the execution creditors assented to those payments. Within fourteen days of the seizure the debtor filed a petition for liquidation, and the sheriff was restrained. No sale was made. Trustees were afterwards appointed. They claimed the sums which had been paid to and were in the hands of the sheriff:—*Held* (following *Ex parte Brooke; In re Hassall*, 43 Law J. Rep. (N.S.) Bankr. 49), that the money belonged to the execution creditors, since it could not be deemed the proceeds of a sale within the terms of section 87 of the Bankruptcy Act, 1869. *Stock* v. *Holland*, Ex., 112

—— See Landlord and Tenant—*Cox* v. *Leigh*. And see Sheriff.

EXECUTOR—*de son tort: assignee of lease*]—Plaintiffs, being assignees of the reversion upon a lease, sued defendant for breach of the covenants therein. The lease had been granted to H. G., who held the demised premises thereunder until his death. His widow, A. G., administered to his personal estate. At her death H. received the rents of the demised premises, which were let to under-tenants, and upon his death defendant received the rents. The covenants in the lease granted to H. G. had been broken:—*Held*, that defendant was liable as executor *de son tort* upon the covenants. *Williams* v. *Heales*, C.P., 80

FACTOR'S ACT. See Principal and Agent—*Cole* v. *The North Western Bank*.

FACTORY—Cement works. Premises without roof or enclosure. *Redgrave* v. *Lee* (M.C., 105), Q.B., 128

FALSE REPRESENTATION—*by advertisement: cause of action: nonsuit*]—Defendant caused to be in-

contract which would be binding upon M. *Peirce* v. *Corf*, Q.B., 52

—— *agreement not to be performed within a year: amendment: increase of claim in declaration*]—Defendant having had bastard children by plaintiff, a spinster, promised her verbally that so long as she would at his request maintain and educate the children, he would pay her 300*l.* per annum quarterly. An action having been brought to recover the instalments due in respect of two years and a half, during which she had maintained and educated the children,—*Held*, that the agreement was not an "agreement that is not to be performed within the space of one year from the making thereof" within the Statute of Frauds, s. 4, and that the plaintiff could recover. *Knowlman* v. *Bluett*, Ex., 29

Held also, that the declaration, which claimed only 600*l.* for two years' instalments, could be amended before verdict by increasing the claim to 750*l.*, this being an amendable "defect" within the Common Law Procedure Act, 1852, s. 222. Ibid.

And on appeal to the Exchequer Chamber (see page 15), *held*, that whether the agreement was within the statute or not, the action lay, being, in substance, for money paid at defendant's request. Ibid.

—— Contract concerning land. See Evidence—*Mann* v. *Nunn*.

—— See Contract. Sale of Goods.

FREIGHT — *payment of freight: liability of shipper: contract*]—Plaintiff, as master of a ship lying in London, entered into a charter-party with L., a shipbroker, to carry a quantity of iron at a tonnage freight. By the charter-party, freight was to be paid in London on signing bills of lading, the owner to have an absolute lien for freight. On the same day L. rechartered the ship to defendants to carry the same quantity of iron at an increased freight, with similar provisions as to payment of and lien for freight, and with this clause—"The brokerage of five per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." L. had, however, no authority to act as broker for plaintiff, or to receive the freight. Neither plaintiff nor defendants knew of the charter-party entered into by the other. The iron was shipped by defendants, and the master signed and defendants received bills of lading, by which the iron (stated to be shipped by defendants) was to be delivered to consignees or assigns, "paying freight for the said goods as per charter-party." Plaintiff did not claim the freight on signing the bills of lading, and delivered the cargo without insisting upon his lien. L. in the meantime obtained the freight due from defendants, and, having stopped payment, the freight due under his charter was not paid to plaintiff:—*Held*, that plaintiff was not entitled to recover freight from defendants as shippers of the iron, inasmuch as both parties made a mistake as to the charter-party referred to in the bills of lading, and were consequently never *ad idem*. No contract could therefore be implied on the part of defendants to pay freight to plaintiff. *Schmidt* v. *Tiden*, Q B., 199

—— *right to lump freight where part of cargo lost: interest*]—By a charter-party a lump sum freight of 5,000*l.* was to be paid after entire discharge and right delivery of the cargo at London. The ship sailed with her cargo for London, and while at sea a fire broke out, and part of the cargo was so injured by fire and water that it became necessary to sell it. The remainder of the cargo was brought to London and reported inwards at the Custom House:—*Held*, affirming the cases of the *Norway* and *Robinson* v. *Knights*, that the lump sum of 5,000*l.* was to be payable on the delivery, not of the entire cargo which had been put on board, but of that which had not been lost by the excepted perils. *Held* also, that interest was not payable, as the money could not be regarded as a sum payable on a day certain. *The Merchant Shipping Co.* (*Lim.*) v. *Armitage* (Ex. Ch.), Q.B., 24

—— *freight: prepayment of part of freight: insurance of freight*]—By a charty-party, under which plaintiff's vessel was chartered to carry a cargo of coal from Greenock to Bombay, freight was to be paid on the right delivery of the cargo at a certain rate per ton on the quantity delivered, and such freight was to be half in cash on signing bills of lading, and the remainder on the right delivery of the cargo. The vessel left Greenock with her chartered cargo, and was wrecked on the voyage. Half her cargo was totally lost, but half was saved and delivered at Bombay; but as the freight in respect of such was less than the freight which had been paid in advance on signing the bills of lading, plaintiff received no freight on the delivery of such half, but totally lost the same:—*Held* (per COCKBURN, C.J., MELLOR, J., and AMPHLETT, B., reversing the decision of the Court of Common Pleas (42 Law J. Rep. (N.S.) C.P. 334), CLEASBY, B., and POLLOCK, B., *dissentientibus*), that the freight which plaintiff so lost was not recoverable as a total loss under an insurance of freight to be earned by plaintiff's vessel on the said voyage, which he effected after the charter-party. *Allison* v. *The Bristol Marine Insur. Co.* (Ex. Ch.), C.P., 311

—— *"ship lost or not lost:" lien on cargo: abandonment of voyage: "owners of cargo"*]—When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage thereof is described as "freight" in the bills of lading. *Nelson* v. *The Association for the Pro-*

foreign possession of the British Crown may be sufficient, if the jurat contains a statement that the oath was administered before a Court, Judge, magistrate, commissioner or notary public, pursuant to the General Rule of this Court, Hilary Term, 1863. Ibid.

—— *wife's earnings: action by wife for breach of contract*]—In an action for breach of contract by a married woman against her bankers, the first count of the declaration was for not presenting for payment a bill of exchange deposited with them for that purpose; the second count was for not giving her notice of the dishonour of a bill of exchange entrusted to them for collection, and the third count was for dishonouring a cheque drawn by plaintiff upon defendants, they having at the time funds of plaintiff to meet it. Plea, that plaintiff was a married woman. Replication, that the causes of action arose exclusively from earnings, money, chattels and property within the meaning of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), and that defendants knew when they accepted plaintiff's banking account that she was a married woman carrying on her business separately from her husband:—*Held*, on demurrer, that the replication was good as shewing that plaintiff was seeking a remedy for the protection of her earnings and property within the meaning of the 11th section of the Married Women's Property Act, 1870. *Summers* v. *The City Bank*, C.P., 261

—— *separation deed: covenant by husband to pay annuity: adultery and divorce of wife: effect on covenant*]—A covenant in a deed, whereby the husband covenanted with trustees that he would, during the joint lives of himself and his wife, and during so long as they should live separate and apart, pay unto the trustees for the separate use of his wife a certain annuity, is an absolute covenant for payment of the annuity during the joint lives of the husband and wife, and during so long time as they lived separate, and not merely while the marriage tie subsisted; therefore, a plea of dissolution of the marriage is no answer to an action on the covenant for arrears of the annuity. *Charlesworth* v. *Holt*, Ex., 25

INCLOSURE ACT—*construction: omission to dispute claim before valuer: provisional order*]—The words, in section 27 of 8 & 9 Vict. c. 118, "right of pasturage which may have been usually enjoyed by the lord or his tenants," mean rights of common or pasturage, *de facto* enjoyed by the lord and his tenants in respect of the demesne lands, for such a period as, but for the fact that the lord was the freeholder both of the dominant and servient tenement, would be evidence of an immemorial right. *Musgrave* v. *The Inclosure Commissioners for England and Wales*, Q.B., 80

A provisional order, silent as to any such rights, was assumed to have omitted to take them into account in the allotment to the lord. Ibid.

There being claims to pasturage over different parts of the waste in respect of seven farms, and no objection being made before the valuer and assistant commissioner,—*Held*, that these officers had no power, in the absence of any such objection, to disallow a claim. Ibid.

—— See Manor.

INDEMNITY. See Vendor and Purchaser.

INDICTMENT—Costs of prosecution. See Costs—*R.* v. *Oastler*.

INSPECTION OF DOCUMENTS—*private and confidential letters between plaintiffs*]—The Court, in the exercise of its discretion, will refuse to order the production of private and confidential letters passing between plaintiffs relative to the projected litigation with the defendants. *Allan* v. *Royden*, C.P., 206

—— *privileged communications: medical report*]—A railway company having received from a passenger a claim for compensation for personal injuries caused on their line, instructed a medical man to examine the passenger in order to inform the company's attorneys of the nature and extent of the injuries so that they might be able to advise the company in reference to the claim, and prepare the defence. The medical man accordingly twice examined the passenger, and made two reports in writing to the company's attorneys. The passenger having afterwards brought an action against the company to enforce the claim,—*Held*, that the reports were privileged, and that the plaintiff was not entitled to inspect them, and that the practice in this Court was in accordance with the rule laid down in *Cossy* v. *The London, Brighton and South Coast Railway Company* (39 Law J. Rep. (N.S.) C.P. 174), and with that in *Fenner* v. *The South-Eastern Railway Company* (41 Law J. Rep. (N.S.) Q.B. 313). *Skinner* v. *The Great Northern Rail. Co.*, Ex., 150

—— See Discovery of Documents. Parliament—*Stowe* v. *Jolliffe* and *James* v. *Henderson*.

INSURANCE ON LIFE—*declaration untrue but not fraudulent: proviso avoiding policy if declaration was untrue*]—A policy of insurance was granted by defendants to plaintiff on the life of T., containing a proviso that "if the declaration under the hand of plaintiff delivered at defendants' office as the basis of the insurance is not in every respect true, and if there has been any misrepresentation, &c. . . . then the said insurance shall be void:"—*Held*, that an inaccurate statement of a material fact contained in the declaration avoided the policy, though the statement was made *bona fide*, and was not untrue to the knowledge of plaintiff. *Macdonald* v. *The Law Union Fire and Life Insurance Co* Q.B., 131

—— *tithe rent-charge: agreement by tenant to pay all charges during the term*]—By a lease, the tenant agreed to pay the rent, "without any deduction in respect of any taxes, rates, assessments or charges whatsoever, the landlord's property tax only excepted:"—*Held*, that the tenant was bound to pay the tithe rent-charge imposed upon the demised hereditaments. *Lockwood* v. *Wilson*, C.P., 179

—— *tenancy from year to year subject to agreement void as a lease*]—When a tenant enters a house under an unsealed agreement to let for a term of more than three years, and occupies and pays rent till the end of the term, he is during the whole term tenant from year to year, subject to all those stipulations in the agreement which are applicable to such a tenancy, and may be sued for the breach of any of them, *e.g.* one binding him to paint in the last year of the term. *Martin* v. *Smith*, Ex., 42

—— *covenant by lessee and implied covenant therein by lessor*]—Plaintiff was tenant of a messuage which defendant had by deed demised to him for a term of years. The lease contained, first, a covenant by the lessee not to let the premises without the consent of the lessor, "such consent not being arbitrarily withheld;" second, a proviso for re-entry if the lessee underlet without the consent of the lessor, stipulating "but such consent is not to be arbitrarily withheld." The lessor refused his consent to an underlease because there was a probability that the premises would be compulsorily purchased by a public body, who, having obtained statutory powers so to do, had already bought some houses near. The lessee sued his lessor, declaring upon a covenant by defendant not to arbitrarily withhold his consent, and alleging as a breach an arbitrary refusal:—*Held*, that there was no such covenant by the lessor expressed or implied in the above-mentioned clauses of the lease; and, per KELLY, C.B., and POLLOCK, B., moreover, that the refusal of consent was not arbitrary. *Treloar* v. *Bigge*, Ex., 95

—— *covenant to pay rates, taxes, assessments and outgoings: Sanitary Act*]—The lessee of a house which was demised for twenty-one years at an annual rent covenanted with his lessor during the term "to bear, pay and discharge the sewers rate, tithes, rent-charge in lieu of tithes, and all other taxes, rates, assessments and outgoings whatsoever, which at any time or times during the said demise should be taxed, rated, charged, assessed or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved (except as aforesaid)." Under section 10 of the Sanitary Act, 1866, the local board of the district were empowered to require the owner of the house to connect the house-drains with a main-sewer belonging to the board, and on his default to do the work, and recover the expenses from the owner in a summary manner. The local board having, during the demise, required the connection to be made,—*Held*, that the lessee was bound by his covenant to pay the expense of making it. *Crosse* v. *Raw*, Ex., 144

—— *breach of covenant to repair: damages: injury to reversion: repairs done by landlord before action*]—Plaintiffs, who were lessees of certain premises, underlet them to defendant by a lease, in which there was the usual general covenant by the lessee to repair. Defendant having neglected to repair according to his covenant, plaintiffs entered and did the repairs themselves in order to save a forfeiture of their own lease, with which they had been threatened by their landlord, and then and during the continuance of the lease to defendant, the term of which had not expired, sued defendant for breach of such covenant to repair:—*Held*, that plaintiffs could only recover nominal damages, since by having done the necessary repairs, they had at the time the action was brought sustained no injury to the reversion. *Williams* v. *Williams*, C.P., 382

—— *notice to quit: commencement of tenancy: receipt of rent*]—Wherever a tenancy for years comes to an end either by efflux of time, or by the death or end of title of the lessor, so that either he or his representative, or any independent owner of the demised hereditament, can without notice eject the tenant, and the person entitled to eject leaves the tenant in possession, and receives rent from him without explanation or stipulation, the person receiving the rent is to be assumed to have created a tenancy upon the terms on which the tenant held in the demise originally made to him; and the holding to be presumed is as of a tenancy from year to year according to the former holding of the tenant, and therefore commencing at a time corresponding to that from which he originally held. *Kelly* v. *Patterson*, C.P., 320

—— See Contract—*Dawson* v. *Fitzgerald*.

LANDS CLAUSES CONSOLIDATION ACT, 1845—"*superfluous lands:*" *cessation of powers*]—Lands acquired by a railway company under their Act and ever since retained *bona fide* for the purposes of the Act in the belief that they will be required at some future time for such purposes, and with the intention of so applying them, are not "superfluous lands" within section 127 of the Lands Clauses Act, 1845, though they have never been actually used for the purposes of the Act during the time specified in that section. *Betts* v. *The Great Eastern Rail. Co.*, Ex., 4

—— *superfluous land unsold: vesting of property in owners of land adjoining: what is superfluous*

made in a fair spirit, and that it was for the jury to say whether the alleged libel imputed intoxication, and also misconduct requiring the interference of the police:—*Held*, a proper direction. Ibid.

—— *parliamentary election: correspondence between agents: privileged communication*]—Shortly before a Parliamentary election the agents of F. and B., the rival candidates, mutually undertook that there should be no corrupt practices by either party during the contest. On the day of polling, the defendant, H., one of the agents, wrote to the other complaining that bribery was going on, and, at an interview sought by the latter, gave the name of the plaintiff as a briber. The day after the election, which resulted in the return of B., the following letter was written by H. in conjunction with the other defendant, who was chairman of B.'s committee, and signed by both of them—"We certify that we have discovered that Mr. D. (the plaintiff) and Mr. R., two of the prominent members of Mr. F.'s committee, have been personally guilty of offering 1*l.* 10*s.* to a voter for his vote, and 1*l.* 10*s.* for every vote he could procure for Mr. F. The elector referred to has been personally examined by one of us, and the evidence which he is prepared to give is clear and distinct." This letter was sent to F.'s agent, and by him handed to the chairman of F.'s committee, and the plaintiff having brought an action for libel in respect of its contents,—*Held*, that no such relations existed between the parties as to make the letter a privileged communication. *Dickeson* v. *Hilliard*, Ex., 37

—— See Defamation. Slander.

LICENSING ACT—Supplying liquor to constable on duty in absence of licensed person. *Mullins* v. *Collins* (M.C., 67), Q.B., 101

—— New license. Confirmation by Licensing Committee. *Marwick* v. *Codlin* (M.C., 169), Q.B., 242

LIEN—Maritime Lien. See Freight.

LIMITATIONS, STATUTE OF — When heir-at-law barred by. See Estoppel.

—— continuing breach of covenant. See Mine.

LOCAL GOVERNMENT—Order for owners of houses to sewer, pave, &c., street. Apportionment, how far conclusive. *Hesketh* v. *The Local Board of Atherton* (M.C., 37); Q.B., 32

—— What is a new building. *Hobbs* v. *Dance* (M.C., 21), C.P., 62

—— See Metropolis Local Management. Municipal Corporation.

MANDAMUS—or rule. See City of London Court. Justice of the Peace.

MANOR — *manorial rights: reservation in Inclosure Act of right of sporting*]—The reservation clause enacted that nothing in the Act should prejudice the right of the lords or ladies of the said manor "of, in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them; but that the present and all succeeding lords of the manor should and might, from time to time, and at all times, hold and enjoy all rents, &c., and rights of fishery, and liberty of hawking, hunting, coursing, fishing and fowling within the said manor, and all tolls, fairs," &c., "royalties, jurisdictions, franchises, matters and things whatsoever to the said manor, or to the lord thereof incident . . . . other than and except such common right as could or might be claimed by the then lord as owner of the soil and inheritance of the said commons or waste grounds:"—*Held* (per COCKBURN, C.J., MELLOR, J., BRAMWELL, B., and AMPHLETT, B., affirming the judgment of the majority in the Court of Common Pleas (42 Law J. Rep. (N.S.) C.P. 233), CLEASBY, B., and POLLOCK, B., *dissentientibus*), that the reservation clause referred only to the seignorial or manorial rights of the lady of the manor, and did not extend to her territorial right, as owner of the soil, of shooting over the allotted lands. *Sowerby* v. *Smith* (Ex. Ch.) C.P., 290.

MARINE INSURANCE—*policy: unstamped slip*]—No action lies on an unstamped slip, inasmuch as by ss. 7 and 9 of 30 Vict. c. 23, no contract for sea insurance is valid unless the same is expressed in a policy, and no policy is available unless duly stamped. So held by the Exchequer Chamber affirming the judgment below, 42 Law J. Rep. (N.S.) Q.B., 224. *Fisher* v. *The Liverpool Marine Insur. Co.* (Ex. Ch.), Q.B., 114

—— *policy: slip: agreement by agent: ratification: concealment*]—Plaintiffs at Cardiff instructed their agents in London to effect an insurance upon a cargo at 30*s.* a ton. Defendant refused to insure at that rate, but initialed a slip at 35*s.*, subject to approval by plaintiffs, who subsequently ratified the agreement of their agent to the higher premium. Subsequently to the slip being initialed, but before the policy was signed, plaintiffs became aware that the cargo was lost. They did not communicate the fact to the defendant:—*Held*, on the authority of *Hagedorn* v. *Oliverson* (2 M. & S. 485), that the defendant was not entitled to have the fact communicated to him. *Cory* v. *Patton*, Q.B., 181

—— *concealment of material facts: over valuation of goods: speculative risk*]—Where the insurer, in effecting a marine policy, does not disclose to the underwriter the fact that the goods insured are largely over valued, it is a question for the jury whether the concealment

from the train:—*Held* (per BRAMWELL, B., MELLOR, J., POLLOCK, B., and AMPHLETT, B., *dissentientibus* COCKBURN, C.J., and CLEASBY, B.), that the foregoing circumstances disclosed no evidence of negligence in the defendants. *Ellis* v. *The Great Western Rail. Co.* (Ex. Ch.), C.P., 304

—— *evidence of: no gates at level crossings of railway: child straying on line*]—A child, aged four and a half years, lived near a public carriage road and a footpath (both highways) which were crossed on a level by defendants' railroad at places about 300 yards from the child's abode, and thirty yards apart from each other. There were no gates, nor was there a gatekeeper at the carriage road level crossing as prescribed by 8 Vict. c. 20. s. 47; neither was there any gate or stile at the footpath level crossing as required by section 61. One day the child left his home to go to the next house, but was shortly afterwards found upon the railway close to the footpath crossing, with his foot out off by a train. An action having been brought against defendants for negligence in not providing gates, fences and means to protect the crossings,—*Held*, that the fact of the absence of a gate or stile at the footpath level crossing, and the fact of the child being found injured there, were sufficiently connected to afford evidence for the jury of liability on the part of defendants. *Williams* v. *The Great Western Rail. Co.*, Ex., 105

—— *omission to repair level-crossing over railway*]—Where a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic. *Oliver* v. *The North Eastern Rail. Co.*, Q.B., 198

—— *railway: contributory negligence by plaintiffs not foreseeing defendants' negligence*]—Plaintiffs, colliery owners, possessed a siding on one of the lines of defendants, a railway company, and a bridge over the siding with a headway of eight feet. The course of business was for defendants to bring plaintiffs' empty waggons on to the siding and leave them, and for plaintiffs then to take them to the pit to be loaded in such order and at such times as they pleased, or to their workshops for repair. On a Saturday, after working hours, when the men were gone, and plaintiffs could only move the waggons by some special engagement of workmen, defendants brought and left on the siding some of plaintiffs' waggons, all empty but one, which, being loaded with a disabled waggon, was eleven feet high, and could not therefore pass under the bridge. This waggon having remained there, on the next Sunday night, after dark, defendants' servants brought a long train of plaintiffs' empty waggons on to the same siding (although there was another unoccupied siding), and with this train pushed the loaded waggon up to the bridge, and on the train being stopped by the bridge, without looking to ascertain the cause, gave such momentum to the engine that the waggon with its load knocked the bridge down and injured plaintiffs' property. Plaintiffs having sued defendants for negligence, and the jury having found a verdict for defendants on the ground that there was contributory negligence on the part of plaintiffs,—*Held*, that, assuming plaintiffs to have known on the Saturday that the loaded waggon was on the siding, there was no evidence of contributory negligence to go to the jury. *Radley* v. *The London and North Western Rail. Co.*, Ex., 73

—— *railway company: cattle frightened and escaping from control: remoteness of damage*]—Cattle belonging to plaintiff were at about eleven o'clock at night driven along an occupation road which crossed a branch line of the defendants' railway on a level. As they were passing over the crossing they became frightened owing to a number of trucks being shunted by the defendants in a negligent manner, and six or seven of them escaped from the control of their drovers and were not seen till four o'clock in the morning, when they were found dead or dying on the main line of the defendants' railway, which they appeared to have reached owing to the defects in the fence of a garden and orchard adjoining the railway:—*Held*, that there was sufficient evidence, that the death of the cattle was the natural result of the defendants' negligence. *Sneesby* v. *The Lancashire and Yorkshire Rail. Co.*, Q.B., 69

—— (in other cases)—*statutory duty: sewers: Metropolis Management Act*, 1855]—When a specified duty is imposed by statute upon a public body, it is, in the absence of express enactment, to be assumed that the legislature intended to exempt the public body from liability to make compensation for alleged omissions to fulfil that duty, unless negligence can be proved to exist. *Hammond* v. *The Vestry of St. Pancras*, C.P., 157

The Metropolis Management Act, 1855, s. 72, imposes upon certain vestries, amongst them defendants, the duty of keeping the sewers in their respective parishes properly cleared, cleansed and emptied. Plaintiff was occupier of a messuage in defendants' parish, and received injury from the overflow of a sewer; the overflow happened without any default on the part of defendants:—*Held*, that plaintiff could not maintain an action against defendants for the injury which he had suffered. Ibid.

—— *repairs of highway: liability of surveyor of highways*]—Defendant had been appointed by the vestry surveyor of highways. The vestry resolved that a part of a highway should be raised, and ordered defendant to employ men to

—— *in making a valuation: valuer: arbitrator: interrogatories*] — Plaintiff purchased the goodwill, stock and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. Plaintiff employed defendant as his valuer, and defendant and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, plaintiff applied to administer interrogatories to defendant to ascertain the basis on which he had agreed with the valuer of the defendant to calculate the valuation:—*Held*, that defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and plaintiff accordingly was allowed to administer the interrogatories. *Turner* v. *Goulden*, C.P., 60

—— Action for, against auctioneer for not making a binding contract of sale. See Frauds, Statute of—*Pierce* v. *Corf*.

NOTICE OF ACTION—*under Public Health Act*, 1848, *in respect of injury by works done under Local Act*]—Where injury was sustained by the insufficient buoying of a sunken anchor, which was part of certain works authorised by a local Act, and which were to be executed subject to the provisions of the Public Health Act, 1848, it was held that notice of action under that Act was necessary before bringing an action for such injury. *Jolliffe* v. *Wallasey Local Board*, C.P., 41

NOTICE OF TRIAL. See Practice.

NOTICE TO QUIT. See Landlord and Tenant—*Kelly* v. *Patterson*.

NUISANCE—*injury to private rights: "incommodious"*]—In order to maintain an action for a public nuisance, the plaintiff must prove that he has suffered a particular, direct and substantial injury. *Benjamin* v. *Storr*, C.P., 162

The defendants were auctioneers, and received large quantities of goods to be sold at their rooms. The plaintiff kept a coffee-house near to the defendants' place of business, and complained that the vans which delivered goods at their rooms blocked up the public street so as to darken his coffee-shop, and to compel him to burn gas during daylight, and that the horses caused unpleasant smells, which rendered his customers unwilling to frequent his house. The declaration did not specially charge that the plaintiff was annoyed by the smells, but alleged that by reason of the obstruction the plaintiff's house was rendered incommodious. At the trial, evidence was allowed to be given of the bad smells, and a verdict was found for the plaintiff:—*Held*, that the injury to the plaintiff was particular, direct and substantial, so as to entitle him to maintain an action, and that, under the allegation in the declaration that the plaintiff's house was rendered incommodious by the obstruction, he could give evidence as to the unpleasant smells. Ibid.

OVERSEERS—expenses. See Jury Lists.

PARLIAMENT—(Registration cases)—*borough vote: residence: occupation: inhabitant occupier*]—The respondent was the rector of C., a parish lying within the parliamentary borough of W.; he obtained a license of non-residence, and was absent from C. from October, 1872, to June, 1873, remaining during that period abroad; during his absence the glebe-house, which the respondent usually inhabited, was occupied by a curate pursuant to the directions of the bishop, within whose diocese C. lay:—*Held*, that the respondent was not entitled to vote for W. under either 2 & 3 Will. 4. c. 45. s. 27, or 30 & 31 Vict. c. 102. s. 3. *Durant* v. *Carter*, C.P., 17

—— *borough vote: residence*]—The respondent was tenant of, and usually resided at a house in E., a city returning members to Parliament; the house was of greater annual value than 10*l*. He was a clergyman, and during the months of July and August, 1873, for the sake of relaxation, he exchanged duties with T., who was vicar of S., a parish situate more than seven miles from E. During that period the respondent lived in T.'s vicarage at S., and T. lived in the respondent's house at E. In September, 1873, the respondent returned to his house at E.:—*Held*, that the respondent had not resided in E. for six calendar months next previous to the last day of July, 1873, and that he was not entitled to be registered as a voter in the lists for E. *Ford* v. *Pye*, C.P., 21

—— *borough vote: freeman: residence*]—The respondent was a freeman of E., a city returning members to Parliament. He was an officer in the army, and usually was on duty with his regiment more than seven miles from E. He had from time to time leave of absence, and he then lived at his mother's house, who resided within seven miles of E. During twelve months preceding the last day of July, 1873, he had obtained three months' leave of absence, and during that period had lived in his mother's house:—*Held*, that the respondent had not resided within seven miles of E. for six calendar months next previous to the last day of July, 1873, and that he was not entitled to be registered as a voter in the lists for E. *Ford* v. *Hart*, C.P., 24

—— *borough vote: payment of poor rate: composition rate*]—By an agreement between a landlord and tenant, the poor rates were to be

the marked register of voters will be granted under the Ballot Act, 1872 (35 & 36 Vict. c. 33), schedule 1, part 1, rule 42, whether the petition against the return of a candidate at a parliamentary election does or does not pray for a scrutiny. *James* v. *Henderson*, C.P., 238

—— *register of voters, how far conclusive*]—The register of parliamentary voters is, by force of the Ballot Act, 1872, conclusive not only on the returning officer, but also on any tribunal which has to enquire into elections, except in the case of persons ascertained by the proviso in section 7. The persons "prohibited" from voting by the proviso are not those who, from failure in the incidents or elements of the franchise, could be successfully objected to on the revision of the register on the ground of the receipt of alms, the receipt of parochial relief, non-residence within the proper distance of a borough, non-occupation, or insufficient qualification; the persons "prohibited" from voting are those who, from some inherent or for the time irremovable quality in themselves, have not the status of parliamentary electors, for instance, peers, women, persons holding certain offices or employments, and persons convicted of crimes, which disqualify them from voting. *Stowe* v. *Jolliffe* (No. 2), C.P., 265

—— *election: payment to returning officer of election expenses*]—A returning officer at a Parliamentary election has no right to insist, as a condition to taking the poll, on a candidate paying or giving security for paying his proportion of the money required to meet the election expenses. *Haverfordwest Election Petition—Davis* v. *Kensington*, C.P., 370

Where, therefore, at an election for a borough returning only one member to Parliament two candidates were duly nominated as required by the Ballot Act, 1872, but, because one of them would not deposit or give security for the sum required of him to meet his proportion of the election expenses the returning officer refused to notice his nomination, and without taking a poll returned the name of the other candidate as duly elected, it was held that such election was void. Ibid.

—— *dissolution of Parliament: petition dropping: return of deposit*]—Where Parliament was dissolved before the day appointed for the trial of an election petition presented under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), the Court ordered the money which had been deposited as security for costs pursuant to section 6 of that Act, to be returned to the petitioners. *Re the Exeter Election Petition; Carter* v. *Mills*, C.P., 111

—— *return to the clerk of the Crown, when made: presentation of petition*]—The return of an elected candidate under section 2 of the Ballot Act, 1872, has not been made to the clerk of the Crown in Chancery within the meaning of the enactment until he or some clerk in his office has had an opportunity of recording the receipt of it, and making the proper return to the clerk in Parliament; therefore, where the certificate of return was received at the office of the clerk of the Crown at eight in the evening, after office hours, by only a woman in charge of the office, who had authority to receive the same and to give a receipt for it, but not to do any other act with reference to it, the return was held not to have been made before the following day. *Poole Election Petition: Hurdle* v. *Waring*, C.P., 209

—— *effect of dissolution on order for costs: division of a day as to the performance of judicial acts*]—The delivery of judgment upon an election petition upholding the return of the respondent thereto and awarding him costs, began at 10 a.m. and finished at 10.35 a.m. The report of the Judge and his certificate were sent by the post at noon to the Speaker of the House of Commons. Upon the same day upon which the foregoing judgment was delivered Parliament was dissolved by a royal proclamation, but the exact time when the proclamation was issued by the Queen was not ascertained. The Judge's report and certificate did not reach the Speaker before the dissolution:—*Held*, that the delivery of the judgment and the order for the payment of the costs being judicial acts, must be taken to have happened before the dissolution, and that by force thereof the respondent was entitled to his costs after the Parliament had ceased to exist. *Marshall* v. *James*, C.P., 281

—— *scrutiny: evidence of corrupt intent in voter: right of voters to be heard as parties to an election petition*]—The Ballot Act, 1872, s. 25, enacts that "where a candidate, on the trial of an election petition claiming the seat for any person, is proved to have been guilty by himself or by any person on his behalf of bribery . . . . in respect of any person who voted at such election, ... there shall, on a scrutiny, be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election, and is proved to have been so bribed." P. having been accepted by the Liberal party in the borough of B. as a candidate at the next election, he afterwards distributed amongst the inhabitants coals by means of tickets bearing the signature of his political agent. Many of the inhabitants who accepted the coals were voters in the borough, and were not objects of charity. The coals were given corruptly. Parliament being soon after dissolved, P. was declared to be returned as member by a majority of votes over M., another candidate. A petition having been presented against the return of P. claiming the seat for M., P. was adjudged to be

owner, if at the time of supplying the goods or advancing the money he had the means of knowing that an agent able and willing to furnish what was requisite for the ship had been appointed by the owner to act at the foreign port. *Gunn* v. *Roberts*, C.P., 233

Quære, whether a merchant, who being in "invincible ignorance" of the appointment of an agent, furnishes requisite supplies to a ship upon an order given by the master without the owner's sanction, can recover the price thereof from the owner? *Semble*, that he cannot. Ibid.

—— See Bill of Lading. Charter-party. Demurrage. Freight. Marine Insurance.

SLANDER—*words not defamatory in themselves*]—It is not actionable to say of a stonemason that he is the ringleader of the nine hours' system, and that he has ruined a town by bringing about the nine hours' system, and he has stopped several good jobs from being carried out by being the ringleader of the nine hours' system; nor is it material that the person alluded to has suffered special damage, if such damage is not intended as a consequence when the words are uttered. *Miller* v. *David*, C.P., 84

—— See Defamation. Libel.

STATUTE, CONSTRUCTION OF. See Negligence. Notice of Action. Port Dues.

STAYING PROCEEDINGS. See Bond. Security for Costs.

SUCCESSION DUTY—*annuitant succeeding to realty on which his annuity is charged: power of the House of Lords to overrule a prior decision of its own*]—Where a person in possession of property as tenant for his life joins with the person next entitled as tenant in tail and opens the entail, reserving a joint power of appointment over the estate, and by means of that power settles an annuity upon the tenant in tail for their joint lives, and the tenant for life afterwards dies, the tenant in tail being alive, the value of that annuity must be taken and allowed as a deduction, under the 38th section of the Act of 1853, from the value of the succession of the tenant in tail upon which duty is to be paid.—So held, following the decisions of this House in *The Attorney-General* v. *Lord Braybrooke*, and *The Attorney-General* v. *Floyer*. *Commissioners of Inland Revenue* v. *Harrison* (H.L.) Exch., 138

Decisions of the House of Lords upon questions of law, as the construction of statutes, and especially of fiscal Acts, are binding upon the House in subsequent cases. Ibid.

TAXATION OF COSTS. See Costs—*Wakefield* v. *Brown*.

TELEGRAPH ACTS—*compulsory purchase of the undertaking: compensation*]—By 31 & 32 Vict. c. 110. s. 7, any railway company possessed of a telegraph open to the use of the public on the 1st of January, 1868, for transmitting messages for money, or possessing any beneficial interest in such telegraph, might require the Postmaster-General to purchase the right of such railway company to transmit such messages or other beneficial interest. By 32 & 33 Vict. c. 73. s. 10, any telegraph company with which the Postmaster-General may not come to an agreement with respect to the amount of compensation to be paid to them for their undertaking, may have such amount settled by arbitration in manner provided by the Lands Clauses Consolidation Act, 1845. By an agreement with a telegraph company, under which the telegraph company erected and placed their telegraphic apparatus on the Cowes and Newport Railway Company's line, the railway company took the exclusive use of one wire during the continuance of the agreement, but were prohibited from using the wire for public use or for profit, or for any other purpose than the transmission of the railway company's own messages. The agreement was to be in force for twenty-one years, and at the end of that time the telegraph company were to remove their telegraphic apparatus:—*Held*, that the railway company had no interest in the telegraph such as to entitle them to require the Postmaster-General to purchase it under the Telegraph Acts, 1868 and 1869. *The Cowes and Newport Rail. Co.* v. *The Board of Trade*, Q.B., 242

TITHE RENT-CHARGE. See Landlord and Tenant—*Lockwood* v. *Wilson*.

TRESPASS. See Highway. Master and Servant. Mine.

TRIAL AT BAR—*jurisdiction: venue: indictment for perjury: certiorari: trial: adjournment: conviction: sentence*]—An indictment found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of that Court contained two counts, in one of which the perjuries assigned were in respect of an oath taken before a Commissioner in Chancery, sitting in the city of London. In the other count the perjuries assigned were in respect of an oath taken by the defendant in the sessions house at Westminster, on the trial of an ejectment in the Court of Common Pleas. The indictment was removed into this Court by a writ of *certiorari*, which, as required by 9 & 10 Vict. c. 24. s. 3, specified "Middlesex" as the county in which it should be tried. On the application of the Attorney-General it was ordered that the trial should be at bar. This Court, in Hilary Term, under statute 11 Geo. 4. and 1 Will. 4. c. 70. s. 7, appointed for the trial the 23rd of April, 1873 (being a day in Easter

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ERRATA.

COURT OF QUEEN'S BENCH, page 4, first column, eighth line from the bottom, for "1855" *read* 1820.

Also, at page 162, second column, 28th line from the top, for "CHELMSFORD" *read* CAIRNS.

Also, at page 223, first columu, sixth line from the top, for "ships" *read* slips.

TABLE OF CASES.

COMMON LAW.

NEW SERIES, VOL. XLIII.

[*In this Table the letters* M.C. *denote that the case belongs to the* MAGISTRATES' CASES,—*the Head-note only being given in the* QUEEN'S BENCH, COMMON PLEAS, *or* EXCHEQUER *respectively.*]

QUEEN'S BENCH.

COMMON PLEAS.

EXCHEQUER.

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